SUPREME COURT, U. S.

JOINT APPENDIX

Nos. 74-165 and 74-166 74-167 74-168

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, ET AL., APPELLANTS,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, ET AL., APPELLEES.

UNITED STATES RAILWAY ASSOCIATION, APPELLANT,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, ET AL., APPELLEES.

ROBERT W. BLANCHETTE, RICHARD C. BOND AND JOHN H. McARTHUR, AS TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR, APPELLANTS,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, ET AL., APPELLEES.

RICHARD JOYCE SMITH, AS TRUSTEE OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILWAY COMPANY, DEBTOR, APPELLANT,

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TABLE OF CONTENTS

		Page
1.	Stipulation as to the Record and Joint Appendix . . .	1
2.	Opinions below (with orders):	
	a. Opinions of 3-judge court, dated June 25, 1974 . . .	9
	b. Opinion of Judge Fullam in Penn Central 120-day proceeding, dated May 2, 1974	84
	c. Opinion of Judge Fullam in secondary debtors 120-day proceedings, dated May 2, 1974	104
	d. Opinion of Judge Fullam in Penn Central 180-day proceeding, dated July 2, 1974	124
	e. Opinion of Judge Fullam in secondary debtors 180-day proceeding, dated July 2, 1974	153
3.	Papers in *Connecticut General, et al. v. USRA, et al.*, Docket No. 74-189:	
	a. Docket entries	157
	b. Complaint, dated January 25, 1974	161
	c. Order adding parties plaintiff, dated February 4, 1974	176
	d. Answer of defendants, dated March 4, 1974	178
	e. Motion of Penn Central Trustees for leave to intervene, dated April 3, 1974	191
	f. Answer of Penn Central Trustees, dated April 3, 1974	192

		Page
3.	g. Order granting the Trustees leave to intervene, dated April 19, 1974	196
	h. Stipulation as to the record, dated April 15, 1974	197
	i. Affidavit of Louis A. Craco, dated April 16, 1974, together with attachments	200
	j. Plaintiffs' motion for summary judgment, dated April 16, 1974	221
	k. Intervenors' motion for summary judgment, dated April 16, 1974	223
	l. Defendants' motion for summary judgment, dated May 24, 1974	224
	m. Affidavit of John W. Ingram, dated May 23, 1974 (as amended)	226
4.	Papers in *Smith v. United States, et al.*, Docket No. 74-1107:	
	a. Docket entries	256
	b. Complaint, dated January 25, 1974	261
	c. Answer of all defendants, dated March 11, 1974	297
	d. Motion of Penn Central Trustees for leave to intervene, dated April 3, 1974	309
	e. Answer of Penn Central Trustees, dated April 3, 1974	310
	f. Order granting Penn Central Trustees leave to intervene, dated May 3, 1974	316

Page

4. g. Stipulation of plaintiff and defendants as to factual matters, dated April 1974 317

h. Caption of stipulation as to record, noting that it is identical to item 3h 325

i. Caption of affidavit of John W. Ingram, dated May 23, 1974 (as amended), noting that it is identical with item 3m 325

j. Motion by plaintiff to strike affidavit of John W. Ingram, dated June 3, 1974 326

k. Plaintiff's motion for summary judgment, dated April 29, 1974 328

l. Intervenors' motion for summary judgment, dated May 10, 1974 331

m. Defendants' motion for summary judgment, dated May 24, 1974 332

n. Caption of Jerome E. Sharfman, dated May 10, 1974, together with Exhibit A thereof, noting that it is not printed but appears in the Joint Documentary Submission as Item 60 336

5. Papers in *Penn Central Co. v. Brinegar, et al.*, Docket No. 74-1149:

a. Docket entries 337

b. Complaint, dated January 1974 341

c. Answer of all defendants, dated March 6, 1974 350

		Page
5.	d. Motion of Penn Central Trustees for leave to intervene, dated April 3, 1974	358
	e. Answer of Penn Central Trustees, dated April 3, 1974	359
	f. Caption of affidavit of John W. Ingram, dated May 23, 1974 (as amended), noting that it is identical with item 3m	363
	g. Order granting Penn Central Trustees leave to intervene, dated May 16, 1974	364
	h. Plaintiff's motion for summary judgment, dated May 22, 1974	365
	i. Intervenors' motion for summary judgment, dated May 20, 1974	366
	j. Defendants' motion for summary judgment, dated May 31, 1974	367
	k. Caption of stipulation as to the record, noting that it is identical to item 3h	369
	l. Stipulation of plaintiff and defendants as to factual matters, dated June 4, 1974	370
	m. Supplementary Joint Documentary Submission of plaintiff, defendants and intervening defendants, together with Exhibits A and B, dated May 31, 1974	376
6.	All notices of appeal	384
7.	The text of the Regional Rail Reorganization Act of 1973	391

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CONNECTICUT GENERAL INSURANCE CORPORATION, *et al.*,	)	
Plaintiffs,	)	Civil Action
v.	)	No. 74-189
UNITED STATES RAILWAY ASSN., *et al.*, *Defendants.*	)	
RICHARD JOYCE SMITH, Trustee of The New York, New Haven and Hartford Railroad Company,	)	
Plaintiff,	)	Civil Action
v.	)	No. 74-1107
UNITED STATES OF AMERICA, *et al.*, *Defendants.*	)	
PENN CENTRAL COMPANY,	)	
Plaintiff,	)	Civil Action
v.	)	No. 74-1149
CLAUDE S. BRINEGAR, *et al.*, *Defendants.*	)	

STIPULATION AS TO RECORD AND JOINT APPENDIX

The parties to the above captioned cases stipulate as follows:

I

Contents of Joint Appendix

The Joint Appendix printed for the use of the Court and all parties will contain:

1. This stipulation
2. Opinions below (orders included):
   a. Opinions of 3-judge court, dated June 25, 1974
   b. Opinion of Judge Fullam in Penn Central 120-day proceeding, dated May 2, 1974
   c. Opinion of Judge Fullam in secondary debtors' 120-day proceedings, dated May 2, 1974
   d. Opinion of Judge Fullam in Penn Central 180-day proceeding, dated July 2, 1974
   e. Opinion of Judge Fullam in secondary debtors 180-day proceeding, dated July 2, 1974
3. Papers in *Connecticut General, et al.* v. *USRA, et al.*, Docket No. 74-189:
   a. Docket entries
   b. Complaint, dated January 25, 1974
   c. Order adding parties plaintiff, dated February 4, 1974
   d. Answer of defendants, dated March 4, 1974
   e. Motion of George P. Baker, Robert W. Blanchette and Richard C. Bond, as Trustees of the Property of Penn Central Transportation Company, Debtor, for leave to intervene, dated April 3, 1974

f. Answer of Penn Central Trustees, dated April 3, 1974

g. Order granting the Trustees leave to intervene, dated April 19, 1974

h. Stipulation as to the record, dated April 15, 1974

i. Affidavit of Louis A. Craco, dated April 16, 1974, together with stipulation of facts attached thereto and dated April 15, 1974 (including Exhibits A and B thereto), affidavit of C. C. Shannon (Exhibit C to Craco affidavit), and letter of Claude S. Brinegar (Exhibit E to Craco affidavit)

j. Plaintiffs' motion for summary judgment, dated April 16, 1974

k. Intervenors' motion for summary judgment, dated April 16, 1974

l. Defendants' motion for summary judgment, dated May 24, 1974

m. Affidavit of John W. Ingram, dated May 23, 1974 (as amended by affidavit of May 30, 1974)

4. Papers in *Smith* v. *United States, et al.*, Docket No. 74-1107:

a. Docket entries

b. Complaint, dated January 25, 1974

c. Answer of all defendants, dated March 11, 1974

d. Motion of George P. Baker, Robert W. Blanchette and Richard C. Bond, as Trustees of the Property of Penn Central Transportation Company, Debtor, for leave to intervene, dated April 3, 1974

e. Answer of Penn Central Trustees, dated April 3, 1974

f. Order granting Penn Central Trustees leave to intervene, dated May 3, 1974

g. Stipulation of plaintiff and defendants as to factual matters, dated April 1974

h. Caption of stipulation as to record, noting that it is identical to item 3h

i. Caption of affidavit of John W. Ingram, dated May 23, 1974 (as amended), noting that it is identical with item 3m

j. Motion by plaintiff to strike affidavit of John W. Ingram, dated June 3, 1974

k. Plaintiff's motion for summary judgment, dated April 29, 1974

l. Intervenors' motion for summary judgment, dated May 10, 1974

m. Defendants' motion for summary judgment, dated May 24, 1974

n. Caption of affidavit of Jerome E. Sharfman, dated May 10, 1974, together with Exhibit A thereof, noting that it is not printed but appears in the Joint Documentary Submission as Item 60

5. Papers in *Penn Central Co.* v. *Brinegar, et al.*, Docket No. 74-1149:

   a. Docket entries

   b. Complaint, dated January 1974

   c. Answer of all defendants, dated March 6, 1974

   d. Motion of George P. Baker, Robert W. Blanchette and Richard C. Bond, as Trustees of the Property of Penn Central Transportation Company, Debtor, for leave to intervene, dated April 3, 1974

   e. Answer of Penn Central Trustees, dated April 3, 1974

   f. Caption of affidavit of John W. Ingram, dated May 23, 1974 (as amended), noting that it is identical with item 3m

   g. Order granting Penn Central Trustees leave to intervene, dated May 16, 1974

   h. Plaintiff's motion for summary judgment, dated May 22, 1974

   i. Intervenors' motion for summary judgment, dated May 20, 1974

   j. Defendants' motion for summary judgment, dated May 31, 1974

   k. Caption of stipulation as to the record, noting that it is identical to item 3h

   l. Stipulation of plaintiff and defendants as to factual matters, dated June 4, 1974

m. Supplementary joint documentary submission of plaintiff, defendants and intervening defendants, together with Exhibits A and B, dated May 31, 1974

6. All notices of appeal

7. The text of the Regional Rail Reorganization Act of 1973

II

Material From the Record to Be Lodged With the Clerk in Ten Copies

1. All items in joint documentary submission (items 1 through 61 inclusive), except items 32, 33, 59 and 61, which are printed in Joint Appendix

2. Report of Secretary of Transportation, dated February 1, 1974, pursuant to Section 204

3. Report of Rail Services Planning Office (ICC), dated May 2, 1974, pursuant to Section 205(d)(1)

4. Transcript of record of 120-day hearing in Penn Central Transportation Company case, pp. 11,106-11,270

5. Transcript of hearing before 3-judge court on motions for summary judgment

6. List of applications for abandonment filed by Penn Central Transportation Company with the United States Railway Association

7. Response by United States Railway Association to abandonment applications.

/s/ Louis A. Craco
Attorney for plaintiffs in Connecticut General, et al. v. USRA, Docket No. 74-189

/s/ Joseph Auerbach
Attorney for Richard C. Smith, plaintiff in Docket No. 74-1107

/s/ David Berger
David Berger, Attorney for plaintiff Penn Central Company in Docket No. 74-1149

/s/ William R. Perlik
Attorney for defendant United States Railway Association

/s/ James F. Dausch
Attorney for defendants Brinegar, Stafford, Schultz, Interstate Commerce Commission and United States of America

/s/ Charles A. Horsky
Attorney for intervening defendants

Dated: July 31, 1974

Opinions

of

United States District Court

for the

Eastern District of Pennsylvania

And Related Opinions

by the

Penn Central Reorganization Court

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

Before: ALDISERT, *Circuit Judge*, and FULLAM and BECHTLE, *District Judges*.

OPINION OF THE COURT

ALDISERT, *Circuit Judge*.

These cases present the question whether an injunction should issue restraining the enforcement of certain provisions of the Regional Rail Reorganization Act of 1973, Public Law 93-236, 45 U.S.C. §§743-744, because of constitutional infirmities. Three-judge courts have been convened pursuant to 28 U.S.C. §§2282, 2284, and the matters are consolidated for disposition on cross-motions for summary judgment. The Connecticut General plaintiffs are owners of mortgage bonds and are corporate trustees or successor corporate trustees under indentures, mortgages and deeds of trust of the Penn Central Transportation Company and certain of its lease lines which together comprise the "Penn Central System."[1] Plaintiff, Richard

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[1] The following plaintiffs own the approximate principal amounts of mortgage bonds of Penn Central and of certain Lessors secured by mortgages on rail properties and other properties of Penn Central and certain Lessors set forth opposite their respective names:

a.	Connecticut General Insurance Corporation	$ 31,025,000
b.	Connecticut Mutual Life Insurance Company	9,985,000

(Cont'd)

Joyce Smith, Trustee of the property of The New York, New Haven and Hartford Railroad Company, Debtor, is the registered holder of divisional mortgage bonds of Penn Central Transportation Company.[2] These bonds are secured by a divisional mortgage comprising a first lien attaching certain real property, railroad tracks and improvements of the Penn Central Transportation Company. Plaintiff, Penn Central Company, is the owner of 100% of the stock in and is a creditor of the Penn Central Transportation Company, Debtor.

The defendants are the United States Railway Association, a corporate entity established under Section 201 of the Act, 45 U.S.C. §711; the Secretary of Transportation; the Chairman of the Interstate Commerce Commission; the Secretary of the Treasury; and the United States of America. Penn Central Trustees, Intervening Defendants, are presently operating the Penn Central Railroad under Section 77 of the Bankruptcy Act, 11 U.S.C. §205, in this court at Bankruptcy No. 70-347.

(Footnote 1 cont'd)

c.	The Equitable Life Assurance Society of the United States	$147,509,000
d.	Metropolitan Life Insurance Company	69,687,000
e.	The Prudential Insurance Company of America	35,395,000

[2] Plaintiff, Richard Joyce Smith, Trustee of the property of The New York, New Haven and Hartford Railroad Company, Debtor in reorganization under Section 77 of the Bankruptcy Act ("New Haven Trustee" and "New Haven" respectively) is the registered holder of $34,025,800 principal amount of 5% Divisional Mortgage Bonds ("Bonds") of Penn Central Transportation Company, Debtor.

While plaintiffs challenge the constitutionality of the 1973 Act with a galaxy of arguments, their central contentions may be summarily outlined:

1. The 1973 Act ultimately requires a permanent taking of their property for which they are entitled to be paid in cash instead of stocks and other securities; that the conveyance procedures offend procedural due process; and that a deficiency judgment against Conrail provides no assurance that just compensation would be paid.

2. The 1973 Act violates the geographical uniformity requirement of Article I, Section 8, Clause 4 of the United States Constitution.

3. The 1973 Act effects an interim taking of their property by requiring continued rail operation pending implementation of the Final System Plan.

I.

Before consideration of these contentions, a short summary of the Act is necessary. The judicial panel on multidistrict litigation described it as "an heroic attempt" by Congress to solve a complex and deeply rooted problem. Eight major railroads in the Northeast and Midwest are undergoing reorganization pursuant to Section 77 of the Bankruptcy Act. Of these eight, seven are the only Class I railroads, those with $5 million or more of annual revenue, in the United States in reorganization. "Reasons cited for this [Northeast railroad] crisis were competition from 90 million automobiles and multiple schedules of competitive jet air service which directly competed with passenger transportation. The decline of railroad freight business also diminished the passenger carrying capabilities

of the railroads. Traditional railroad freight business was lost to inland water way operations, pipelines and trucks. Moreover, government policy tended 'to favor non-rail transportation and perpetuate a regulatory climate that [was] hostile to experimentation.' Water, air and highway transportation were successfully aided through public investment, at little or no user cost while railroads had to make such investments on their own."[3]

Congress first responded to the rail crisis with the Emergency Rail Services Act of 1970, 45 U.S.C. §661, *et seq.*, authorizing the Secretary of Transportation to guarantee up to one hundred twenty-five million dollars in certificates issued by trustees of railroads in reorganization under Section 77. However, detailed treatment of the railroads' particular difficulties did not emerge until the enactment of the 1973 Act. As stated in the defendants' brief:

> The 1973 Act represents Congress' comprehensive response to the long-range problems of railroads that own or operate most of the trackage in the Northeast and Midwest, and which therefore constitute a vital segment of the U.S. railroad system and an important segment of the U.S. economy.
>
> The Act requires the United States Railway Association . . . to design a [Final System] [P]lan for reorganized rail services in the Region . . . and provides, among other things,

---

[3] *In re Central Railroad Company of New Jersey*, 485 F.2d 208, 217 (Aldisert, J., dissenting) (footnotes omitted), citing, *inter alia*, Staff Report, "The Penn Central and Other Railroads," Senate Committee on Commerce, December, 1972, at 220-222.

> that a new private railroad, the Consolidated Rail Corporation ("Conrail") shall acquire, own and operate rail properties pursuant to the Final System Plan.

(Brief, 10-11)

> Congress also provided in the 1973 Act several kinds of financial assistance, new in form and substantial in amount, each intended to assist in creating and implementing the overall plan for rail transportation service in the Region and the Conrail portion of that plan in particular. Four of these additional resources deserve special mention. (i) Substantial obligational authority is conferred on USRA. To carry out its purposes under the Act (principally to plan the new rail system and to provide part of the consideration for rail properties acquired by Conrail under the Act), USRA is authorized to issue $1.5 billion in securities to be guaranteed by the Secretary of Transportation. Section 210. Of this sum, not more than $1 billion may be issued to Conrail, of which not less than half must be used by Conrail for rail rehabilitation and modernization. Section 210(b). Additional amounts may be issued if approved by joint resolution of Congress. *Id.* (ii) The Secretary of Transportation, with USRA's approval, is authorized to enter into agreement for the acquisition, maintenance or improvement of property that will be in the Final System Plan; for this purpose, the Act provides obligational authority of $150 million. Section

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215. (iii) To meet emergency needs pending implementation of the Final System Plan, the Secretary of Transportation is further authorized to make payments not exceeding $85 million to the trustees of railroads in reorganization. Section 213. (iv) Finally, the Secretary of Transportation and the Association may provide subsidies for continuing noneconomic service and loans for the acquisition and modernization of rail properties. Sections 402 and 403.

(Brief, 12-13).

Section 207(b)[4] of the Act sets forth the procedure by which a railroad becomes subject to the transfer provisions contained in the Final System Plan. The Section 77 Penn

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4 SEC. 207

* * *

(b) APPROVAL. – Within 120 days after the date of enactment of this Act each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by continuing the present reorganization proceedings than by a reorganization under this Act. Within 60 days after the submission of the report by the Office, under section 205(d)(1) of this title, on the Secretary's report on rail services in the region, each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether or not such railroad shall be

(Cont'd)

Central reorganization court has already determined that Penn Central is not reorganizable "on an income basis within a reasonable time under Section 77 of the Bankruptcy Act." The next step under the Act is the "180-day" determination by that court as to whether "such railroad shall be reorganized by means of transferring some of its rail properties to the Corporation." This hearing was held on June 10, 1974, but no findings have yet been made.

(Footnote 4 cont'd)

> reorganized by means of transferring some of its rail properties to the Corporation pursuant to the provisions of this Act. Because of the strong public interest in the continuance of rail transportation in the region pursuant to a system plan devised under the provisions of this Act, each such court shall order that the reorganization be proceeded with pursuant to this Act unless it (1) has found that the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by such a reorganization than by a reorganization under this Act, or (2) finds that this Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization in which case it shall dismiss the reorganization proceeding. If a court does not enter an order or make a finding as required by this subsection, the reorganization shall be proceeded with pursuant to this Act. An appeal from an order made under this section may be made only to the special court. Appeal to the special court shall be taken within 10 days following entry of an order pursuant to this subsection, and the special court shall complete its review and render its decision within 80 days after such appeal is taken. There shall be no review of the decision of the special court.

Within 420 days after January 2, 1974, a Final System Plan must be prepared by the executive committee of the Association and submitted for approval by its Board of Directors. Section 207(c). Yet final review of the Plan remains with Congress. Section 208(a). A Special Court has been created to "exercise the powers of a district judge in any judicial district with respect to such proceedings and such powers shall include those of a reorganization court. The Special Court shall have the power to order the conveyance of rail properties of railroads, leased, operated, or controlled by a railroad in reorganization in the region." Section 209(b).[5]

The Association is required to deliver a copy of the Final System Plan to the Special Court. Section 209(c).[6] Thereafter, the Special Court shall order the trustees to

---

[5] Members of the Special Court selected by the judicial panel on multi-district litigation, as provided by Section 209(b), are Circuit Judges Henry J. Friendly and Carl McGowan, and District Judge Roszel C. Thomsen.

[6]

SEC. 209

* * *

(c) Delivery of Plan to Special Court. – Within 90 days after its effective date, the Association shall deliver a certified copy of the final system plan to the special court and shall certify to the special court –

(1) which rail properties of the respective railroads in reorganization in the region and of any railroad leased, operated, or controlled by such railroads in reorganization are to be transferred to the Corporation, in accordance with the final system plan;

(Cont'd)

convey to Conrail "forthwith . . . all right, title and interest in the rail properties. . . ." Section 303(b).[7]

(Footnote 6 cont'd)

(2) which rail properties of the respective railroads in reorganization in the region or railroads leased, operated, or controlled by such railroads in reorganization are to be conveyed to profitable railroads, in accordance with the final system plan;

(3) the amount, terms, and value of the securities of the Corporation (including any obligations of the Association) to be exchanged for those rail properties to be transferred to the Corporation pursuant to the final system plan, and as indicated in paragraph (1) of this subsection; and

(4) that the transfer of rail properties in exchange for securities of the Corporation (including any obligations of the Association) and other benefits is fair and equitable and in the public interest.

7 SEC. 303. (a) Deposit With Court. – Within 10 days after delivery of a certified copy of a final system plan pursuant to section 209(c) of this Act –

(1) the Corporation, in exchange for the rail properties of the railroads in reorganization in the region and of railroads leased, operated, or controlled by railroads in reorganization in the region to be transferred to the Corporation, shall deposit with the special court all of the stock and other securities of the Corporation and obligations of the Association designated in the final system plan to be exchanged for such rail properties;

(2) each profitable railroad operating in the region purchasing rail properties from a railroad in reorganization in the region, or from a rail-

(Cont'd)

After the conveyance, the Special Court reviews the terms of the exchange as set forth in the Final System Plan. In

(Footnote 7 cont'd)

road leased, operated, or controlled by a railroad in reorganization in the region, as provided in the final system plan shall deposit with the special court the compensation to be paid for such rail properties.

(b) Conveyance of Rail Properties. – (1) The special court shall, within 10 days after deposit under subsection (a) of this section of the securities of the Corporation, obligations of the Association, and compensation from the profitable railroads operating in the region, order the trustee or trustees of each railroad in reorganization in the region to convey forthwith to the Corporation and the respective profitable railroads operating in the region, all right, title, and interest in the rail properties of such railroad in reorganization and shall itself order the conveyance of all right, title, and interest in the rail properties of any railroad leased, operated, or controlled by such railroad in reorganization that are to be conveyed to them under the final system plan as certified to such court under section 209(d) of this Act.

(2) All rail properties conveyed to the Corporation and the respective profitable railroads operating in the region under this section shall be conveyed free and clear of any liens or encumbrances, but subject to such leases and agreements as shall have previously burdened such properties or bound the owner or operator thereof in pursuance of an arrangement with any State, or local or regional transportation authority under which financial support from such State, or local or regional transportation authority was being provided at the time of enactment of this Act for the continuance of rail passen-

(Cont'd)

remedying any inadequacy of consideration which it finds, that court is permitted to reallocate Conrail's securities

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(Footnote 7 cont'd)

> ger service or any lien or encumbrance of no greater than 5 years, duration which is necessary for the contractual performance by any person of duties related to public health or sanitation. Such conveyances shall not be restrained or enjoined by any court.
>
> (3) Notwithstanding anything to the contrary contained in this Act, if railroad rolling stock is included in the rail properties to be conveyed, such conveyance may only be effected if the profitable railroad operating in the region or the Corporation to whom the conveyance is made assumes all of the obligations under any conditional sale agreement, equipment trust agreement, or lease in respect to such rolling stock and such conveyance is made subject thereto; and the provisions of this Act shall not affect the title and interests of any lessor, equipment trust trustee, or conditional sale vendee or assignee under such conditional sale agreement, equipment trust agreement or lessee under section 77(j) of the Bankruptcy Act (11 U.S.C. 205(j)).
>
> (4) Notwithstanding anything to the contrary contained in this Act, if a railroad in reorganization has leased rail properties from a lessor that is neither a railroad nor controlled by or affiliated with a railroad, and such lease has been approved by the lessee railroad's reorganization court prior to the date of enactment of this Act, conveyance of such lease may only be effected if the Corporation or the profitable railroad to whom the conveyance is made assumes all of the terms and conditions specified in the lease, including the obligation to pay the specified rent to the non-railroad lessor.

(Cont'd)

among the various bankrupt estates, to order the provision by Conrail of further securities of Conrail or obli-

(Footnote 7 cont'd)

(c) Findings and Distribution. – (1) After the rail properties have been conveyed to the Corporation and profitable railroads operating in the region under subsection (b) of this section, the special court, giving due consideration to the findings contained in the final system plan, shall decide –

(A) whether the transfers or conveyances –

(i) of rail properties of each railroad in reorganization, or of each railroad leased, operated, or controlled by a railroad in reorganization, to the Corporation in exchange for the securities and other benefits accruing to such railroad as a result of such exchange, as provided in the final system plan and this Act, and

(ii) of rail properties of each railroad in reorganization, or of each railroad leased, operated, or controlled by a railroad in reorganization, to a profitable railroad operating in the region, in accordance with the final system plan.

are in the public interest and are fair and equitable to the estate of each railroad in reorganization in accordance with the standard of fairness and equity applicable to the approval of a plan of reorganization or a step in such a plan under section 77 of the Bankruptcy Act (11 U.S.C. 205), or fair and equitable to a railroad that is not itself in reorganization but which is leased, operated, or controlled by a railroad in reorganization; and

(Cont'd)

gations of the Association as designated in the Final System Plan and, ultimately, to enter a deficiency judg-

(Footnote 7 cont'd)

(B) whether the transfers or conveyances are more fair and equitable than is required as a constitutional minimum.

(2) If the special court finds that the terms of one or more exchanges for securities and other benefits are not fair and equitable to an estate of a railroad in reorganization, or to a railroad leased, operated, or controlled by a railroad in reorganization, which has transferred rail properties pursuant to the final system plan, it shall –

(A) enter a judgment reallocating the securities of the Corporation in a fair and equitable manner if it has not been fairly allocated among the railroads transferring rail properties to the Corporation; and

(B) if the lack of fairness and equity cannot be completely cured by a reallocation of the Corporation's securities, order the Corporation to provide for the transfer to the railroad of other securities of the Corporation or obligations of the Association as designated in the final system plan in such nature and amount as would make the exchange or exchanges fair and equitable; and

(C) if the lack of fairness and equity cannot be completely cured by reallocation of the Corporation's securities or by providing for the transfer of other securities of the Corporation or obligations of the Association as designated in the final system plan, enter a judgment against the Corporation.

(3) If the special court finds that the terms of one or more conveyances of rail properties to a prof-

(Cont'd)

ment against Conrail should these steps prove insufficient to pay the estates their "constitutional minimum."

(Footnote 7 cont'd)

itable railroad operating in the region in accordance with the final system plan are not fair and equitable, it shall enter a judgment against such profitable railroad. If the special court finds that the terms of one or more conveyances or exchanges for securities or other benefits are fairer and more equitable than is required as a constitutional minimum, then it shall order the return of any excess securities, obligations, or compensation to the Corporation or a profitable railroad so as not to exceed the constitutional minimum standard of fairness and equity.

(4) Upon making the findings referred to in this subsection, the special court shall order distribution of the securities, obligations, and compensation deposited with it under subsection (b) of this section to the trustee or trustees of each railroad in reorganization in the region who conveyed right, title, and interest in rail properties to the Corporation and the respective profitable railroads under such subsection.

(d) Appeal. – A finding or determination entered pursuant to subsection (c) of this section may be appealed directly to the Supreme Court of the United States in the same manner that an injunction order may be appealed under section 1253 of title 28, United States Code: Provided, That such appeal is exclusive and shall be filed in the Supreme Court not more than 5 days after such finding or determination is entered by the special court. The Supreme Court shall dismiss any such appeal within 7 days after the entry of such an appeal if it determines that such an appeal would not be in the interest of an expeditious conclusion of the proceedings and shall grant the highest priority to the determination of any such appeals which it determines not to dismiss.

II.

We first dispose of plaintiffs' threshold contention that the possible future conveyance of rail properties to Conrail in consideration for Conrail stock and securities constitutes a Fifth Amendment taking without payment of just compensation.[8] Plaintiffs argue that the provision for compensation for the conveyance of Penn Central assets renders the Act unconstitutional on its face because the compensation provided in the Act is not payable in money or other legal tender, because the purported safety valve in a deficiency judgment against Conrail provides no assurance that just compensation will be paid, and because these procedures offend procedural due process.

We do not meet these Fifth Amendment questions because we are persuaded that these issues are premature. "Courts do not review issues, especially constitutional issues, until they have to." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 154-55 (1951) (Frankfurter, J., concurring). It has been said that a number of jurisprudential rules underlie this general principle. The doctrines of "standing", "ripeness", "finality" and "mootness" all serve "the primary conception that federal judicial power is to be exercised to strike down legislation . . . only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action." *Poe v. Ullman*, 367 U.S. 497, 503-04 (1961). We believe that the present circumstances do not present a ripe controversy because the basis of

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[8] In addition to the mandatory conveyance provision of the Act, Congress provided that the conveyances be made "free and clear of any liens and encumbrances" subject to limited exceptions. Section 303(b)(2).

plaintiffs' complaint depends on the "concurrence of . . . contingent events . . . too speculative to warrant anticipatory judicial determinations." *Eccles v. Peoples Bank*, 333 U.S. 426, 432 (1948).

Before the plaintiffs may be harmed by the mandatory conveyances, certain contingencies must occur. First, the Penn Central reorganization court must decide "whether or not such railroad shall be reorganized by transferring some of its rail properties to the Corporation pursuant to the provisions of this Act." Section 207(b). Although the court conducted a hearing on June 10, 1974, no findings have been made. Second, the board of directors of the Association must deliver the Final System Plan adopted by the Association to both Houses of Congress and to the Committee on Interstate and Foreign Commerce of the House of Representatives and the Committee on Commerce of the Senate for approval. Section 208(a).[9] Third, after Congressional approval, the conveyances take place only at the direction of the Special Court within ten days after deposit of the consideration by Conrail. Section 303(b).

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9 SEC. 208(a) GENERAL. – The Board of Directors of the Association shall deliver the final system plan adopted by the Association to both Houses of Congress and to the Committee on Interstate and Foreign Commerce of the House of Representatives and the Committee on Commerce of the Senate. The final system plan shall be deemed approved at the end of the first period of 60 calendar days of continuous session of Congress after such date of transmittal unless either the House of Representatives or the Senate passes a resolution during such period stating that it does not favor the final system plan.

Thus, before plaintiffs can be exposed to the alleged harm, there must be a judicial determination by a Section 77 reorganization court followed first by Congressional action, and finally judicial action by the Special Court. Faced with this triple contingency, the plaintiffs cannot be said to have been exposed to harm. Until these contingencies occur, only an abstract issue appears; and "abstract issues do not invoke the jurisdiction of the courts." *McCahill v. Borough of Fox Chapel,* 438 F.2d 213, 215 (3d Cir. 1971). "As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions." *United Public Workers of America v. Mitchell,* 330 U.S. 75, 89 (1947) (footnote omitted).

We are persuaded that the teachings of *Communist Party of United States v. Subversive Activities Control Board,* 367 U.S. 1 (1961), and *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965), control the issues dealing with the ultimate conveyance of railroad properties. In *Communist Party* the Court ruled that the mere possibility of Section 7(h) of the Subversive Activities Control Act and a regulation issued thereunder affecting the officers of the Party was not sufficient to present a live controversy. "The duties imposed by those provisions will not arise until and unless the Party fails to register. At this time their appearance is wholly contingent and conjectural." 367 U.S. at 106. However, when the Party members subsequently appealed from an order directing them to register under the Act, the Court ruled in *Albertson* that the claims were ripe for adjudication. Accordingly, we conclude that plaintiffs' contention that the conveyance of the rail properties offends the due process clause is not ripe for adjudication.

III.

Article I, Section 8, Clause 4 requires "uniform Laws on the subject of Bankruptcies throughout the United States." Plaintiffs contend that because the Act must be geographically uniform in application, *Hanover National Bank v. Moyses*, 186 U.S. 181 (1902), it is facially unconstitutional because it provides that only rail properties of railroads in reorganization in the "Region" may be designated for transfer to Conrail. Section 206(c)-(d). By definition the Region is limited to seventeen northeastern and midwestern states, the District of Columbia, and certain portions of contiguous states.[10]

The defendants' answer to these arguments is that, insofar as the Act is an exercise of the bankruptcy process, it is uniform: all Class I railroads in reorganization are in

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[10] The Act is entitled "Regional Rail Reorganization Act of 1973." Section 101(b) states:

> (b) PURPOSES. – It is therefore declared to be the purpose of Congress in this Act to provide for –
>
> (1) the identification of a rail service system in the midwest and northeast region which is adequate to meet the needs and service requirements of this region and of the national rail transportation system. . . .

Section 102(13) declares that " 'Region' means the States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, Ohio, Indiana, Michigan, and Illinois; the District of Columbia; and those portions of contiguous States in which are located rail properties owned or operated by railroads doing business primarily in the aforementioned jurisdictions (as determined by the Commission by order. . . ."

fact located within the defined Region, and there is no discriminatory treatment of creditors within or without the Region. Alternatively, defendants contend that the Region was defined for purposes of statutory provisions based on Congress' power under the commerce clause, which is not subject to requirement of uniformity.

The court is divided on this issue. Judges Fullam and Bechtle are of the view that certain provisions of §207(b) (*see ante* page 10, n. 4) offend the constitutional requirement of uniformity. These provisions mandate dismissal of the Section 77 proceeding if the procedures of the Act are rejected. Their analysis and conclusions are set forth in Part II of Judge Fullam's separate opinion.

For my part, without reaching defendants' alternate contention that the Act finds constitutional support under the commerce clause, I am persuaded that, in the context of the circumstances of this case, the Act does not offend Article I, Section 8, Clause 4.

Hanover Bank instructs that "[t]he laws passed on the subject [of bankruptcies] must, however, be uniform throughout the United States, but that uniformity is geographic and not personal. . . ." 186 U.S. at 188. We believe that the Founding Fathers' requirement of uniformity was mandated to prevent Congressional geographical discrimination of creditors or debtors. But the 1973 Act is geographically uniform with respect to creditors' claims. No provision of the Act restricts the right of any creditor wheresoever located to obtain relief because of regionalism. If there is a facial geographic restriction, it would apply to regional or non-regional debtor railroads only. However, that is not this case. We are not confronted with a proper case or controversy involving a constitutional challenge to the Act brought by a debtor

railroad inside or outside the Region. The challenge is brought by *creditors* within the Region whose claims are treated alike. Accordingly, instructed by the rule of *United States v. Raines*, 362 U.S. 17, 21 (1960) that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional",[11] I do not reach the question of whether the

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11 The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. This was made patent in the first case here exercising that power – "the gravest and most delicate duty that this Court is called on to perform." *Marbury v. Madison*, 1 Cranch 137, 177-180. This Court, as is the case with all federal courts, "has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39. Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. *United States v. Wurzbach*, 280 U.S. 396; *Heald v. District of Columbia*, 259 U.S. 114, 123;

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Act may not survive a constitutional attack brought by a debtor railroad located outside the Region. Thus, I would hold that as to plaintiff-creditors, the Act does not offend the uniformity requirements of Article I, Section 8, Clause 4.

(Footnote 11 cont'd)

> *Yazoo & Mississippi Valley R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217; *Collins v. Texas*, 223 U.S. 288, 295-296; *New York ex rel. Hatch v. Reardon*, 204 U.S. 152, 160-161. *Cf. Voeller v. Neilston Warehouse Co.*, 311 U.S. 531, 537; *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 513; *Virginian R. Co. v. System Federation*, 300 U.S. 515, 558; *Blackmer v. United States*, 284 U.S. 421, 442; *Roberts & Schaefer Co. v. Emmerson*, 271 U.S. 50, 54-55; *Jeffrey Mfg. Co. v. Blagg*, 235 U.S. 571, 576; *Tyler v. Judges of the Court of Registration*, 179 U.S. 405; *Ashwander v. TVA*, 297 U.S. 288, 347-348 (concurring opinion). In *Barrows v. Jackson*, 346 U.S. 249, this Court developed various reasons for this rule. Very significant is the incontrovertible proposition that it "would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation." *Id.* at 256. The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined. The Court further pointed to the fact that a limiting construction could be given to the statute by the court responsible for its construction if an application of doubtful constitutionality were in fact concretely presented. We might add that application of this rule frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.

362 U.S. at 20-22 (footnote omitted).

IV.

Finally plaintiffs contend that the Act effects a taking of their property by compelling operation of Penn Central's rail properties at an irreversible loss during the period before adoption of the Final System Plan.[12] They urge that "the Act is unconstitutional in that 1) it denies them their present right to terminate their investment in a hopelessly losing railroad; and 2) it provides no assurance that plaintiffs will in all events be paid just compensation on account of such forced continued operations."[13]

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[12] Section 304(f) of the Act provides for interim abandonment if certain conditions are met:

> After the date of enactment of this Act, no railroad in reorganization may discontinue service or abandon any line of railroad other than in accordance with the provisions of this Act, unless it is authorized to do so by the Association and unless no affected State or local or regional transportation authority reasonably opposes such action, notwithstanding any provision of any other Federal law, the constitution or law of any State, or decision or order of, or the pendency of any proceeding before any Federal or State court, agency, or authority.

At oral argument the Penn Central Trustees represented that requests for abandonment were filed with the office of the Association, but as of June 3, 1974 – over five months after the effective date of the Act – the office of the Association was not yet fully functioning.

[13] Connecticut General Plaintiffs' Brief, 30. The Penn Central Company contends that an unconstitutional taking of the Penn Central railroad's property occurred on January 2, 1974; that the compulsory continuation of operations during the interim period without payment of just compensation abridges the Fifth Amendment; and that since the debtor estate is being continually depleted, plaintiff, as an unsecured creditor, is presently being injured. Penn Central Company's Memorandum in Support of its Motion for Summary Judgment, 10-14.

That Congress expected losses during implementation of the Final System Plan is evidenced by Section 213 which provides that the Secretary of Transportation may make payments for certain specific interim losses:

> (a) *Emergency Assistance.* – The Secretary is authorized, pending the implementation of the final system plan, to pay to the trustees of railroads in reorganization such sums as are necessary for the continued provision of essential transportation services by such railroads. Such payments shall be made by the Secretary upon such reasonable terms and conditions as the Secretary establishes, except that recipients must agree to maintain and provide service at a level no less than that in effect on the date of enactment of this Act.
>
> (b) *Authorization for Appropriations.* – There are authorized to be appropriated to the Secretary for carrying out this section such sums as are necessary, not to exceed $85,000,000, to remain available until expended.[14]

It becomes quickly apparent that the limited amounts of these funds – available to railroads in reorganization in the region – have not been specially designated to meet challenges of unconstitutional erosion. Moreover, the full statutory authorization has not been appropriated nor is there total agreement between the Secretary

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[14] Significantly there is no explicit reference to the Court of Claims.

of Transportation and the trustees and creditors as to the nature of the payments to be made under Section 213 and those to be made under Section 215.[15] Congress has only appropriated $35 million of the $85 million authorized. By February 19, 1974, a tentative, partial solution was reached between the trustees and the Secretary as to $10.8

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15 SEC. 215. Prior to the date upon which rail properties are conveyed to the Corporation under this Act, the Secretary, with the approval of the Association, is authorized to enter into agreements with railroads in reorganization in the region (or railroads leased, operated, or controlled by railroads in reorganization) for the acquisition, maintenance, or improvement of railroad facilities and equipment necessary to improve property that will be in the final system plan. Agreements entered into pursuant to this section shall specifically identify the type and quality of improvements to be made pursuant to such agreements. Notwithstanding section 210(b) of this title, the Association shall issue obligations under section 210(a) of this title in an amount sufficient to finance such agreements and shall require the Corporation to assume any such obligations. However, the Association may not issue obligations under this section in an aggregate amount in excess of $150,000,000. The Secretary may not enter into any agreements under this section until he issues regulations setting forth procedures and guidelines for the administration of this section. The Corporation shall not be required under title III of this Act to compensate any railroad in reorganization for that portion of the value of rail properties transferred to it under this Act which is attributable to the acquisition, maintenance, or improvement of such properties under this section.

million, which required approval by the Section 77 reorganization court. In approving the trustees' petition the court observed:

> Section 215 of the Act authorizes the advance of up to $150 million for the purpose of interim acquisition, maintenance and improvement of rail assets which would eventually be conveyed to the new operating corporation contemplated by the statute, as part of the final system plan (increases in value resulting from such expenditures are not to be reflected in the consideration to be paid for such transfers, and the obligation to repay is to be assumed by the new corporation).
>
> The Secretary has thus far declined to approve any grants under §213, and is not yet in a position to implement §215. To meet the present emergency, the Secretary is apparently willing to use §213 funds, but not on a grant basis. The proposal contemplates that, instead of providing funds to the Trustees to meet operating expenses, the Secretary will, in effect, transfer funds equal to certain current installments due on equipment, and in return acquire a *pro tanto* interest in the Trustees' equity in that equipment. Meanwhile, it is contemplated that the parties will attempt to determine the extent to which §215 funds can appropriately be made available to relieve future cash shortages.

A hearing on the Trustees' petition was held on February 26, 1974. The creditor interests all expressed, in varying degrees, their conviction that the proposed financing was contrary to the intent of the Regional Rail Reorganization Act of 1973, and also would violate the constitutional rights of the creditors. The New Haven Trustee flatly opposes the transaction. Substantially all of the other creditor interests, and the Trustees, expressed their willingness to have the Court approve the transaction, so long as it was clearly understood that this would not create a precedent for similar approvals in the future, and that all parties expressly reserved their rights to press all constitutional and legal arguments at the forthcoming hearings on the issues involved in §207 of the Reorganization Act and in all other proceedings involving their rights under, and the constitutionality of, the statute.

As all parties recognize, unless these funds are provided immediately, the Trustees will be forced to default in the payments due on equipment in which they have an equity in excess of $70 million. Section 77(j) of the Bankruptcy Act severely restricts the power of a reorganization court to preclude equipment creditors from exercising the rights granted under the financing documents. No other source of cash to meet these installments has been suggested (and it is difficult to imagine any alternative source which would not involve repayment,

and thus the same constitutional issues as in the present proceeding).[16]

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[16] *In re Penn Central Transportation Co., Debtor,* Memorandum in Support of Order No. 1480 (March 1, 1974) (pp. 1-3).

Immediately after the enactment of the 1973 Act, the Trustees applied to the Secretary of Transportation for a grant under Section 213, to meet a projected cash shortfall of approximately $12 million anticipated to occur by March 1, 1974. There were three difficulties: (1) the grants were supposed to be made pursuant to regulations prescribed by the Secretary, and the Secretary had not yet prescribed any regulations; (2) The Act requires, as a condition of any such grant, that the recipient agree to maintain rail service at the level of January 2, 1974, and there were problems of interpretation on that, as well as questions about whether the Trustees could make any such commitment in good faith, or without violating the constitutional rights of creditors; and (3) It was the firm position of the Secretary of Transportation that the preferred vehicle for interim financing would be loans for capital improvements under Section 215, rather than grants under Section 213.

There were, however, many problems standing in the way of use of any Section 215 money. (These funds, to be used for capital improvements and acquisitions, are in effect loans made to Conrail, in advance of its coming into existence.) In addition to the fact that such capital improvements were to be limited to the rail properties which would be designated in the Final System Plan, and which were therefore not presently identifiable, there would be no money available under Section 215 until United States Railway Association had been formed and could issue government-guaranteed debt securities.

By February 19, 1974, a proposal for a patchwork solution had been worked out between the Trustees and the Department of Transportation. The DOT would put up $10.8 million, by directly meeting certain installment payments due on equipment, and would be subrogated, *pro tanto,* to the Trustees' equity in that equipment. In effect, the Trustees would sell a part of their equity in certain rail equipment to the Department of Transportation, but with the right

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A.

Our first responsibility is to determine whether the interim erosion issue is presently ripe for adjudication. The predicate of this issue is that, absent permissive interim abandonment, the Act mandates continued operations of Penn Central until the Final System Plan is adopted. Plaintiffs contend that a compulsory interim operation for a virtually indefinite length of time at large operating losses continues to erode the Penn Central estate so as to constitute a condemnation of the assets without fair and just compensation. To decide whether this contention presents a ripe, and therefore justiciable, issue requires an overview of the Penn Central operations. A statement of operational losses being sustained by Penn Central, while under Section 77 reorganization, is revealed in the stipulations filed by the parties. During the period that began June 21, 1970, until December 31, 1973, Penn Central sustained ordinary net losses in an amount which approximates $851,000,000.00.[17]

(Footnote 16 cont'd)

to redeem it by paying back the money without interest. A hearing was held on this proposal on February 26, 1974, and the Section 77 reorganization court approved it, over the objections of various creditors, by Order No. 1480. In a Supplemental Memorandum and Order (No. 1509) the court denied a motion for reconsideration. The orders are now under appeal.

Thus, of the $35 million thus far appropriated under Section 213 of the Act, $10.8 million has been expended to purchase a part of Penn Central's equity in some of its equipment.

[17] During this same period, the Penn Central trustees expended in operating rail properties approximately $137,500,000 of non-recurring cash items as follows:

Trustees' Certificate Drawdowns	$100,000,000
Tenants Tax Escrow Account	3,100,000
Proceeds from New Haven Property Sale	9,100,000

(Cont'd)

It is also stipulated that for the two months ended February 28, 1974, Penn Central had a deficit in net railway operating income, a deficit in total income, a deficit in income available for fixed charges and deficit net income, as those items are determined in accordance with accounting regulations of the Interstate Commerce Commission. As previously stated, the Penn Central reorganization court has ruled that the railroad is not "reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act."

(Footnote 17 cont'd)

Sale of Freight Cars to P&LE	7,300,000
M.B.T.A. Settlement	9,100,000
Proceeds from sale of stock of Madison Square Garden Corp.	2,400,000
Proceeds from sale of securities held in Contingent Compensation Fund	6,500,000
TOTAL	$137,500,000

They expended $2,100,000 in proceeds from sale of mortgaged properties in connection with the Selkirk Yard improvement and $15,700,000 in proceeds from the "Agnes" Flood Loan.

They expended in operating rail properties approximately $157,000,000 in income derived from Penn Central's non-rail properties.

They deferred payment of approximately $241,000,000 in state and local taxes, of which some $44 million to $48 million is allocable to the pre-reorganization period. These taxes ($241,000,000) are included in the ordinary net losses.

They deferred payment of approximately $101,000,000 in rentals on leased line properties. The deferred leased line rentals are included in the ordinary net losses.

The book value – and we emphasize that this is not a market value or liquidated value – of total assets is recorded as $4,419,917,759 as of December 31, 1971.[18] The trustees report that as of December 31, 1971, 26,254 claimants filed Proofs of Claim, claiming a gross amount of $3,348,620,840.[19] Fifty-one secured creditors filed timely proofs of claim in the amount of $1,062,734,988. Ten indenture trustees filed claims in the amount of $963,135,138. Thirty-five individual bondholders claimed $81,911,646. Six claimants filed claims arising from conditional purchases of equipment and property in the amount of $17,688,204. An accountants' report indicates that on June 21, 1970, the long-term debt in respect of mortgage bonds and collateral trust bonds, exclusive of railroad equipment obligations, was $687,692,000.[20] This, of course, is only a partial listing of the claims.[21] A single

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18 Annual Report to ICC, 1971, p. 8.

19 Trustees' Plan for Reorganization, April 1, 1972, Attachment 5, pp. 6-7 (Doc. No. 3033). The trustees estimate an aggregate liability of $1,583,076,820 from the *filed* claims.

20 *Ibid.*, at 14-15.

21 In addition to the filed claims there is the matter of priority claims incurred against the estate during the Section 77 reorganization proceedings:

> E. Growth in priority claims against the estate.
>
> Deprived of an adequate cash flow, the Penn Central estate has accumulated substantial priority claims ahead of all pre-bankruptcy interests. Conservatively estimated, these priority claims already aggregate at least $300 million. On a status quo

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unsecured creditor in these proceedings, the Penn Central Company, claims an approximate amount of $41,800,000.

The Court of Appeals for the Third Circuit suggests: "If, as some of the reports filed by the trustees suggest, it is already clear that such a reorganization is not feasible,[11] then this reorganization is already at the point where the erosion of the estate in deficit operations must cease and a liquidation alternative must be considered if

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[11] *See, e.g.*, Trustees' Interim Report of February 1, 1973; Memorandum accompanying July 2, 1973 Plan of Reorganization of the Penn Central Transportation Company and Other Railroad Corporations (June 29, 1973)."[22]

(Footnote 21 cont'd)

> assumption, another $100 million would be added in 1973. As a result, the value of the estate has already been substantially eroded and the Trustees are presently unable to prevent continuing erosion. In addition to these items, there is a priority charge of some $200 million a year for interest and amortization of equipment debt and equipment lease rentals which must continue to be serviced out of future cash resources whether or not such charges are earned.
>
> There is, simply, not enough cash to cope with continuing claims and to embark upon the capital improvement programs which would permit a continuation of service improvements. Not only is the ability to preserve earning power jeopardized, but Penn Central's essential public services cannot be sustained on this basis.
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> * * * * *

Trustees' Interim Report of January 1, 1973, p. 4 (Doc. No. 4911).

[22] *In the Matter of Penn Central Transportation Co., Debtor,* (Columbus Option Cases), 494 F.2d 270, 283 (3d Cir. 1974).

the secured creditors or other interested parties insist upon such consideration."

Over a year ago the Section 77 reorganization Court warned: "1. *Erosion.* While the precise calculations have not been fully developed, the record justifies the conclusion that post-reorganization deferrals and unpaid administration claims have already eroded the Debtor's estate to the extent of about $500 million. Whether the constitutional limit has been exceeded depends primarily upon how the remaining assets are to be valued; and this in turn may well depend upon how those assets are to be used at the conclusion of this reorganization. Under any view of the matter, it seems clear that the point of unconstitutionality is fast approaching, if it has not already arrived. . . . On the basis of the record to date, it appears highly doubtful that the Debtor could properly be permitted to continue to operate on its present basis beyond October 1, 1973." *In re Penn Central Transportation Company*, 355 F. Supp. 1343, 1344, 1346 (E.D. Pa. 1973).

Cognizant of massive operational losses of $851,000,000 during the present reorganization proceedings, and cognizant also that unsecured creditor as well as secured creditor interests are squarely before this court, we are persuaded that a significant possibility exists that a point of erosion either has been or may soon be reached so that it can be said that plaintiffs' contention of interim unconstitutional taking by continued loss operations is ripe for adjudication. Having determined that there is a controversy ripe for adjudication, we now examine the merits of plaintiffs' contention.

B.

The defendants acknowledge that if a point is reached where continued loss operations during the interim amount

to an unconstitutional taking,[23] the Act does not explicitly provide for the payment of just compensation. They insist, however, that plaintiffs have an implied remedy at law – a suit in the Court of Claims under the Tucker Act, 28 U.S.C. §1491, for just compensation from the United States. The Tucker Act confers jurisdiction on the Court of Claims:

> to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation or an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.[24]

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23 [T]here are limits beyond which . . . [the] public interest cannot be served without violating the constitutional prohibition against appropriation of private property for public use without just compensation. New Haven Inclusion Cases, 399 U.S. 392, 90 S. Ct. 2054, 26 L.Ed.2d 691 (1971); *cf.* Brooks-Scanlon Co. v. Railroad Commission of Louisiana, 251 U.S. 396, 40 S. Ct. 183, 64 L.Ed. 323 (1920). These limitations are measured both in terms of the amount of erosion of the Debtor's estate which can be permitted to occur before impairing liquidation value, and in terms of the length of time that is reasonable for assessing the ultimate prospects of achieving sufficient profitability to support a valid recapitalization of the enterprise.

In Re Penn Central Transportation Company, 347 F. Supp. 1346, 1366 (E.D. Pa. 1972).

24 The district courts have concurrent jurisdiction of claims not exceeding $10,000. 28 U.S.C. §1346.

The applicability of the Tucker Act is vital to the defendants' position. At oral argument counsel conceded that if a point was reached at which continued mandatory operations created losses of such an amount as to constitute a Fifth Amendment taking, the operators would then be entitled to just compensation, and that without an implied Court of Claims remedy, the 1973 Act would be unconstitutional as to these plaintiffs.[25]

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25 JUDGE ALDISERT: All right now, Mr. Cutler, assuming an unconstitutional taking by means of continued interim operation, without a Tucker Act remedy, would the 1973 Act be unconstitutional?

MR. CUTLER: You are saying assuming that a point might be reached before the consummation of the new plan in which the constitutionally permissible point of erosion had been reached, before that could be carried out?

JUDGE ALDISERT: Yes, sir.

MR. CUTLER: And that a Tucker Act remedy was not available?

JUDGE ALDISERT: Yes.

MR. CUTLER: I think I would answer that, Judge Aldisert, by saying under those circumstances, Congress would then have decreed a taking by the provision of this Act for which it had removed any adequate remedy at law by way of the Tucker Act suit. In that case, the Act as a whole would probably be unconstitutional. We would agree with that.

We think it would be possible at that point though to save most of the Act by construing I think it is 303 where the court is required to transfer the properties before it has passed on the value of what is to be given in exchange, by construing that as unconstitutional, that particular provision,

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The defendants concede that the United States, as sovereign, may not be sued without its consent. "[T]he terms of its consent to be sued in any court define that

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(Footnote 25 cont'd)

> and saving the rest of the statute under the severability clause, which would have the result that the court could delay the transfer until after it had passed on the values, and as to erosion, if the interim or the final point, the limit of constitutionally permissible erosion, had been reached before the plan was consummated, then I suppose Judge Fullam, as the reorganization judge, and the other judges would be free, since the compulsory transfer would have been struck down as unconstitutional, to terminate the proceedings, if they thought that was appropriate.

R. 68-69.

Penn Central Trustees have expressed a similar position:

> B. *Interim Erosion.* Moreover, there is the further objection to the Act already referred to – the lack of any assurance that the estate will be compensated for erosion during the many months which must elapse before Penn Central's rail properties are conveyed. Financial erosion – the accumulation of real estate taxes, interest on secured debt, leased line rentals and a variety of administrative expenses – continues to accumulate at the expense of the owners. Physical erosion, as noted above, is likewise continuing, as the rail properties of the debtor continue to suffer from inadequate maintenance.
>
> The Trustees have been advised that a Tucker Act remedy may be available to them to recover these erosion losses. The Trustees will attempt to secure a Supreme Court ruling that, if a constitutionally impermissible level of erosion was reached

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court's jurisdiction to entertain the suit." *United States v. Sherwood,* 312 U.S. 584, 586 (1941). Consent to be sued must be established in an act of Congress, and such an act, "since it is a relinquishment of a sovereign immunity, must be strictly interpreted." *Ibid.*, at 590; *see, United States v. King,* 395 U.S. 1, 4 (1969). Specifically defendants urge that a statutory grant of consent to a suit against the United States for any unconstitutional taking by reason of interim losses is conferred on the Court of Claims by implication because the Regional Rail Reorganization Act of 1973 shows no affirmative Congressional intent to deprive

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(Footnote 25 cont'd)

> by January 2, 1974, the date the Act became law, a "taking" of Penn Central's rail properties occurred at least by that date, and that a Tucker Act remedy exists for erosion occurring thereafter. Section 304 (f) of the Act provides that "after the date of enactment of this Act, no railroad in reorganization may discontinue service or abandon any line of railroad other than in accordance with the provisions of this Act, * * *". While the planning agency, the United States Railway Association, may authorize a service to be discontinued or a line to be abandoned (unless local authorities reasonably object), this mandate by Congress has the effect of requiring Penn Central to continue operations – notwithstanding the losses it will incur – until a final system plan is implemented. Again, however, the Trustees are advised that unless and until the Supreme Court has ruled that the United States can be required to reimburse the Penn Central estate for its interim losses, they cannot as fiduciaries rely exclusively on a Court of Claims recovery

Trustees' April 3, 1974 Report on Reorganization Planning, pp. 5-6 (Doc. No. 7304).

that court of its Tucker Act jurisdiction in cases where claims for unconstitutional takings are made.

The plaintiffs counter with a reference to the legislative history to demonstrate that there was a specific intention to limit the obligations of the United States to the express provisions and explicit limitations contained in the Act. Thus the issue is joined, and the solution turns on the vexing problem of statutory construction.

We cannot demean the importance of proper statutory construction in the precise matter at hand. On proper statutory construction stands or falls the constitutionality of important provisions of the statutory schema. The defendants, joined by the intervening Penn Central trustees, mount a formidable argument, reminding us that when "the validity of an act of the Congress is drawn in question, and . . . a serious doubt of constitutionality is raised, it is a cardinal principle that . . . [courts] will first ascertain whether a construction of the statute is *fairly possible* by which the question may be avoided." *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971), citing *Crowell v. Benson*, 285 U.S. 22 (1932) (emphasis supplied). *See also, American Communications Assn, C.I.O. v. Douds*, 339 U.S. 382, 407 (1950); *United States v. Congress of Industrial Organizations*, 335 U.S. 106, 120-21 (1948). The Penn Central trustees emphasize that "the Act contains no fewer than *thirteen* provisions repealing or making inapplicable the provisions of various laws or excluding the jurisdiction of federal courts on various subjects. Since none of these thirteen provisions excludes a Tucker Act remedy – although, as plaintiffs themselves argue, Congress was intensely aware of the possibility of such a remedy – Congress must be deemed to have deliberately rejected the readily available option of including

such an exclusionary provision in the Act."[26]

On their part the plaintiffs also turn to the text of the Act, describing it as "a preemptive system of judicial participation [with] respect to the final system plan. Section

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[26] Penn Central Trustees' Brief in Opposition to Plaintiffs' Motion for Summary Judgment, p. 6.

> The thirteen repealing or jurisdiction-excluding provisions in the Act are found in Sections 202(a), 205(c)(2), 206(d)(3), 207(b), 209(a), 209(b), 303(b)(2), 303(d), 304(c), 304(f), 601(a)(2), 601(b) and 601(c).
>
> Sections 202(a)(10) and 205(c)(2) exempt United States Railway Association (USRA) and the Rail Services Planning Office, respectively, from the provisions of Section 3709 of the Revised Statutes, 41 U.S.C., Section 5. Section 206(d)(3) provides that certain determinations by USRA and the ICC shall not be reviewable in any court. Section 207(b) provides that appeals from orders made under that subsection may be taken only to the Special Court, whose decisions are not subject to further review. Section 207(b) also in effect repeals part of the jurisdiction created by Section 77 of the Bankruptcy Act by requiring dismissal of Section 77 proceedings in certain circumstances.
>
> Section 209(a) provides that the final system plan shall become effective after review by Congress "notwithstanding any other provision of law" and is "not subject to review by any court except in accordance with this section." Here Congress provides that no court may review the contents of the final system plan – the document which establishes what railroad properties shall be taken – and that the plan is to become effective notwithstanding any other provisions of law. Obviously nothing here purports or

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209 mandates the empaneling of the Special Court and the consolidation before it of 'all judicial proceedings with respect to the final system plan'. Section 303(c) endows the

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(Footnote 26 cont'd)

> atempts to exclude a Tucker Act remedy for just compensation for the properties so taken.
>
> Section 209(b) authorizes the Judicial Panel on Multi-District Litigation to create a Special Court and to consolidate therein all judicial proceedings with respect to the final system plan, and to issue rules for the conduct of the Panel's functions. The section goes on to provide that "no determination by the panel [on Multi-District Litigation] under this subsection may be reviewed in any court." Here again Congress demonstrated that it well knew how to exclude jurisdiction of federal courts when it wished to do so.
>
> Section 303(b)(2) provides that mandatory conveyances ordered pursuant to the Act by the Special Court "shall not be restrained or enjoined by any court." Section 303(d) provides that, after the Special Court enters its orders with respect to compensation which are authorized by prior subsections of Section 303, an appeal may be taken to the Supreme Court and "that such appeal is exclusive." This makes a single appeal to the Supreme Court the only means by which interested parties may question whether the Special Court has properly performed the functions assigned to it by Section 303. Since those functions do not include consideration of any question whether the compulsory conveyance pursuant to the Act constitutes a taking of property or the amount of just compensation due therefor, section 303(d) in no way attempts to exclude a Tucker Act remedy for such a taking. To the contrary, Section 303(d) yet again demonstrates

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Special Court with the duty to review the consideration to be received for the properties conveyed and ultimately the

(Footnote 26 cont'd)

> that Congress was fully aware of the necessity of excluding various types of jurisdiction and did so expressly when it wished to do so.
>
> Section 304(c) provides that railroad abandonments permitted under the section may be made "notwithstanding any provision of the Interstate Commerce Act" or of other laws. Section 304(f) provides that the inhibition on interim abandonments imposed by that subsection prevails "notwithstanding any provision of any other Federal law, the constitution or law of any State, or decision or order of, or the pendency of any proceeding before any Federal or State court, agency, or authority."
>
> Section 601(a)(2) provides that "the antitrust laws are inapplicable with respect to any action taken to formulate or implement the final system plan where such action was in compliance with the requirements of such plan." Section 601(b) similarly makes inapplicable the provisions of the Interstate Commerce Act "whenever a provision of any such act is inconsistent with this Act." And Section 601(c) provides that certain provisions of the National Environmental Policy Act of 1969 "shall not apply with respect to any action taken under authority of this Act before the effective date of the final system plan." These provisions are contained in Title VI of the Act, in a subtitle headed "Relationship to Other Laws." If Congress had wished also to exclude the application of the Tucker Act, it obviously would have added such an exclusion to the very explicit provision of Section 601 excluding the applicability of various other laws."

Ibid., at 6-9 (footnote omitted).

authority under Section 303(c)(2)(C) to enter a deficiency judgment against Conrail. The exclusive appeal from the Special Court's findings is provided in Section 303(d)."[27]

The legislative history reveals that Senator Vance Hartke, who would later be one of the Managers of the bill on the part of the Senate, observed that if Congress did not act by providing the creditors with stock in Conrail, "there is the distinct possibility . . . that a number of these people could make a claim against the Government which could be sustained in the Court of Claims."[28]

Especially significant in the legislative history of the Act are the remarks recorded during the discussion on the conference report accompanying H.R. 9142 in a colloquy between two of the "*Managers* on the Part of the House":

> *Mr.* [Dan] *Kuykendall.* "Mr. Speaker, I would like to ask the gentleman from Washington one point, and that is the matter of the deficiency judgment. There was a lot of colloquy in the original debate which expressed fears that the Federal Court had the key to the Treasury.
>
> "Will the gentleman give us his interpretation of the guarantees we have to keep that from happening in the court proceedings?"
>
> *Mr.* [Brock] *Adams.* "Mr. Speaker, there is a definite limitation on the total amount that can be authorized under this

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27 Connecticut General's Brief, 59-60.

28 119 Cong. Rec. S. 23783-84 (1973).

bill. Any amounts that go beyond that, or the shifting of the way in which it is spent, is to be approved by an Act of Congress, to be signed by the President. . . . [I]t was the clear intent of the managers that any amount other than common stock [of Conrail] was to be at the lowest possible limit to meet the constitutional guarantees."

* * *

Mr. Kuykendall. "There is no way the Federal Court may assess the taxpayers or this Congress on the judgments of the creditors, is that correct?"

Mr. Adams. "The gentleman is correct."

Mr. Kuykendall. "There is no way they can assess the Congress for the money?"

Mr. Adams. "The gentleman is correct."[29]

We are persuaded that the legislative history supports the conclusion that Congress intended that financial obligations be limited to the express terms of the Act. Article I, Section 9, Clause 7 provides that no money shall be drawn from the Treasury of the United States except in consequence of an appropriation made by law. Section 213(b), *supra*, and Section 214[30] entitled "Authorization for Appropriations" place an express ceiling on expenditures.

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29 119 Cong. Rec. H. 11876 (1973).

30 SEC. 214(a) SECRETARY. – There are authorized to be appropriated to the Secretary

(Cont'd)

Section 210 describes the maximum obligational authority of the Association, and the authorization for appropriation is limited to "such amounts as are necessary to discharge the obligations of the United States arising *under this section.*" (Emphasis supplied.) Judicial review is delineated with specificity in Sections 209(a) and 303 with no mention of the Court of Claims.

(Footnote 30 cont'd)

> for purposes of preparing the reports and exercising other functions to be performed by him under this Act such sums as are necessary not to exceed $12,500,000, to remain available until expended.
>
> (b) OFFICE. – There are authorized to be appropriated to the Commission for the use of the Office in carrying out its functions under this Act such sums as are necessary, not to exceed $5,000,000, to remain available until expended. The budget for the Office shall be submitted by the Commission directly to the Congress and shall not be subject to review of any kind by any other agency or official of the United States. Moneys appropriated for the Office shall not be withheld by any agency or official of the United States or used by the Commission for any purpose other than the use of the Office. No part of any other moneys appropriated to the Commission shall be withheld by any other agency or official of the United States to offset any moneys appropriated pursuant to this subsection.
>
> (c) ASSOCIATION. – There are authorized to be appropriated to the Association for purposes of carrying out its administrative expenses under this Act such sums as are necessary, not to exceed $26,000,000, to remain available until expended.

We were taught by Justice Frankfurter "that the troublesome phase of [statutory] construction is the determination of the extent to which extraneous documentation and external circumstances may be allowed to infiltrate the text on the theory that they were part of it, written in ink discernible to the judicial eye."[31] John Chipman Gray often quoted a sermon by Bishop Hoadley that "[w]hoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the law-giver to all intents and purposes, and not the person who first wrote or spoke them."[32]

For this court to interpret the Act in a manner contrary to its explicit terms, contrary to the express representations of the bill's managers at the conference committee discussions, and to construe this Act in a manner which will expose the United States Treasury to presently incalculable, but, in any event, substantially formidable claims would be a flagrant violation of the separation of powers doctrine. If we did this, the judiciary would truly have become the "law-giver" for substantial federal appropriations; this in itself would raise serious constitutional problems.

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31 Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529 (1947).

Justice Frankfurter also reminded us that "Mr. Justice Holmes reached meaning easily, as was true of most of his results, with emphasis on the language in the totality of the enactment and the felt reasonableness of the chosen construction. He had a lively awareness that a statute was expressive of purpose and policy, but in his reading of it he tended to hug the shores of the statute itself, without much reinforcement from without," supra, at 532.

32 Gray, NATURE AND SOURCES OF THE LAW, 102, 125, 172 (2d Ed. 1921).

To accept the government defendants' contention would require judicial legislation on a grand, if not arrogant, scale. Justice Holmes told us "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."[33] To read a Tucker Act remedy into the Act would be a movement of the mass and not simply the particles. We simply lack such power.

V

Accordingly, we hold that Section 304(f), in requiring mandatory interim operations without providing a legal remedy to furnish fair and just compensation for an erosion of property beyond constitutional limits, offends the Fifth Amendment; that Section 303, the only provision of the Act pertaining to valuation of the railroad estate, in failing to provide a remedy for any unconstitutional erosion caused by mandatory interim operations under Section 304(f), is also defective; that because the effect of Section 207(b) precludes a form of liquidation under Section 77 of the Bankruptcy Act, it is constitutionally defective as set forth in Part II of the separate opinion of Judge Fullam; and that because of these conclusions the United States Railway Association must be enjoined from certifying a Final System Plan to the Special Court pursuant to Section 209(c).

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[33] *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

An appropriate decree will issue (1) enjoining the United States Railway Association, the Secretary of Transportation, the Chairman of the Interstate Commerce Commission, and the Secretary of the Treasury from enforcing the Regional Rail Reorganizational Act of 1973 in a manner inconsistent with this holding and (2) declaring as null and void designated sections of the Act.

/s/ Ruggero J. Aldisert
Ruggero J. Aldisert
United States Circuit Judge

FULLAM, J.

In view of the number and complexity of the issues which have been presented in this case, it should occasion little surprise that there is a lack of total agreement among judges on all issues. With respect to the issues actually decided by the majority, I am in general agreement, although to some extent for slightly different reasons. But the majority fails to reach a number of issues which I feel must be faced, not only because they are indeed ripe for decision, but because the principal conclusion expressed by the majority – that the Regional Rail Reorganization Act of 1973[1] is unconstitutional because it fails to provide compensation for interim erosion during the planning period – necessarily depends upon an evaluation of the nature and validity of the Act's provisions concerning mandatory conveyance of rail properties to Conrail. In short, I believe the majority has attempted to isolate an issue which cannot be isolated.

I. Prematurity

Plaintiffs challenge the facial constitutionality of the Act on a variety of grounds, not all of which are necessarily ripe for decision. In considering which issues must be faced at this time, it is important to keep in mind the distinctions between concepts of standing, ripeness, and the need for injunctive relief.

Unquestionably, one or more of the parties to these lawsuits have standing to raise every issue which has been presented. That is, the statute affects these parties in

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[1] The Regional Rail Reorganization Act of 1973 is referred to in this Opinion as the Act, the RRRA, or the statute.

particular, as distinguished from the public at large, in substantial ways. They thus meet the tests of *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), and *Flast v. Cohen*, 392 U.S. 83 (1968).

The question of whether all of the constitutional issues are ripe for decision requires us to analyze the inevitability of the alleged unconstitutional impact, whereas the immediacy of the alleged threat bears upon the propriety of injunctive relief.

By July 1, 1974, each of the reorganization courts will have made, or failed to make, findings pursuant to §207(b) of the Act. Under the statute, the effect of these findings or non-findings (as affirmed or reversed by the Special Court within 80 days thereafter) will be either that the statutory processes will inexorably apply to these estates, or that the § 77 proceedings will be dismissed. The plaintiffs assert that the §207(b) proceedings themselves are unconstitutional on due process grounds. Surely this challenge is now ripe for decision; indeed, the defendants do not contend otherwise.

As set forth in Judge Aldisert's scholarly opinion, the existence and inevitability of staggering losses from continuing rail operations pose an immediate threat to the constitutional rights of the owners and creditors of the bankrupt estates. Plaintiffs contend that the effect of §§304(f) and 303 of the Act is to mandate continued loss operations for an indefinite period without hope of reimbursement, in derogation of both the taking and due process clauses of the Fifth Amendment. Since the majority has concluded that the ultimate conveyance issues are not now ripe for decision, the fact §304(f) has been in force since January 2, 1974, and continues to require in-

terim operations and losses, undoubtedly makes the interim erosion challenge ripe for decision.

Plaintiffs challenge the entire Act as a violation of the uniformity requirement of the bankruptcy clause, Article I, Section 8, Clause 4 of the Constitution. Again, this issue is undeniably ripe for decision.

Finally, plaintiffs pose a series of challenges to the statutory provisions which contemplate the mandatory transfers of rail assets to Conrail or to existing solvent carriers, at prices to be determined by the Special Court after the event, and to be paid in the form of a to-be-determined mixture of Conrail securities, undefined "other benefits," and possibly a limited amount of guaranteed obligations of USRA. Whether some or all of these "ultimate conveyance" issues are now ripe for decision is a more difficult question. Judge Aldisert views the possibility that a conveyance may never take place because of action taken by the reorganization court under §207 (b), the Congress, and the Special Court, as rendering inappropriate consideration of any of the ultimate conveyance issues. For me, the decision of this issue is not so simple.

No one doubts, and in fact the parties have stipulated, that Penn Central rail properties will be included in the Final System Plan. Equally certain is the fact that USRA will deliver to Congress a Final System Plan which is to become effective 60 session-days thereafter. In order to prevent the Plan from taking effect, one House of Congress must act affirmatively by passage of a resolution expressing disapproval of the Plan, §208(a). Section 208(b) makes it the continuing duty of USRA to present final system plans to the Congress until one becomes effective. I cannot equate Congress' reservation of the right to veto the first Final System Plan, or even the second or third, to a sit-

uation in which Congressional action is necessary as a precondition to a Final System Plan becoming effective. I believe this Court must assume that the Act means what it says, and that the expressed intent of Congress would be carried out.

Once a Final System Plan is effective, *i.e.*, when the 60-day Congressional action period expires, the Special Court is required under §303(b) to order conveyance of the property. There remains no discretionary role to be played by the Special Court, or any other court, at that point. Therefore, it is clear that if the reorganization court does not make §207(b) findings that remove the railroad from the RRRA, conveyances are certain, save only amendment or repeal of the RRRA. Of course, the possibility of future legislative and executive action is always present during the judicial evaluation of the constitutionality of a statute, and does not render such adjudication premature.

The last potential exit would be a finding by the reorganization court that the RRRA "does not provide a process which would be fair and equitable to the estate of the railroad in reorganization," §207(b). In this event, there would be no conveyance under the Act. In my view, this possibility does not raise an issue of ripeness, but rather, a question more akin to abstention.

Under §207(b), the reorganization court will have to consider at least some of the cluster of discrete issues concerning the ultimate conveyance provisions of the Act, including some of the constitutional issues raised by these cases. This is so because the reorganization court must consider the RRRA in its entirety in order to ascertain whether the process is fair and equitable to the estates. Moreover, it is highly improbable that a reorganization court could successfully reject the statute as unfair or in-

equitable under §207(b) for reasons of less than constitutional magnitude. Indeed, the government's position at the June 10 hearing in the reorganization court was that nothing short of unconstitutionality would justify rejection of the Act under §207(b). Thus, the issue is essentially whether it is preferable for the three-judge court to rule on the constitutional issues surrounding the conveyance provisions, either directly or in conjunction with plaintiffs' due process attack on §207(b), before the reorganization courts act under §207(b).

The policies embodied in 28 U.S.C. §2282 appear applicable in this case. Enforcement of major federal legislation is sought to be enjoined. As a practical matter, a decision by the reorganization court under §207(b) that a constitutional infirmity requires the Act to be found not fair and equitable would be equivalent, for all practical purposes, to an injunction that might issue as a result of this three-judge court litigation; and a contrary decision would be equivalent to denial of an injunction. It is preferable that the deliberate and collegial judgment of this three-judge court should determine the constitutionality of the RRRA's conveyancing provisions. It is significant that the government has not contended that the §207(b) hearings operate to render any of the constitutional claims premature.

This is not to say that with respect to many of key constitutional claims the government's contention that there is not an adequate factual record for constitutional adjudication is not sound. Rather, the point is that the government's contentions in this regard should be considered by the Court at this time.

Another aspect of the RRRA's impact that warrants consideration, is the relationship of the availability of the

RRRA's processes to the pending petitions to terminate rail services and to dismiss the Penn Central's § 77 proceeding. Obviously, the RRRA is an important factor to be weighed by the reorganization court in assessing validity of the petitioners' contentions that operations can no longer be constitutionally required. This consequence in and of itself would seem to justify present consideration by this Court of the constitutional issues deferred by the majority.

Irrespective of the validity of the foregoing observations, I am satisfied that, in the final analysis, many of the constitutional issues concerning the mandatory conveyance features of the Act are necessarily ripe for decision at this time because of their relationship to the issues of interim erosion. While it is not necessary to determine whether or not the contemplated transfers would amount to takings in the constitutional sense, requiring advance assurance of payment in cash or equivalent, I am persuaded that the constitutional validity of uncompensated interim erosion cannot be properly decided except in the light of the constitutionality of the ultimate result which implementation of the Act would produce.

Stated otherwise, the fact that the statute does not provide compensation for interim erosion as such would not necessarily render the statute unconstitutional if there is reasonable present assurance that the end result of the statutory process would be the receipt of consideration for the assets and other benefits in amounts equaling at least liquidation value plus interim erosion.[2]

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[2] Counsel for the government pressed the point that under the conveyance provisions the Special Court could include in its valuation of Penn Central's property an amount sufficient to compensate the estate for unconstitutional interim erosion. Record 98-99.

II. Uniformity

The Act in its entirety is challenged as violative of the uniformity requirement of Article I, Section 8, Clause 4 of the Constitution. With one minor exception discussed below, I believe that the Act can (and therefore must) be construed in such a way as to render it constitutional. But I reach this result by a somewhat different route than does Judge Aldisert.

Professor Warren tells us:

> ". . . any National law which deals with inability to pay debts and which is uniform throughout the country is a law 'on the subject of bankruptcy.'" Charles Warren: *Bankruptcy in United States History* (Harv.U.Press 1935), at p. 8.

For more than half a century, attempts to achieve national bankruptcy legislation were severely hampered by the widely held belief that the Constitution required that to all bankruptcy litigation must be uniform in its application eventually (*ibid*, p. 61). However, the Supreme Court *Hanover* decided that the requirement was geographical. *National Bank v. Moyses*, 186 U.S. 181, 190. It has

> "been stated that the uniformity requirement . . . is wholly satisfied when existing obligations of a debtor are treated alike by the bankruptcy administration throughout the country, regardless of the state in which the bankruptcy court sits." *Vanston Bondholders Protective Committee v. Green, et al.*, 329 U.S. 156, 172 (Frankfurter, J., concurring).

Taken literally, that statement would seem to vindicate the statute here involved, since this Act unquestionably permits all claims against the affected bankrupt railroads to be treated alike, irrespective of the situs of particular creditors or particular courts. But bankruptcy legislation affects debtors as well as creditors, and it seems doubtful that the quoted language was intended to suggest that different treatment based upon the geographical location of the debtor would be permissible under the uniformity clause.

The fact is, the Supreme Court has never had occasion to consider a statute which was not geographically uniform. The few reported decisions have all dealt with variations in state laws respecting property rights (*e.g.*, exemption), or the application of nationwide standards to particular factual situations determined by courts. *See Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke*, 300 U.S. 440 (1937).

While Congress' power to classify debtors is not open to question at this late date, *see In re Baltimore & Ohio R.R. Co.*, 29 F.Supp. 608 (D.Md. 1939), *cert. denied* 309 U.S. 654 (1940); *In re Chicago, Rock Island & Pacific Ry.*, 72 F.2d 443, 450 (7th Cir. 1934), *aff'd* 294 U.S. 648 (1935), that power may not be exercised on the basis of geography.

I cannot accept the notion that only those debtors not affected by the statute can have standing to challenge the lack of geographical uniformity. In my view, every railroad subject to the statute has standing to make that challenge, and so do creditors of such railroads. The Penn Central interests are not complaining that the Act is validly applied to others and not to Penn Central; the contention is that an invalid, non-uniform statute is being applied to Penn Central.

Neither do I accept the government defendants' argument that the statute is in fact uniform because all Class I railroads now in reorganization are located in the region defined in the statute. The statute is not limited to Class I railroads, and it is not, apparently, limited to railroads which were in reorganization on the effective date of the Act.[3]

But I do find it possible to uphold the statute as an exercise of Congress' powers under the commerce clause. The essential features of an exercise of the bankruptcy power are that it deals with adjustment of the respective rights of embarrassed debtors and their creditors, and that impairment of the obligation of contracts is permissible. *Continental Illinois Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 294 U.S. 648 (1935); *Hanover National Bank v. Moyses, supra.* Stated otherwise, recourse to the bankruptcy clause to justify Congressional action is necessary only if that action impairs the obligation of contracts.

For the most part, the statute under discussion adds nothing, in that respect, to the powers already granted to reorganization courts under the geographically uniform and admittedly valid provisions of §77 of the Bankruptcy Act. To some extent, those powers are transferred to the Special Court, but this is surely permissible under Article III of the Constitution. The ultimate dispositions of the respective rights of debtors and creditors are to be made under §77. Authority to order conveyances free

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[3] By implication, it appears that the statute could not affect a railroad unless it was in reorganization on January 2, 1974, or entered reorganization within 180 days thereafter. Whether there are any railroads in the latter category does not appear.

and clear of liens, and to "cram down" a plan of reorganization, already exists under §77, and is not newly created or added by the 1973 Act.[4]

Therefore, in my view, since the principal provisions of the 1973 Act which depend upon the bankruptcy power for their validity are merely repetitive of similar provisions in existing, valid, laws, the statute as a whole does not violate Article I, Section 8, Clause 4 of the Constitution.

There is, however, one provision of the Act which is clearly an exercise of Congressional power derived solely from the bankruptcy clause, and which cannot be found in existing, uniform, legislation. I refer to the provisions of §207(b) which mandate dismissal of the §77 proceeding if the procedures of the Act are rejected. At first blush, this might seem relatively innocuous: Since the particular debtors have been found to be incapable of reorganizing "on an income basis" under §77, dismissal of the §77 proceeding might be thought to follow as a matter of course.

But a §77 proceeding may properly lead to results other than a "normal" income-based reorganization of a railroad as a railroad. The *New Haven Inclusion* case, 399 U.S. 392 (1970), stands as a prime example of a type of reorganization designed to produce permanent withdrawal of the debtor from common carrier operations. There, the

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[4] As discussed in Part IV, *infra*, the RRRA does sharply alter the procedural, and perhaps substantive, foundation upon which these existing bankruptcy powers have traditionally been exercised. Although the question is a close one, I have concluded that these departures are not necessarily a sufficient basis for invalidating the entire Act on uniformity grounds.

rail assets were disposed of, with a view toward reorganizing the enterprise as an investment holding company. The plan of reorganization was approved by the ICC, the reorganization court, and the Supreme Court.

It thus appears that §77 can be used to produce a form of liquidation, at least where the plan contemplates that the bulk of the rail properties will continue to be operated as a railroad by someone. The provisions of §207 (b) of the Act seem to preclude that kind of recourse to §77. Since this partial repeal of §77 of the Bankruptcy Act applies only to debtors in the geographical region specified in the statute, and since that feature of the Act is plainly a law "on the subject of bankruptcy," I am forced to conclude that the Act is, in that one respect, violative of Article I, Section 8, Clause 4 of the Constitution. Indeed, it seems probable that that same portion of §207(b) is vulnerable on due process and equal protection grounds, and perhaps on the ground of separation of powers as well.

III. Underlying Principles and Background

In order to evaluate the constitutional permissibility of interim erosion in light of the constitutional adequacy of the end result, it is helpful to review briefly the legal theories underlying the reorganization provisions of the Bankruptcy Act, and their application to the Penn Central proceedings apart from, and in relation to, the RRRA itself.

A.

Reorganization of financially embarrassed debtors pursuant to a plan that is feasible, fair and equitable is beneficial to both public and private interests. Underlying the

reorganization process is the simple economic fact that the intangible values inherent in a going concern will be lost if individual creditors are completely free to exercise their rights to foreclose on the physical assets of the enterprise.

> "One of the purposes of §77B was to avoid the consequences to the debtor and creditors of foreclosure, liquidation and forced sales with their deflationary effects." *Case v. Los Angeles Lumber Products,* 308 U.S. 106, 124 (1939) (Douglas, J.)[5]

See also R.F.C. v. Denver & Rio Grande Western R.R. Co., 328 U.S. 495, 508 (1945). If the reduction in values associated with forced sales can be avoided, and going concern values wholly or partially preserved, many junior interests which would have been wiped out by liquidation (junior secured, unsecured and equity interests) may participate in the plan. *See generally,* Blum, *The Law and Language of Corporate Reorganization,* 17 Univ. of Chicago L.R. 565 (1950). The medium of exchange is, of course, new corporate securities of the surviving entity.

Allocation of the new securities poses both practical and theoretical problems. The theoretical difficulty involves the method of recognizing the respective priorities of the various claimants. Section 77(e)(1) is the pertinent statutory provision:

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[5] §77B was a general corporate reorganization statute enacted in 1934, one year after §77, but superseded in 1938 by Chapter X of the Chandler Act.

> "The judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section [77], is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders."

As Mr. Justice Douglas observed, in *Case v. Los Angeles Lumber Products, supra:*

> "The words 'fair and equitable' . . . are words of art which prior to the advent of §77B had acquired a fixed meaning through judicial interpretation in the field of equity receivership reorganization." 308 U.S. at 115.

The substance of the fair and equitable test is derived from *Northern Pacific Ry. v. Boyd,* 228 U.S. 482 (1913), in which the Supreme Court established what has become known as the absolute priority rule. Simply put, the absolute priority rule requires that "once a hierarchy of interest is established, each class must receive 100% satisfaction before the next lower class may participate at all." Friendly & Tondel, *The Relative Treatment of Securities in Railroad Reorganizations under §77,* 7 Law & Contemporary Problems 420, 423 (1940). Yet, claims may be satisfied in whole or in part by securities of a character inferior to those originally owned by the claimant, so long as junior claimants are not permitted to participate unless and until the senior claimants receive under the plan the equitable equivalent to their entire panoply of rights under their original debt instruments. *Consolidated Rock*

Products v. DuBois, 312 U.S. 510 (1941); *Ecker v. Western Pacific R.R. Corp.*, 318 U.S. 448 (1943); *Group of Institutional Investors v. Chicago, Minneapolis, St. Paul & Pacific R.R. Co.*, 318 U.S. 523 (1943).

Basic to the application of the absolute priority rule is the valuation of the enterprise and the determination of value of the security underlying purportedly secured claims. Both §77(e) and the Supreme Court's pronouncements in the *Consolidated Rock Products, Ecker,* and *Institutional Investors* cases require that earning power or income-generating capacity of the debtor be the measure of a railroad's value. Once the earning power has been established, the aggregate capitalization of the new capital structure is derived from the earning power. Although §77 does not contain an explicit requirement that the reorganization plan be feasible (in the sense that the new capital structure is such that a viable entity will survive the reorganization process), the Interstate Commerce Commission's duty under §77(d) to formulate a plan that is in the public interest has been read to include this requirement. *Group of Institutional Investors v. Chicago, Minneapolis, St. Paul & Pacific R.R. Co.*, 318 U.S. 523, 544-45 (1943).

Congress has invested the judiciary with powerful tools for the effectuation of §77 reorganizations. Preservation of the *status quo* can be insured by the prudent exercise of the stay provisions of §77(j). Trustees' certificates having priority over secured debt may be issued pursuant to §77(c)(3) to obtain interim working capital. Executory contracts may be rejected by the trustee or in the plan of reorganization §77(b). Rail and non-rail properties may be sold free and clear of liens under §77(o) (subject to the limitation imposed in this Circuit by *In re Penn Central*

Transportation Co., 458 F.2d 1030 (3d Cir. 1973)). Under certain circumstances, funds held subject to the liens of mortgage indentures may be used for working capital or additions and betterments to the plant, *Central R.R. of New Jersey v. Manufacturers Hanover Trust Co.*, 421 F.2d 604 (3d Cir. 1970); *In re Third Avenue Transit Co.*, 198 F.2d 703 (2d Cir. 1952). And notwithstanding lack of majority support, an approved plan may be confirmed under the cram-down provision of §77(e), *R.F.C. v. Denver & Rio Grande Western R.R. Co.*, 328 U.S. 495 (1946). Moreover, the expertise of the Interstate Commerce Commission is made an integral part of a §77 reorganization process by the assignment to the Commission of the task of formulating the plan, ascertaining the values of railroad property, and evaluating the public interest aspects of the proposed uses of a §77 debtor's transportation property.

The reorganization process fosters the public interest as well as the private interests of owners and creditors. The economic inefficiency of dismantling a potentially productive enterprise is avoided, and investor confidence is restored. Moreover, §77 is designed to promote the public interest in preservation of a sound rail transportation system. *Continental Illinois Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 294 U.S. 648, 676 (1935).

B.

The Regional Rail Reorganization Act of 1973 represents the Congressional response to the unfortunate fact that the processes and concepts of §77 outlined above proved inadequate to deal with the current plight of railroads in the Northeast. Section 77 is adequate only when a railroad's revenues are, or can reasonably be predicted to be, in excess of operating expenses.

Historically, railroad reorganizations have been precipitated by the circumstances that fixed charges were unrealistically high in relation to long-term earning capacity. The solution was to scale down and stretch out the debt structure so that fixed charges could be met from net operating revenues without exhausting those revenues.

Penn Central and most of the other bankrupt northeastern carriers do not generate net operating revenues, but incur large operating deficits. They cannot achieve reorganization on an income basis under §77.

As a matter of simple maximization of values, if there is no "going concern" value in the usual sense, there is no justification for continuing a reorganization proceeding,[6]

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[6] The significant advantage of §77 over the equity receivership is the substitution of the Interstate Commerce Commission's valuation procedures for the foreclosure sale of the equity receivership as the mechanism for determining who has an interest in the debtor's estate. *See* generally S.E.C., *Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees*, Part VIII (1940). But clearly, the §77(e) procedures are assumed to result in a valuation in excess of that which would be obtained by the foreclosure sale. As Mr. Justice Douglas observed in *R.F.C. v. Denver & Rio Grande Western R.R. Co.*, 328 U.S. 495, 509 (1946):

> "Liquidation in depression periods meant that large portions of debts, as well as stock interests in the properties, would be irretrievably lost to the holders, while reorganization on a capitalization that estimated what normal income would support meant the salvage of sound values. We see no more constitutional impediment to the elimination of claims against railroad debtors by the Interstate Commerce Commission's determination of values,

(Cont'd)

unless either or both of the following conditions are established: (1) a reasonable prospect that, because of streamlining, consolidations, and other changes in circumstances, earning power and profitability can be restored; or (2) a reasonable prospect that the public need for preserving the debtor's railroad is such that it will be appropriated for public use, and that the values inherent in its assemblage as an operating railroad will be recognized and paid for. *Cf. Port Authority Trans. Hudson Corp. v. Hudson Rapid Tubes*, 20 N.Y. 2d 457, 231 N.E. 734, *cert. denied* 309 U.S. 1002 (1967).

If Penn Central were not a railroad and were being reorganized under Chapter X, presumably a liquidating plan of reorganization would be pursued, 6A Collier ¶10.02, at pp. 421-23, or the proceeding would be converted to a straight bankruptcy proceeding or dismissed under §236 of the Act. But railroad corporations are not eligible for relief under the straight bankruptcy provisions. Section 77(g) does permit dismissal of the case, but the implications of such a dismissal are not clear. Presumably, such a dismissal would be immediately followed by an equity receivership and the relatively cumbersome and unsatisfactory liquidation measures available in such a proceeding.

As discussed in Part II of this Opinion, a plan of reorganization providing for the partial or total liquidation of a §77 debtor's rail assets might well be accomplished under §77. The language of §77(b)(5) provides that:

(Footnote 6 cont'd)

> with judicial review as to the sufficiency of the evidence and compliance with statutory standards, than we do to their elimination by an accepted bid in a depression market."

> "[The plan may provide for] the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than the fair upset price."

The New Haven plan can be characterized as a liquidating type of reorganization plan. However, in its October 1973 report to the Penn Central reorganization court (Document No. 6336), the ICC expressed the view that such a liquidation could not be regarded as a plan of reorganization under §77, apparently on the basis of a perceived difference in the degree of assurance of continued operation of the railroad by someone.

It is against this background, and in light of the accrued and continuing post-reorganization losses summarized in Judge Aldisert's Opinion, that the provisions of the Act are to be considered.

IV. Analysis of the Pertinent Provisions of the Statute

It is desirable at the outset to attempt to characterize the Act in terms of some familiar legal model or category. To the extent that the statute can thus be labeled, *e.g.*, as a reorganization statute or as an eminent domain statute, the constitutional implications emerge with reasonable clarity. Unfortunately, the Act does not fit comfortably into any familiar category.

From the terminology employed in the statute, and much of the legislative history, it would appear that a reorganization-type statute was intended. But on the basis of its total impact, such a characterization is somewhat misleading. Perhaps the best description of the essential character of the statute appears in §207(b):

> "Each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether or not such railroad shall be reorganized by means of transferring some of its rail properties to the Corporation pursuant to the provisions of this Act."

It bears emphasis that the Act does not affect the reorganization process of §77 directly. Upon completion of all of the procedures contemplated by the Act, it will still be necessary for the parties to the Penn Central proceeding to complete the process of adjustment of creditors' claims, and of proposing, processing and consummating a plan of reorganization that is fair and equitable in accordance with the requirements of §77. What the Act does is provide a mechanism for consummating, insofar as the Debtor's rail assets are concerned, what would be in effect a liquidating reorganization plan, if the properties are transferred to Conrail (and perhaps other solvent railroads) pursuant to the Final System Plan. In connection with such a partial liquidation scheme, the §77 role of the Interstate Commerce Commission is largely eliminated, as is participation and voting by creditors. Essentially, the Act provides a buyer for some or all of the Debtor's rail properties, an expedited mechanism for terminating rail services over the balance of the Debtor's properties, and expedited procedures for achieving the transfer and sale.

Thus, the Act can be viewed as a reorganization statute in the sense that it provides for disposal of some or all of the Debtor's rail properties in a manner analogous to dispositions authorized by §77(o) of the Bankruptcy Act during the course of a reorganization and outside a

reorganization plan, or pursuant to §77(b)(5) of the Bankruptcy Act as part of a reorganization plan. The obvious difference, however, is that under §77(o) a sale must be found to be "in the interest of the debtor's estate and of ultimate reorganization" and the price must be adequate, and under §77(b)(5) the sale price must be at least equal to a fair upset price established by the reorganization court. It is noteworthy that, in the *New Haven Inclusion* case, *supra*, the reorganization court viewed the conveyance of the New Haven's properties to Penn Central as having been made pursuant to §77(b)(5). Although the full price was not to be finally ascertained until after the conveyance, a minimum price had been established before the conveyance, and the parties were all willing to leave the final price open for further litigation.

The *New Haven Inclusion* case is particularly instructive in another respect: There, a substantial part of the purchase price was to be paid in the form of Penn Central stock. In order to insure that the New Haven interests would receive the actual value of the assets conveyed, Judge Anderson imposed an underwriting provision which in effect required a guarantee that the stock would regain its previous market value of $87.50 per share at some time during a ten-year period following the conveyance.[7] The Supreme Court expressly approved that feature of the transaction, as of the date of the district court's decision, but since Penn Central had entered reorganization shortly before the Supreme Court decided the case, the Court remanded for further proceedings, stating:

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[7] *In re New York, New Haven & Hartford R.R. Co.*, 314 F. Supp. 793, 808 (D. Conn. 1969).

"The fairness and equity that are the essence of a §77 proceeding forbid our approval of a payment for the transferred New Haven properties that may be worth only a fraction of its purported value. . . ." 399 U.S. at 488-89.

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ision of the Supreme Court can be fairly read to hat, if shares of stock are to constitute part of the ration for a sale under §77(b)(5), the issuer must manner underwrite the value of the stock.

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apparent that the approach represented by the Act different from what has heretofore been considwithin the ambit of §77(o) or §77(b)(5). The transaction is initiated by Congress and is to be ented through USRA and Conrail. The value of stock is to be determined after the conveyance, railroad must accept the risks of fluctuations in price (assuming that the stock is marketable at

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st blush, there is some similarity between the ap- of the Act, and the treatment accorded claimants 77 proceeding under a plan of reorganization. Pur- such a plan of reorganization, secured and unse- editors, as well as stockholders, may be required quish their property rights in exchange for securinferior character. Such exchanges are, of course,

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to the absolute priority rule and the standards of oncerning valuation. Claims which cannot be satithin the framework of the new capital structure harged.

gain, this is only a surface similarity. The Act t operate at the claimant-debtor level, but involves

the debtor and Conrail. The Conrail securities are to be issued to the debtor, not to its creditors. The valuation of the creditors' security and their treatment under the plan would not be contemporaneous, or, perhaps, even related. While an eventual reorganization plan for the railroad might provide for a direct pass-through of Conrail securities to the creditors whose claims were secured by properties taken by Conrail, that would not be a necessary result. Moreover, the voting rights of Conrail stockholders would be so limited that they would have no voice in management of the enterprise, §301(d), and, apparently, the stock would be ineligible for listing on the major exchanges.[8] Thus, it is clear that the Act does not fit comfortably within any existing procedure or mechanism under the Bankruptcy Act.

Finally, it is of course clear that the approach of the Act does not fit an eminent domain model. It does not

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[8] In *R.F.C. v. Denver & Rio Grande Western R.R. Co., supra,* the Supreme Court affirmed the district court's confirmation and cram down of a plan on a group of junior secured creditors. In reviewing the dissenter's contention that the original valuation by the Interstate Commerce Commission was too low and that, in any event, subsequent events demonstrated the valuation was too low, the Court stated that "the unlimited dividends that might be earned and paid on the common stock in 'lush years,'" 328 U.S. at 518, and the large amount of cash on hand were "part of the compensation to senior claimants for their loss of position," 328 U.S. 522. Moreover, the bondholders obtained some control of the corporation by receiving common stock. While the earnings at the time of the challenge to the plan were substantially in excess of that envisioned by the Interstate Commerce Commission, the Court approved the capital structure based on the earning power, in part, on the theory that the loss of the senior claimants' secured position justified receipt of stock which had the possibility of paying substantial dividends.

provide for payment in cash, payment is not assured in advance of the conveyance, and there is a limit upon the amount of the consideration.

There are, however, at least partial resemblances to a condemnation approach. The conveyances are not voluntary, on the part of either the purchaser or the seller. Conrail, although purportedly a private corporation, has no choice in the matter. The only element of choice, insofar as the railroad is concerned, is the limited choice afforded in connection with the §207(b) findings, and these are choices of the courts, not of the railroad or its creditors. From the standpoint of the seller-railroad, there is no assurance that the price will ever actually be realized. If the value of Conrail's stock, plus whatever portion of the $500 million in USRA bonds are included in the consideration mix, is less than the "constitutional minimum" value to which the railroad is entitled, the Special Court can enter a deficiency judgment against Conrail. But it seems rather obvious that if the value of Conrail's stock is inadequate, a judgment against that same equity would add nothing, and would be essentially circuitous.

From the standpoint of Conrail, on the other hand, the fact that the price may be fixed at a level greater than the value produced by capitalizing the projected earnings of the new venture[9] is a significant departure from the normal concept of a private sale. For a private purchaser would not ordinarily be expected to pay more for a business enterprise than its capitalized earnings.

To summarize, the RRRA represents an amalgam of sale, reorganization, and eminent domain concepts. Implementation of the Final System Plan would produce

[9] *See* note 6, *supra.*

transactions akin to sales under §77(o) or §77(b)(5) of the Bankruptcy Act, but without the safeguards of participation by the parties or advance judicial scrutiny; sales in which the price would be paid in a form somewhat like that encountered in a plan of reorganization. The transactions would somewhat resemble a reorganization in which the "cram down" decision is made by Congress, or at least virtually compelled by Congress, in advance of formulation of the plan. And the plain purpose of the entire arrangement would be to insure the continued availability of these rail properties for use in meeting the public need for continued rail service, without regard to the wishes of the present owners of the properties.

The novelty of the statutory approach does not, of course, establish its unconstitutionality. In dealing with problems of this importance and complexity, it is understandable that Congress should attempt to apply whatever legal concepts might prove useful. But merely because it can be constitutionally permissible under some circumstances to compel creditors in a reorganization plan to be satisfied with stock in the new enterprise, it does not follow that that result is always permissible. Presumably, the Fifth Amendment is equally applicable to bankrupts and non-bankrupts. Thus, if the compulsory character and public purpose of the Act compel the conclusion that the Act constitutes an exercise of the eminent domain power, albeit a slightly indirect one, the use of stock as the compensation medium is extremely suspect. *See*, Nicholas, *Eminent Domain* ¶8.2 (3d rev. ed. 1970) and cases cited therein. Similarly, at least until now, a decision that a stock distribution was fair and equitable has always required *contemporaneous* comparisons between the value of the creditors' and stockholders' claims and the value of the stock, a weighing of entrepreneurial risks

against the prospects for growth. And merely because it is constitutionally permissible for a reorganization court to authorize sales of assets free and clear of liens, it does not follow that such sales may be approved without knowledge of the purchase price, and without a simultaneous transfer of existing liens to proceeds having value equivalent to the assets conveyed. And, of course, the magnitude of the public interest in continued rail service cannot justify treating these rail properties as if they were already public property.

It is apparent that the determination by the Special Court as to what constitutes the "constitutional minimum" price for the transferred properties is crucial to the implementation of the statute. That issue, as such, is not before this Court and I intimate no view on the merits. But it is important to note that, no matter how that issue may ultimately be resolved by the Special Court, the present, immediate, constitutional obstacle would remain. There is no assurance that the price fixed by the Special Court can be paid, under the statutory scheme.

Under any view of the Act, there is at least a distinct possibility that application of the deficiency judgment mechanism will be required; and, as set forth above, that is an obviously inadequate remedy. It must be assumed that USRA will strive diligently to comply with the Congressional directive to design both "a financially self-sustaining rail service system" and a "rail service system adequate to meet the rail transportation needs and service requirements of the region." At present, no one knows whether these somewhat inconsistent goals can be achieved. Congress itself has recognized the uncertainty, by retaining the right to review the plan before it becomes effective. And of course, even if the Final Plan is designed to show

profitability on the basis of *pro forma* projections, there can be no assurance that actual results will live up to the forecasts.

The point is, not that these uncertainties can or should be eliminated, but that all risks – of the possibility of designing a profitable system, of ultimate profitability, and of interim losses while the hypotheses are explored – are imposed upon the debtors and their creditors, who are to be irretrievably committed to the project in advance, no matter how it works out.

As discussed in Part I of this Opinion, I agree with the majority that we need not reach all of the constitutional implications of the transfer provisions of the RRRA. Specifically, we need not now determine whether or not those transfer provisions amount to an exercise of the power of eminent domain. But it is impossible to avoid the conclusion that, before the burden of further interim erosion can constitutionally be imposed upon the railroad and its creditors, there must be greater assurance of a constitutionally acceptable end result than is provided by this statute.

V. The Tucker Act Remedy

For the reasons so well stated in the majority Opinion, I agree that Congress did not intend to provide for any compensation to the railroads or their creditors for interim erosion other than that specified in the Act. Whether this would necessarily preclude a later resort to the Court of Claims on a constitutional theory I deem it unnecessary to decide. I note, however, that the argument of the government defendants in support of such a potential remedy seems to amount to an assertion that governmental immunity is itself constitutionally suspect.

For present purposes, it suffices to state that the availability of a Tucker Act remedy is not now sufficiently assured to justify denial of relief in the present litigation. Moreover, the adequacy of any such putative remedy, if it exists, seems highly questionable. I find it difficult to characterize as due process of law the notion that further interim erosion can be justified because, if the lengthy and complex procedures of the Act do not produce a constitutionally permissible result, the parties may then start over again in the Court of Claims. The rights of the secured creditors of the New Haven, for example, have already been held in suspension for more than ten years.

I concur in the result reached by the majority. I am authorized to state that Judge Bechtle joins in Part II of the foregoing Opinion.

/s/ John P. Fullam

ORDER

AND NOW, this 25th day of June, 1974, for the reasons set forth in the foregoing opinions, it is ORDERED:

1. That the defendant, United States Railway Association, is enjoined from certifying a Final System Plan to the Special Court pursuant to Section 209(c) of the Regional Rail Reorganization Act of 1973.

2. That the defendants are enjoined from taking any action to enforce the provisions of Section 304(f) of the Regional Rail Reorganization Act of 1973, with respect to any abandonment, cessation, or reduction of service which has been or may hereafter be determined by a court of competent jurisdiction to be necessary for the preservation of rights guaranteed by the United States Constitution.

3. That all parties are enjoined from enforcing, or taking any action to implement, so much of Section 207(b) of the Regional Rail Reorganization Act of 1973 as purports to require dismissal of pending proceedings for reorganization under Section 77 of the Bankruptcy Act.

4. That a declaratory judgment be entered, declaring:

a. That Section 303 of the Regional Rail Reorganization Act of 1973 is null and void as contravening the Fifth Amendment of the United States Constitution insofar as it fails to provide compensation for interim erosion pending final implementation of the Final System Plan pursuant to the statute.

b. That Section 304(f) of the Regional Rail Reorganization Act of 1973 is null and void as violative of the Fifth Amendment of the United States Constitution, to the

extent that it would require continued operation of rail services at a loss in violation of the constitutional rights of the owners and creditors of a railroad.

c. That so much of Section 207(b) of the Regional Rail Reorganization Act of 1973 as requires reorganization courts to dismiss pending proceedings under Section 77 of the Bankruptcy Act under the circumstances set forth in said Section 207(b) is null and void, as violative of Article I, Section 8, Clause 4 of the Constitution of the United States.

5. That the respective motions of the plaintiffs for partial summary judgment are granted in part, as set forth above, and in all other respects are denied.

6. That the defendants' motions for summary judgment are denied.

/s/ Ruggero J. Aldisert
Ruggero J. Aldisert

/s/ John P. Fullam
John P. Fullam

/s/ Louis C. Bechtle, J.
Louis C. Bechtle, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[caption omitted in printing]

MEMORANDUM AND ORDER NO. 1543, and FINDINGS PURSUANT TO THE FIRST SENTENCE OF §207(b) of the Regional Rail Reorganization Act of 1973

FULLAM, J. May 2, 1974

Section 207(b) of the Regional Rail Reorganization Act of 1973 (hereinafter the "Act"), provides:

> "Within 120 days after the date of enactment of this Act, each United States District Court or other court having jurisdiction over a railroad in reorganization shall decide whether the railroad is reorganizable on an income basis within a reasonable time under §77 of the Bankruptcy Act (11 U.S.C. §205) and that the public interest would be better served by continuing the present reorganization proceedings than by a reorganization under this Act . . . ."

The Debtor is a "railroad in reorganization" as defined in the Act. The statute became effective January 2, 1974, which means that the decision as to reorganizability is to be made not later than May 2, 1974.

By Order No. 1426, this Court directed that a hearing be held on March 25, 1974, in relation to the decision required by the quoted language of the statute, and invited all interested parties, at stated times in advance of the hearing, to specify and brief the legal and factual issues they deemed relevant to the required determination.

In response to this invitation, a wide range of questions have been briefed and presented, but in view of the factual record developed at the hearing, not all of these issues need now be discussed.

I. Jurisdictional and Other Preliminary Issues

It is necessary to note at the outset that the constitutionality of the Act is being challenged on a variety of grounds in other litigation now pending in this District and elsewhere.[1] Many of the same constitutional issues have been raised in the present proceeding. For the most part, they will not now be considered. Apart from the question of whether this Court should attempt to avoid deciding the constitutional issues, in deference to the three-judge proceedings, it would seem that these issues can and should be deferred for consideration in connection with the findings contemplated by the second clause of §207 (b) (the so-called "180-day findings").

The only constitutional issues which must be faced now are those expressing a challenge to the jurisdiction of this Court to make the findings required by §207(b).

The findings contemplated by the first sentence of §207 (b), the so-called "120-day" findings, embrace two areas

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[1] The two cases originally filed in this District are *Connecticut General Insurance Corp., et al. v. United States Railway Association, et al.*, Civil Action No. 74-189, and *Manufacturers Hanover Trust Co. v. United States Railway Association, et al.*, Civil Action No. 74-332. In both cases, a three-judge court (of which the writer is one member) has been convened, pursuant to 28 U.S.C. §2284. Documents filed of record in those cases suggest that similar cases pending in other districts are being transferred to this District pursuant to 28 U.S.C. §1404.

of inquiry: (1) whether the Debtor "is reorganizable on an income basis within a reasonable time under §77 . . ." and (2) "[whether] the public interest would be better served by continuing the present proceedings than by reorganization under this Act . . . ." The New Haven Trustee contends that this Court lacks power to make findings on either subject because there is no "case or controversy" before the Court; and further argues that making findings with regard to "the public interest" is not a judicial function and cannot be delegated to a court, at least in the absence of adequately defined standards.

A. "Case or Controversy"

I have concluded that a finding on the issue of reorganizability may properly be made by an Article III court. The reorganization proceeding itself is the "case or controversy" which justifies judicial action. While there might perhaps be some question as to the validity of legislative intrusion into specific pending litigation by fixing deadlines for decision of particular issues (a question which has not been raised in the present proceeding, and as to which I intimate no view), it is entirely clear that a court may properly comply with such deadlines; its preexisting jurisdiction would not be impaired.

It is true that the Act does not prescribe procedural machinery for making the required findings in an adversary setting: there is no petitioner or respondent; indeed, the Act does not even mandate a hearing. But there is no requirement that the norms of procedural due process must be disregarded, and they have not been. All parties have been afforded ample opportunity to be heard.

It is also true that the statute provides little or no guidance on the question of the proper allocation of the bur-

den of proof; but that shortcoming is not, in my view, jurisdictional.

In short, there appears to be no valid reason for reaching any conclusion other than the obvious one, namely, that a reorganization court does have jurisdiction to make findings concerning reorganizability of the Debtor.

B. Public Interest

The principal thrust of the New Haven Trustee's jurisdictional argument is that a determination as to whether the public interest would be better served by continuing the §77 proceeding or by proceeding pursuant to the 1973 Act is essentially legislative in character, and cannot be delegated to an Article III court. The government and other parties counter with the argument that the Act itself adequately discloses what Congress intended to define as the public interest, and that all that is required is performance of the normal judicial function of fact-finding.

Unless there is a finding that the Debtor is reorganizable under §77, there is no necessity for making a public interest comparison under §207(b). Since I have reached the conclusion that the Debtor is not reorganizable, there is no present necessity for resolving the second phase of the jurisdictional argument.

II. Definition of "Reorganizable on an Income Basis Within a Reasonable Time under §77 of the Bankruptcy Act"

The parties are not in complete agreement as to whether the standards for determining reorganizability under the Act are different from, or identical to, the standards of

§77. More importantly, there is lack of agreement as to what constitutes a valid plan of reorganization under §77.

For example, the *New Haven Inclusion Cases*, 399 U.S. 392 (1970) recognized as valid a plan of reorganization in which the Debtor would first dispose of its rail operations and then reorganize as a holding company. But when the Penn Central Trustees filed a somewhat similar plan, the ICC purported to hold that it would not constitute a plan of reorganization under §77. While this ruling does not, of course, represent the final word on the subject, it serves to point up the potential for conflicting views.

I find it unnecessary to resolve this doctrinal dispute at the present time. For it is at least clear that in adopting the 1973 Act, Congress was attempting to deal only with the rail assets of railroads in reorganization, and that, for purposes of §207(b) only a reorganization of those rail assets, pursuant to a plan involving continuation of rail service by the Debtor, would pass muster.

Moreover, I am persuaded that reorganizability must be determined on the assumption that the existing regulatory and operational setting will continue. From the very inception of these proceedings, it has been reasonably clear that, if certain conditions could be altered, the Debtor could be made viable. The needed changes – elimination of plant redundancy, reductions in crew consists, full reimbursement for passenger service, improvement in rates and divisions, and, more recently, substantial governmental financial assistance – are not within the control of the Trustees or this Court, and have not been realized.

The issue, then, is whether there is now any reasonable prospect that continuation of the Debtor's rail

operations under existing constraints will produce enough net income, soon enough, to support adequately a realistic re-capitalization of the enterprise. Applying the familiar figure of speech, we are concerned with the existence and relative intensity of the light at the end of the tunnel, and also with the length of the tunnel and the further burdens involved in traversing it.

III. Findings of Fact

1. During the period from the filing of the Debtor's reorganization petition on June 21, 1970, to December 31, 1973, the Debtor's operations have produced losses in ordinary income, calculated in accordance with ICC regulations (49 CFR Part 1201, 501-51) totalling $851.1 million.

2. The Debtor has been able to continue operations during this period only by deferring payments of virtually all real estate taxes, rentals of leased lines, and interest (including mortgage and collateral trust bonds) other than equipment obligations.

3. Non-recurring income aggregating $155.3 million from trustees certificates, sales of real property and equipment, sales of securities, and drawdowns from escrowed funds, have been utilized to sustain operations.

4. The charts below show the ordinary losses, deferrals, and applications of non-recurring income on an annual basis and the detail relating to non-recurring income.

Summary of Financial Results
($ in millions)

	Ordinary Income (Loss)	Deferred Taxes Leased Line Rents and Interest Oblig.*	Non-Recurring Sources of Cash
June 21 to Dec. 31, 1970	$(179.7)	$142.8	
Year 1971	(284.5)	163.9	$96.6
Year 1972	(197.9)	156.1	25.0
Year 1973	(189.0)	143.1	33.7 **
Total June 21, 1970 to December 31, 1973	$(851.1)	$605.9	$155.3

*Interest on all debt obligation, secured and unsecured, is included in these figures.

**Does not include approximately $10.7 covered in Order No. 1480 dated March 1, 1974, regarding D.O.T. and certain equipment obligations.

Detail of Non-Recurring Sources of Cash

Sources	1971	1972	1973
Trustees Certificates Drawdown	$75.0	$25.0	
Tenants Tax Escrow Account	3.1		
Proceeds from New Haven Property Sale	9.1		
Sale of Freight Cars to P&LE	7.3		
Mortgage Trustees Drawdown-Selkirk Improvement	2.1		
M.B.T.A. Settlement			$ 9.1
Proceeds from Madison Square Garden			2.4
Proceeds from Sale of Contingent Compensation Fund			6.5
"Agnes" Flood Loan			15.7
Total	$96.6	$25.0	$33.7

5. The aggregate annual expenditures, including all road depreciation accounts, for maintenance of way and structures by the New Haven, New York Central, and Pennsylvania Railroads from 1957 to 1968 and the Debtor's expenditures since the merger, are reflected below:

1957	-	$224.75	1966	-	$179.73
1958	-	176.47	1967	-	178.54
1959	-	176.55	1968	-	190.66
1960	-	176.43	1969	-	190.32
1961	-	163.14	1970	-	223.82
1962	-	171.47	1971	-	256.46
1963	-	168.34	1972	-	244.51
1964	-	171.21	1973	-	255.9
1965	-	172.47			

6. The cost of labor and material utilized in maintenance of way and structures has risen 113% from 1957 to 1973.

7. Expenditures for maintenance of way and structures from 1958 until the merger, and to a lesser extent since the merger, were inadequate to maintain the plant at the level necessary to accommodate traffic.

8. The initial impact of deferral of maintenance of way expenditures was on branch, side, and yard trackage. By the mid-60's, the deferral of maintenance began to have an impact on main line trackage, and since that time the deterioration of portions of the main line has accelerated. Foregoing preventive maintenance has created a situation in which significant refurbishing and replacement of materials is now necessary.

9. In 1970, slow orders had been imposed on 2,100 track miles. By 1974, slow orders had been imposed on 8,475 track miles. 6,900 track miles within the system are not in adequate condition to meet the minimum standard imposed by the Federal Rail Administration for operational train speeds of 10 miles per hour. 49 CFR 213 *et seq.*

10. Assuming normalized maintenance of way expenditures of at least $225 to $250 million per annum, an addi-

tional $665 million in present dollars must be expended in an eight-year period to remedy past deferrals.[2]

11. Poor condition of the roadway increases train time, and thereby decreases the service capacity and revenue of the system.

12. In order to provide an estimate of the future financial results of the Debtor's operations, the Trustees' traffic consultants, Temple, Barker & Sloan, developed a forecast of traffic and revenue for 1974 through 1978 (the forecast period).

13. The main assumptions underlying the forecast are as follows:

a. Using 1958 as the base year, the national economy will have an average real rate of growth of 4% per annum during the forecast period.

b. Rail traffic growth in the eastern district will be less than the national rail traffic growth rate. The difference between the eastern district and the national growth rate will be less than in previous years.

c. The Debtor's rail service will be adequate during the forecast period to meet the reasonable expectations of its shippers.

d. The "energy crisis" will improve the competitive position of railroads versus other transportation modes, and im-

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[2] This figure is derived from Mr. Jackman's affidavit (Document No. 7243) in which he estimated an 11,000-route mile system would require $451 million ($41,000 per route mile) and the 15,000-route mile system would require $567 million ($37,466 per route mile) to cure past deferrals. A per-route mile cost of $35,000 is applied to an assumed 19,000-route mile system to generate the estimate of $665 million to cure deferred maintenance throughout the system.

prove the Debtor's total tonnage carried and commodity mix.

e. Governmental environmental regulations will be altered to permit utilities and industry to increase their use of coal.

f. Coal traffic will increase 31% from 1973 to 1978, with coal traffic in 1978 comprising 31% of the Debtor's traffic as compared to 28% of the Debtor's traffic in 1973.

g. Higher fuel costs after 1974 will be covered by immediate rate surcharges or increases; or, stated another way, the 1975-78 figures show no incremental cost for fuel and no additional revenue from rate increases to cover that cost.

h. Rate increases adequate to cover increased unit costs (increased costs less saving from higher productivity) will be effective on July 1 of the year succeeding the cost increases.

14. The 1973 estimated actual tonnage for the Debtor was 276.9 million tons. A tonnage increase of 3.68% per year over the 1973 estimated actual tonnage is predicted as follows:

	(millions of tons)	
1974	-	282.1
1975	-	293.8
1976	-	305.3
1977	-	316.0
1978	-	327.9

15. In accord with the method set out below, the traffic forecast was utilized to generate a net revenue forecast in current dollars.

a. Unit revenues derived from a model based on 1972 data with certain adjustments to reflect 1973 data were

applied to the projected tonnage in each commodity category to generate estimated gross revenue in 1972 dollars.

b. Gross revenue was adjusted to a net revenue figure by application of a .047 factor to reflect revenues received for services rendered by others.

c. Net revenues in 1972 dollars were then converted into current dollars for the forecast period by determining the increase cost due to inflation as offset by productivity increases. Revenue was then adjusted in accord with the rate increases assumptions indicated in Finding 13(h).

d. No reduction in tonnage was made to reflect possible shipper reaction to rate increases.

16. Revenue in current dollars is forecasted to be:

(in millions)

1974	-	1,879.2
1975	-	2,069.4
1976	-	2,258.2
1977	-	2,435.5
1978	-	2,637.3

17. Fifty-five percent of the increased revenue is attributable to rate increases and 45% to increased traffic, changes in commodity mix, and changes in unit revenue.

18. Below is the forecasted income statement for the Debtor premised on the traffic and revenue forecast with certain assumptions for cost increases.

(dollars in millions)

	1974	1975	1976	1977	1978
Operating Revenues					
Freight	$1,879.2	$2,069.3	$2,258.2	$2,435.5	$2,637.3
All other	289.3	303.9	322.0	340.0	360.0
Total	2,168.5	2,373.2	2,580.2	2,775.5	2,997.3
Operating Costs	2,309.7	2,491.6	2,651.6	2,815.7	3,001.7
Net Rwy. Oper. Inc.	(141.2)	(118.4)	(71.4)	(40.2)	(4.4)
Other Income	62.2	74.2	82.0	88.5	90.4
Misc. Deductions	21.2	20.2	20.2	20.2	20.2
Inc. Avail for Fx. Chgs	(100.2)	(64.4)	(9.6)	28.1	65.8
Fixed Charges	137.5	131.9	126.4	124.1	122.0
Ordinary Income	$ (237.7)	$ (196.3)	$ (136.0)	$ (96.0)	$ (56.2)
Average Number of Employees	79,325	79,325	79,325	79,325	79,325
Tons handled (Mil.)	282.1	293.8	305.3	316.0	327.9
Operating Ratio (%)	82.99	81.16	79.49	78.51	77.45

19. The ordinary income loss for 1976, '77 and '78 as shown in Finding 18 is overstated because the revenue projections therein utilized did not reflect rate increases to cover increased fuel cost in 1977-78, whereas the operating cost projections do contain increased fuel costs. The substantial increment in the "Other Income" account shown in Finding 18 is attributable to yearly increases in the proceeds of property sales ($6.7 million in 1974 compared with $30 million in 1978).

20. The chart below shows the projected cash position resulting from operations consistent with the income statement shown in Finding 18.

Source and Application of Funds

(dollars in millions)

Source	1974	1975	1976	1977	1978
Ordinary income (Loss)	$(237.7)	$(196.3)	$(136.0)	$ (96.0)	$(56.2)
Adjustments to Earnings:					
Taxes-Accrued	58.5	60.5	62.5	64.4	66.8
-Paid	(.4)	(.4)	(.4)	(.4)	(.4)
Interest Accrued	108.3	102.8	97.4	95.1	93.0
-Paid	(23.0)	(23.9)	(18.4)	(16.1)	(14.1)
L.L.Rts.-Accrued	29.0	28.9	28.9	28.9	28.9
-Paid	(1.0)	(1.0)	(1.0)	(1.0)	(1.0)
Depreciation	85.1	83.3	81.3	79.3	77.4
Other	(12.)	(20.0)	(26.1)	(30.7)	(30.7)
Total Adjustments	244.5	230.2	224.2	219.5	219.9
Cash from Operations	6.8	33.9	88.2	123.5	163.7
Other Sources:					
Proceeds from Sale of Salvage	15.1	16.2	17.3	18.5	19.8
Total Sources	21.9	50.1	105.5	142.0	183.5
Application					
Capital Program–Equip.	5.0	11.7	12.4	13.2	14.0
–Road	20.0	30.0	31.9	33.8	35.9
Debt Retirement	39.1	42.3	87.4	35.0	33.6
Amtrak	6.0	–	–	–	–
Total Application	70.1	84.0	131.7	82.0	83.5
Net Incr. (Decr.) in Cash	(48.2)	(33.9)	(26.2)	60.0	100.0
Beginning Cash	40.2	(8.0)	(41.9)	(68.1)	(8.1)
Ending Cash	(8.0)	(41.9)	(68.1)	(8.1)	91.9
Emp. Withheld Taxes Incl. Above	9.0	9.5	10.0	10.5	11.0
Ending Cash Avail for Oper.	$ (17.0)	$(51.4)	$ (78.1)	$ (18.6)	$ 80.9

21. The cash forecast for 1974 is as follows:

(dollars in millions)

	Month Ending Cash Balance Available for Operations[3]
March 1974	$ (8.8)
April	(4.7)
May	(2.0)
June	4.9
July	(5.4)
August	(28.4)
September	(19.4)
October	(22.8)
November	(25.8)
December	(17.0)

NOTE: 1. Assumes SEPTA payments in April, August and December of $4 million each.

2. Assumes increase AMTRAK reimbursement of $1.3 million per month commencing May 1974.

3. Cash balances reflect approximately $10.7 million in equipment obligations assumed by the D.O.T.

4. Does not include effect of recent F.R.A. order regarding maintenance standards.

22. The revenue forecast and projections derived therefrom are overstated because of the assumption that the Debtor will be able to provide adequate service to its shippers. Findings 8-13 indicate that the physical condition of the system is not such that the service level will meet the reasonable expectations of shippers. It is estimated that the inability to provide service levels satisfactory to shippers will cause a shortfall in

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[3] By affidavit dated April 26, 1974 (Document No. 7446), the cash balances through August were revised as follows: April - $(17.6); May - $(14.2); June - $(5.6); July - $(15.9); and August - $(38.9).

the revenue forecast of 2 to 3% per annum or $25 to $50 million per year.

23. During the 1974-78 period, $310.7 million in local taxes, $137.1 million in bond interest, and $140 million in leased line rents will accrue, but not be paid.

24. In order to depict the financial results of the Debtor's rail operations only, the income statement shown in Finding 18 was adjusted as follows:

a. Non-rail income, including accruals of tax allocation payments due from related companies, is extracted from the statement.

b. Due to the lack of definitive information, an arbitrary allocation of 50% of the leased line rents and interest obligations (components of fixed charges) have been extracted from the statement.

c. Tax accruals have been adjusted according to a preliminary analysis developed by the Trustees' staff of the tax consequences of severance of rail and non-rail operations.

d. The rail operation is presumed to carry the full cost of overhead.

25. Set out below is the forecasted income statement based on the procedure set out in Finding 24 for the Debtor's rail operations only.

	1974	1975	1976	1977	1978
Operating Revenues					
Freight	$1,879.2	$2,069.3	$2,256.2	$2,435.5	$2,637.3
All Other	289.3	303.9	322.0	340.0	360.0
Total	2,168.5	2,373.2	2,580.2	2,775.5	2,997.3
Operating Costs	2,314.3	2,496.1	2.656.1	2,820.1	3,006.0
Net Rwy. Oper. Inc.	(145.8)	(122.9)	(75.9)	(44.6)	(8.7)
Other Income	5.6	5.6	5.6	5.6	5.6
Misc. Deductions	13.0	10.9	10.9	10.9	10.9
Inc. Avail for Fx. C[illegible]s.	(153.2)	(128.2)	(81.2)	(49.9)	(14.0)
Fixed Charges	83.5	78.2	72.7	70.4	68.3
Ordinary Income	$ (236.7)	$ (206.4)	$ (153.9)	$ (120.3)	$ (82.3)
Average Number of Employees	79,325	79,325	79,325	79,325	79,325
Tons Handled (Millions)	282.1	293.8	305.3	316.0	327.9
Operating Ratio (Percent)	82.99	81.16	79.49	78.51	77.45

26. The chart below shows the projected cash position resulting from rail only operations consistent with the income statement shown in Finding 18.

Source and Application of Funds
(dollars in millions)

SOURCE	1974	1975	1976	1977	1978
Ordinary Income (Loss)	$ (236.7)	$ (206.4)	$ (153.9)	$(120.3)	$ (82.3)
Adjustments to Earnings:					
Taxes-Accrued	51.7	53.6	55.6	57.4	59.7
-Paid	(.4)	(.4)	(.4)	(.4)	(.4)
Interest-Accrued	68.9	63.6	58.2	55.9	53.8
-Paid	(23.0)	(23.9)	(18.4)	(16.1)	(14.1)
L.L.Rts.-Accrued	14.5	14.5	14.5	14.5	14.5
-Paid	(1.0)	(1.0)	(1.0)	(1.0)	(1.0)
Depreciation	83.7	81.9	79.9	77.9	76.0
Other	(1.2)	–	–	–	–
Total Adjustments	193.2	188.3	188.4	188.2	188.5
Cash from Operations	(43.5)	(18.1)	34.5	67.9	106.2
Other Sources:					
Proceeds from Sale of Salvage	15.1	16.2	17.3	18.5	19.8
Total Sources	(28.4)	(1.9)	51.8	86.4	126.0

APPLICATION					
Capital Program-Equip.	5.0	11.7	12.4	13.2	14.0
-Road	20.0	30.0	31.9	33.8	35.9
Debt Retirement	39.1	42.3	87.4	35.0	33.6
Amtrak	6.0	–	–	–	–
Total Application	70.1	84.0	131.7	82.0	83.5
Net Incr. (Decr.) in Cash	(98.5)	(85.9)	(79.9)	4.4	42.5
Beginning Cash	40.2	(58.3)	(144.2)	(224.1)	(219.7)
Ending Cash Emp.	(58.3)	(144.2)	(224.1)	(219.7)	(177.2)
Emp. Withheld Taxes Incl. Above	9.0	9.5	10.0	10.5	11.0
Ending Cash Avail. for Oper.	$ (67.3)	$ (153.7)	$ (234.1)	$ (230.2)	$ (188.2)

27. The forecast shown in Findings 18, 25 and 26 do not reflect the costs of eliminating deferred maintenance. See Finding 10.

28. For over two years the Trustees have been analyzing the effect of reducing the system from its present 19,000-plus route miles to either 15,000 or 11,000 route miles.

29. The Trustees' engineering consultants, Wyer, Dick & Company, prepared extensive studies of traffic movements and costs in 1972 to develop a computer model to assist in ascertaining the traffic that would be retained if the system were reduced to a 15,000 or 11,000-route mile operation. The forecasted results of operating the 15,000-mile or 11,000-mile core are derived from the following premises:

a. The productivity of labor, except train and engine crews, will increase at a compound annual rate of 3% for the 15,000-mile core and 5% for the 11,000-mile core.

b. The respective core systems were implemented on January 1, 1974.

c. Fifty peercent of the employees made excess by the reduction off the system would elect to take lump sum severance, aand the remaining job slots would be eliminated by attritiion.

d. The coire railroad would be exclusively freight.

30. The charrt below compares the projected tonnage, freight revenue, and net railway operating income for the present system, the 15,000-mile and 11,000-mile cores.

	Tonnage			Net Revenue		
Year	Full System	15,000 Mile	11,000 Mile	Full System	15,000 Mile	11,000 Mile
	(miillions of tons)			(millions of dollars-current)		
1974	282.1	271.5	236.0	$1,879.2	$1,813.5	$1,591.7
1975	293.8	283.2	245.9	2,069.4	2,000.9	1,755.1
1976	305.3	294.0	255.6	2,258.2	2,182.3	1,919.3
1977	316.0	304.3	265.1	2,435.5	2,353.7	2,074.1
1978	327.9	316.7	275.2	2,637.3	2,558.9	2,247.2

Ndet Railway Operating Income

Year	Full System	15,000 Mile[4]	11,000 Mile[4]
1974	(141.2)	(85.8)	(117.1)
1975	(118.4)	(23.5)	44.4
1976	(71.4)	39.8	104.9
1977	(40.2)	72.8	156.4
1978	(4.4)	102.8	171.

[4] These figurees were derived by subtracting from the projected income statementits (Sharfman affidavit-Document No. 7242) all costs of catch-up mainntenance of way and equipment. By doing this the N.R.O.I. projectiion for the full system and the 15,000 and 11,000-mile systems are comparable. However, all the projections are overstated because thhe revenue forecast assumed the Debtor's ability to render service eqqual to reasonable expectations of shippers. The

(Cont'd)

IV. Conclusion

As the foregoing detailed findings disclose, there is no prospect that, in the absence of fundamental changes which the Trustees are precluded from bringing about, the Debtor can be reorganized as an operating railroad. Even if the optimal configuration could be achieved, it appears unlikely that the Trustees could obtain the resources to sustain operations in the interim, or that the final result would make it possible to provide for interim administration expenses and support a recapitalization on a fair and equitable basis.

I therefore conclude, in accordance with the views expressed by every participant in the hearings, that the Debtor is not reorganizable on an income basis within a reasonable time under §77 of the Bankruptcy Act, within the meaning of §207(b) of the Regional Rail Reorganization Act of 1973.

(Footnote 4 cont'd)

condition of the plant, absent vast investment, is not such that reasonable service levels can be sustained. An alternate approach would have been to include the costs of catch-up maintenance in the full system figures. This would have increased the losses substantially. However, there was no basis in the record for accurately computing the yearly cost of a comparable catch-up program for the full system. *See* Finding 10.

ORDER NO. 1543

AND NOW, to wit, this 2nd Day of May, 1974, it is ORDERED, and this Court finds and concludes, that the Debtor, Penn Central Transportation Company, is not reorganizable on an income basis within a reasonable time under §77 of the Bankruptcy Act (11 U.S.C. §205), within the meaning of §207(b) of the Regional Rail Reorganization Act of 1973.

/s/ John P. Fullam
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

MEMORANDUM

Re: Proceedings Pursuant to §207(b) of the Regional Rail Reorganization Act of 1973

FULLAM, J. May 2, 1974

Section 207(b) of the Regional Rail Reorganization Act of 1973 (hereinafter "the Act") directs that certain findings be made in each pending railroad reorganization proceeding in the Midwest and Northeast. Application of the Act to the proceedings of the Secondary Debtors poses many legal and factual problems. In large measure, these problems are common to all of the Secondary Debtors, and can conveniently be considered together.

I. Procedural Background

For almost a century it has been a frequent practice of railroad companies seeking to expand into other territories to achieve this goal by means of long term leases of existing rail lines.[1] Use of the operating property can thereby be acquired without the problems and complexities of full-blown corporate consolidations. Generally, rental of the leased line includes servicing the lessor's debt, payments in an amount equal to taxes and the lessor's corporate expenses, and a fixed or contingent annual rental available

[1] An exhaustive treatment of the railroad lease is found in II Dewing, *The Financial Policy of Corporations*, ch. 31 (5th ed. 1953).

for distribution to the holders of the lessor's equity securities. Today, about half of the Penn Central's operating system is owned by Penn Central, and the remainder is leased to Penn Central by numerous lessor companies. Penn Central's predecessors successfully followed the industry-wide practice of acquiring substantial stock holdings in important leased lines. Although many of Penn Central's leased line lessors own important property, only 15 lessor companies are owned or controlled by Penn Central. However, these 15 companies own 9,304 route miles of the Debtor's system.

Railroad leases are, of course, executory contracts, and subject to disaffirmance by a §77 trustee; and even in the event the lease is affirmed by a §77 trustee, the lease may be rejected in the reorganization plan. §77(b). Moreover, if a lease is disaffirmed, operations after the initiation of the §77 proceeding are deemed to have been for the account of the lessor, and as a result the lessor may be obligated to make up losses sustained by the lessee in operating the leased line.[2] In the Penn Central case, pending decisions by the Trustees to affirm or disaffirm leases, rental payments have been deferred.

Deferral of rental payments to lessors exposed the lessors to the possibility of defaulting on their own obligations, thereby triggering action by the lessor's creditors to enforce their rights against the lessors and their property. On the other hand, many of the parties felt that so long as Penn Central continued to operate the leased properties,

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[2] The treatment of railroad leases in §77 proceedings is discussed in *In Re Penn Central Transportation Company (Sale of Park Avenue Properties)*, 354 F.Supp. 717 (E.D. Pa. 1972), aff'd in part, 484 F.2d 323, 334 (3d Cir. 1973).

and so long as the leases were not disaffirmed, this Court's jurisdiction to protect Penn Central's leasehold interest provided shelter for the lessors as well. In order to maintain a degree of control over the status of leased lines, at an early stage of the Penn Central reorganization virtually all of the interested parties agreed to the entry of a "status quo" order in the Penn Central proceeding, to the effect that no one could take action to enforce any claims against the lessors, except upon 14 days' advance notice to all other parties (Order No. 170). Thus, an opportunity was provided the parties to apply to this Court for specific protection, if appropriate.

Order No. 1, and additional orders thereafter, stated and extended the time within which the Trustees were obligated to make decisions concerning affirmance of executory contracts. The Trustees submitted reports (Document Nos. 2466, 2637, 3029, 4428) explaining the significant difficulties they were encountering in attempting to determine whether the estate would be benefitted by affirmance of each of the leased line leases. Eventually the time within which to act on leased lines was extended until further order of this Court (Order No. 948). To date, only the New York & Harlem Railroad Company lease, which includes the land underlying portions of the Penn Central's substantial real estate holdings in the Park Avenue area of New York City, has been affirmed. In all other cases (except certain leases of Canadian Lines, not part of this reorganization proceeding), Penn Central has paid no rent under the leases since bankruptcy, and the leases have neither been affirmed nor rejected by the Penn Central Trustees.

From time to time, as the Penn Central proceedings continued, sales of excess properties owned by leased lines were effectuated. In some instances, it became necessary to

resort to fairly cumbersome proceedings in order to be certain that the purchaser would acquire clear title, with assurance that liens against the lessors' reversionary rights had been discharged from the property. Yet, on the whole, the situation of the leased lines remained relatively stable compared to other aspects of the Penn Central proceeding.

In 1973, it became apparent that, in the absence of Congressional action, Penn Central might be unable to continue operations. The Penn Central Trustees filed a proposed plan of reorganization which contemplated termination of rail operations, disposition of its rail property within a short time, and reorganizing around the proceeds plus the non-rail assets. On July 12 and 14, 1973, the 15 lessor companies which are owned or controlled by Penn Central filed separate reorganization petitions pursuant to §77(a) of the Bankruptcy Act, seeking reorganization as part of or in connection with the plan of reorganization of the Penn Central. These 15 leased lines are hereinafter referred to as the "Secondary Debtors." Initially, in an effort to minimize the overall costs of the reorganization proceedings, I withheld appointment of trustees for the Secondary Debtors, and permitted the Secondary Debtors to function as debtors in possession. The passage of the 1973 Act and other intervening developments made it appear likely that the future course of the reorganization proceedings might well be such that the interests of the Secondary Debtors could best be protected by appointment of trustees. Accordingly, on March 11, 1974, trustees were appointed for all but one of the Secondary Debtors. In some instances, the same individual was designated for several Secondary Debtors, having similar, or at least non-conflicting, interests. So that the designated trustees could begin operations immediately, they were also designated temporary receivers, pending final action by the Interstate Commerce Commission upon their

ratification. At present writing, the Commission has ratified five of the Trustees, but has announced no decision as to the other two.

One of the Secondary Debtors, Connecting Railroad, continues in reorganization as a debtor in possession, without a trustee, pursuant to a stipulation worked out between all of the parties interested in that lessor.

II. Necessity for Separate §207(b) Findings for Each Secondary Debtor

The Act requires a finding as to reorganizability with regard to every "railroad in reorganization" (§207(b)). That term is defined as "a railroad which is subject to a bankruptcy proeeeding and which has not been determined by a court to be reorganizable or not subject to reorganization [under §207(b)]." Section 102(12). And the term "railroad" is defined as "a common carrier by railroad as defined in §1(3) of part I of the Interstate Commerce Act (49 U.S.C. §1(3))" §102(11).

Initially, the government contended that §207(b) findings would be inappropriate in the cases of the Secondary Debtors, because they were not "railroads in reorganization" within the meaning of the statute, since they were not "railroads" in the sense of being operating carriers. The government has now expressly abandoned that contention, perhaps because, if the contention were accepted, the possibility of acquisition of the lessors' interests in rail property through mandatory conveyance would be jeopardized. I am persuaded that the government's original contention was without merit in any event. Leased lines have always been regarded as "railroads" for purposes of the Interstate Commerce Act and §77(a) of the Bankruptcy

Act. *See, e.g., Warren v. Palmer,* 310 U.S. 137 (1970); *Freeman v. Mulcahy,* 250 F.2d 463, 466 (1st Cir. 1957). This Court has previously rejected similar arguments based upon unduly narrow readings of the Interstate Commerce Act. *See* Memorandum and Order No. 11, *United New Jersey Railroad & Canal Company* proceedings.

The principal contention of the government now appears to be that all of the Secondary Debtors must be automatically found non-reorganizable if the Penn Central itself is found not to be reorganizable. The basis for this argument is the assertion that, having petitioned under §77(a) of the Bankruptcy Act for reorganization "as part of, or in connection with" a plan of reorganization of Penn Central, the Secondary Debtors cannot be permitted to reorganize as an independent operating company or by sale of lease of the Secondary Debtor's property to another carrier.

For purposes of discussion, I am prepared to assume that the government is correct in its assertion that a secondary debtor, by petitioning under §77(a), casts its lot with that of the principal debtor, at least to some extent. In my view, this means that both companies are committed to working towards achieving plans of reorganization which are compatible with each other, and to do so according to a somewhat similar timetable. But this surely does not rule out the possibility that a secondary debtor may emerge as an independent, operating company. One can readily visualize many situations in which the joint or related plans for reorganization of both the primary and secondary debtor would contemplate reallocation of the rail system between them; or disaffirmance of a lease between them. Clearly, under such circumstances independent reorganization of secondary debtors is appropriate.

Decisions of the ICC in which the Commission declined to approve proposals for secondary debtors to "go it alone" after having sought reorganization with the principal debtor are not to the contrary. *In re Missouri, Pacific Railway Co.*, 290 ICC 674 (1954) and 275 ICC 203 (1949); *Chicago, Rock Island & Pacific Railway Reorganization*, 244 ICC 329 (1937). It is apparent that those cases do not purport to establish or apply a general rule of law on the subject, but rather were decided on their respective facts. The First Circuit Court of Appeals has intimated a contrary view. *Boston Terminal v. Mutual Savings Bank Group Committee*, 127 F.2d 707 (1st Cir. 1942).

I also find unacceptable the proposition that any attempt to reorganize a secondary debtor under § 77 would necessarily be incompatible with reorganization of Penn Central pursuant to the 1973 Act. This is simply a *non sequitur*. The ability of the Association to devise a Final System Plan, and to acquire the rail properties embraced within such plan would remain unchanged.

In short, I have concluded that, having found that Penn Central is not reorganizable within the meaning of §207(b), I must nevertheless make separate determinations for the Secondary Debtors, and may properly find some or all of them to be reorganizable.

III. Jurisdiction to Make §207(b) Findings

As set forth in the corresponding portion of the Penn Central proceedings (Memorandum Findings and Order No. 1543), it is my view that a reorganization court clearly has jurisdiction to make findings with respect to the reorganizability of the debtor. Since I have concluded that some of the Secondary Debtors are reorganizable, it becomes

necessary to consider the remaining jurisdictional issue, left undecided in the Penn Central Opinion, namely, whether it is properly within the power of an Article III court to make findings with respect to the public interest.

Section 207(b) requires the Court to

> ". . . decide whether the railroad is reorganizable on an income basis within a reasonable time under §77 of the Bankruptcy Act (11 U.S.C. §205) and that the public interest would be better served by continuing the present reorganization proceeding than by a reorganization under this Act."

Read literally, this language does not leave anything to be decided on the public interest question, since the Court is required to decide "*that* the public interest would be better served by continuing the present reorganization proceeding." In context, however, it is apparent that Congress intended the Court to decide "whether" the public interest would thus be better served.

To the extent that Congress itself has defined the public interest, a court may presumably perform the judicial function of determining whether the facts of a particular case bring it within that definition. But it is, generally speaking, a legislative matter to determine what the public interest is, and that function may not be delegated to a court. In short, the jurisdictional issue boils down to a question of whether Congress has provided adequate standards for making the comparative judgment on public interest which is required by §207(b).

On the assumption that Congress intended to act constitutionally, I conclude that the applicable standards are to be derived from the four corners of the 1973 Act

itself. I recognize that certain expressions of Congressional intent in other related statutes may be helpful to the attempt to verify what Congress defines as the public interest. For example, the Interstate Commerce Act, and §77 of the Bankruptcy Act, can properly be resorted to. But in the final analysis, since what is required is a comparison between §77 proceedings and proceedings under the Act,[3] the most recent expression of Congressional intent (in the 1973 Act) must carry greater weight.

Perhaps the clearest indication of Congressional intent lies in its allocation of the burden of proof on this issue. In the first place, if the Court finds that the public interest would be equally well served under either method of reorganization, the procedures of the 1973 Act must be chosen. The same result follows if the Court is unable to make a decision on the subject. Other portions of §207 (b) provide:

> ". . . Because of the strong public interest in the continuance of rail transportation in the region pursuant to a system plan devised under the provisions of this Act, each such court shall order that the reorganization be proceeded with pursuant to this Act unless it (1) has found the railroad is reorganizable on an income basis within a reasonable time under §77 of the Bankruptcy Act (11 U.S.C. §205) and that the public interest would be better served by such a reorganization than

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[3] Actually, of course, the comparison is between a §77 proceeding without resort to the Act, and a proceeding under §77 as supplemented by the Act. Because of the language of §207(b), however, it is convenient shorthand to discuss the issue as a comparison between two mutually exclusive procedures.

> by reorganization under this Act . . . If a court does not enter an order or make a finding as required by this subsection, the reorganization shall be proceeded with pursuant to this Act . . . ."

Unquestionably, by this language, and by all of the provisions of the Act, including its preamble, Congress has expressed a decided preference for proceeding under the Act, rather than continuation of the §77 proceedings.

Stated otherwise, by placing the burden of proof upon those who argue for continuation of the §77 proceedings, while simultaneously failing to provide any standard by which a court might adjudge that course to be preferable, Congress has effectively deprived the court of any power to decide in favor of the §77 proceeding.

I recognize that there may be constitutional difficulties which would arguably preclude giving effect to any such conclusive presumption. But in my judgment, that constitutional issue need not, and indeed cannot adequately, be considered except in conjunction with the "180-day" findings as to whether the 1973 Act process would be fair and equitable to the Debtor's estate. If the processes of the Act are fair and equitable, then a Congressional directive to utilize those procedures would presumably not violate constitutional rights.

It is, however, appropriate to register a few caveats at this point. This reasoning assumes that any infringement of constitutional rights which would flow from adoption of the Act's procedures, whether in terms of the values assigned to rail properties, or in terms of the values, form, and timing of the consideration to be received for such assets, would be reflected in the 180-day finding. Moreover,

it might well prove constitutionally impermissible, in the case of a reorganizable debtor, to carry out the Congressional mandate that the proceedings must be dismissed if the proceedings under the 1973 Act are found to be other than fair and equitable. But all of these matters can best be considered in the context of the 180-day proceedings.

Two other possible lines of approach would seem to lead to the same result expressed above. One is perhaps implicit in what has already been stated, namely, a holding that the Act does not provide adequate standards for determining the public interest, and therefore no finding on that subject can properly be made. The other would be to derive from the four corners of the Act an expression of Congressional intent that the principal public interest factors to be considered are the preservation and continuation of essential rail service in accordance with a valid regional plan. It would then arguably follow that, since the Secondary Debtors are not operating railroads, and since their interests in rail properties are equally available for inclusion in a final system plan irrespective of whether they proceed under §77 or under the Act (since, among other reasons, all are controlled by Penn Central, which is a railroad in reorganization), it makes no difference to the public interest which statutory proceeding is followed. The net result would be that the Court would be unable to find that §77 would better accord with the public interest.

No matter which approach is adopted, it would seem that any Secondary Debtor which is found to be reorganizable should nevertheless, for the present at least, proceed under the 1973 Act.

IV. Feasibility of Making §207(b) Findings

Several factoors make it extremely difficult to reach a rational conclusion as to the reorganizability of the Secondary Debtorss. In the first place, their leases have neither been affirrmed nor rejected. If the leases were affirmed, and if tthe Penn Central Trustees were able to pay the accrued and continuing rentals under the leases, obviously all of thee Secondary Debtors could successfully reorganize. Indeeed, in most cases their reorganization petitions could be dismissed as moot. And even if a particular lease were tto be disaffirmed, if it should appear that the revenues deerived from rail operations over the leased property exceeded the costs of operation, the lessor would have an administration claim against the Penn Central estate and would undoubtedly be able to reorganize eventually.

It is only with respect to the lessors whose operations have produced deficits that the issue would be in doubt; the Penn Centrral Trustees could ostensibly disaffirm the lease and assert a lien against the lessor's property to cover post-reorganization deficits.

The Penn Ceentral Trustees have thus far been unable to take definitive action with respect to affirmance or rejection of leases of the Secondary Debtors. Initially, the principal reasons for this situation were the extreme complexity of the problems involved, the lack of adequate accounting information to form the basis of a judgment on the subject, thee unavailability of cash to make the rental payments, and the fact that, for the most part, it was not in anyone's best interests to attempt to force a rejection of the lease. More recently, the enactment of the 1973 Act has made it virtually impossible for the Trustees to

take definitive action on these leases. Until the final system plan is adopted, it will remain difficult to make valid judgments concerning the burdens and benefits of particular leases. Moreover, in view of the drastic changes in patterns of rail traffic which will presumably be one consequence of the Final System Plan, data derived from past and current operations seem likely to provide an uncertain guide for the future.

The Secondary Debtors have attempted to explore the question of reorganizability on several alternate theories. These include: (1) affirmance of the lease; (2) rejection of the lease, with continued operation by Penn Central; (3) rejection of the lease, with lease or sale of all or part of the rail properties to a profitable railroad; and (4) rejection of the lease followed by independent operation by the lessor. In attempting to pursue these alternatives, the Secondary Debtors were faced with a lack of pertinent information, and the insufficiency of time within which to develop the required information.

First, the inadequacies of available data must be discussed. The Penn Central system was operated as a single railroad. Except for certain capital items, as to which accounts had to be maintained pursuant to the terms of applicable leases or mortgage identures, revenues and expenses were not separately accounted for under each lease. Beginning in about 1972, the Penn Central Trustees instituted the necessary accounting procedures so that the required raw data could be accumulated. After many months of effort, the Trustees' consultants, Wyer, Dick & Company, have recently completed a "segregation study" of all of the Secondary Debtors. It is important to emphasize just what this study is, and what it is not. It represents an attempt to allocate to each of the leased lines

its proper share of revenues and expenses. Allocating revenues involve many judgment questions, and many costs are allocated on a basis of systemwide averages. Thus, there may be merit to the contention that in some instances the segregation studies may not accurately reflect actuality.

A segregation study of this kind is useful in determining the profitability or non-profitability of operations over a particular leased line. But its usefulness in determining whether independent operation of that leased line would be profitable or not is marginal at best.

What is needed to form a valid basis for determining whether a particular leased line could operate independently are severance studies, which analyze what traffic such an independently operated road could expect to retain or attract, what its revenues from such traffic would be, and what its costs would be if operated independently. No severance studies are available; at the earliest, none will be available before August of 1974.

To add to the difficulty, as noted above, severance studies based upon data derived from past and current operations are unlikely to reflect accurately the changes which can be expected to flow from implementation of the final system plan under the 1973 Act.

For all of these reasons, I am inclined to agree with the contention advanced by many of the parties that requiring a finding on reorganizability by May 2, 1974 represents a violation of procedural due process of law. But while I have grave doubts on that subject, I have concluded that such findings should be attempted anyway, for two reasons: (1) arguably, the procedural deficiency would amount to a due process violation only in the event of a finding

of non-reorganizability, and (2) an erroneous refusal to make a finding could not be corrected later, whereas an inadequately supported or erroneous finding could be.

V. Reorganizability of the Secondary Debtors

In each of the Secondary Debtors' proceedings, a separate document is being filed, setting forth what may be termed subsidiary findings as to the present situation and future prospects of each of the Secondary Debtors. My views on the ultimate question of reorganizability of the Secondary Debtors will be outlined here.

By entering Orders, less than ten months ago, approving the reorganization petitions of the Secondary Debtors as having been properly filed, in good faith, this Court necessarily espoused the view that the Secondary Debtors were probably reorganizable. As noted above, the Trustees of the Secondary Debtors have had only about one month in which to familiarize themselves with the affairs of their charges and analyze their respective prospects. There is every reason to believe that, in establishing the deadline for the first decisions under §207(b), Congress did not actually have in mind these special circumstances relating to the Secondary Debtors. It therefore seems reasonable to hold that the burden of proof should be upon those who seek to establish that the Secondary Debtors are not reorganizable within a reasonable time under §77 of the Bankruptcy Act. There is nothing in the language of the 1973 Act which compels a different assignment of the burden of persuasion; and I should be reluctant to conclude that Congress, by enactment of the 1973 Act, intended to create a presumption against reorganizability, while at the same time including provisions which virtually

rule out any prompt decisions with respect to affirmance or disaffirmance of the leases of the Secondary Debtors.

Somewhat related to the foregoing approach is my feeling that the concept of reorganization "on an income basis" may be somewhat different in the case of a lessor railroad than in the case of an operating railroad. Lessors can be expected to reorganize on an income basis by reason of income derived from lease of the property, rather than from operations. The identity of the lessee is not necessarily a crucial factor. Since most of these leases were negotiated many years ago, it is reasonable to suppose that, where substantial portions of the rail properties involved appear likely to remain essential for serving the public, equivalent arrangements could be worked out which could support reorganization of the lessors. In my view, a "reasonable time" for exploring these possibilities has not yet expired.

In my view, the evidence attempting to project independent operation of a Secondary Debtor has principally a negative relevance. That is to say, it should be considered primarily in order to identify and weed out situations in which, by reason of light density, or identification of most of the trackage as potentially excess (in the preliminary report of the Department of Transportation) and similar factors it appears that a reorganization which contemplates continued operation of the property by someone is unlikely.

Applying the approaches outlined above, I have concluded that, with the exception of the Beech Creek, Erie & Pittsburgh, and Penndel Companies, all of the Secondary Debtors appear to be reorganizable on an income basis within a reasonable time under §77 of the Bankruptcy

Act. In the case of the three exceptions, the evidence is such that I find myself unable to make a finding either way.

Separate orders will be entered in each of the Secondary Debtor's proceedings, in conformity with the conclusions expressed above.

/s/ JOHN P. FULLAM

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE UNITED NEW JERSEY RAILROAD AND CANAL CO.,	) Bankruptcy No. 70-347-A
THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,	) Bankruptcy No. 70-347-C
THE CLEVELAND & PITTSBURGH RAILWAY COMPANY,	) Bankruptcy No. 70-347-D
THE CONNECTING RAILWAY COMPANY,	) Bankruptcy No. 70-347-E
THE DELAWARE RAILROAD COMPANY,	) Bankruptcy No. 70-347-F
MICHIGAN CENTRAL RAILROAD,	) Bankruptcy No. 70-347-H
THE NORTHERN CENTRAL RAILWAY COMPANY,	) Bankruptcy No. 70-347-I
THE PHILADELPHIA, BALTIMORE & WASHINGTON RAILROAD COMPANY,	) Bankruptcy No. 70-347-K
THE PHILADELPHIA & TRENTON RAIL ROAD COMPANY,	) Bankruptcy No. 70-347-L
THE PITTSBURGH, YOUNGSTOWN AND ASHTABULA RAILWAY COMPANY,	) Bankruptcy No. 70-347-M
PITTSBURGH, FORT WAYNE AND CHICAGO RAILWAY COMPANY,	) Bankruptcy No. 70-347-N
UNION RAILROAD COMPANY OF BALTIMORE,	) Bankruptcy No. 70-347-O

All Secondary Debtors

(Identical Order in Each Proceeding)

ORDER NO.

AND NOW, this 2nd day of May, 1974, pursuant to §207(b) of the Regional Rail Reorganization Act of 1973, it is ORDERED, and this Court FINDS, as follows:

1. That the above-named Secondary Debtor is reorganizable on an income basis within a reasonable time under §77 of the Bankruptcy Act (11 U.S.C. §205).

2. That the evidence available does not preponderate in favor of a finding that the public interest would be better served by continuing the present reorganization proceedings than by a reorganization in accordance with the Regional Rail Reorganization Act of 1973; that the presumptions established by §207(b) of said Act have not been overcome; and that therefore, until further Order of this Court, the reorganization of the above-named Secondary Debtor shall be conducted pursuant to the Regional Rail Reorganization Act of 1973 as well as the pertinent provisions of §77 of the Bankruptcy Act.

/s/ John P. Fullam

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BEECH CREEK RAILROAD COMPANY,	) Bankruptcy No. 70-347-B
ERIE AND PITTSBURGH RAILROAD COMPANY,	) Bankruptcy No. 70-347-G)
PENNDEL COMPANY,	) Bankruptcy No. 70-347-J

All Secondary Debtors

(Identical Order in Each Proceeding)

ORDER NO.

AND NOW, this 2nd day of May, 1974, it is ORDERED, and the Court FINDS, that the record as a whole does not permit a decision at this time as to whether or not the above-named Secondary Debtor is reorganizable on an income basis within a reasonable time under §77 of the Bankruptcy Act (11 U.S.C. §205), within the meaning of §207(b) of the Regional Rail Reorganization Act of 1973.

/s/ John P. Fullam

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

FULLAM, J. July 2, 1974

I. Procedural Posture

After four years in reorganization under §77 of the Bankruptcy Act, the estate of the Penn Central Transportation Company has reached another crucial milestone. Pursuant to §207(b) of the Rail Reorganization Act of 1973 (hereinafter "RRRA" or the "ACT"), the reorganization court is required to determine whether or not the railroad "shall be reorganized by means of transferring some of its rail properties to the Corporation pursuant to the provisions of this Act." The Court is required to decide in favor of utilizing the RRRA unless it "finds that this Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization."

On June 25, 1974, in the case of *Connecticut General Insurance Co., et al. v. United States Railway Association, et al.*, Civil Action No. 74-189, a three-judge court, of which the writer was one member, declared certain provisions of the RRRA to be unconstitutional, and granted an injunction partially restraining its enforcement. Specifically, the court held that the Act is unconstitutional insofar as it fails to provide compensation for the diminution in value of the Debtor's estate which would result from continuing losses from rail operations during the period preceding implementation of any Final System Plan under the statute.

The threshold question, therefore, is the effect of the *Connecticut General* holding upon the findings to be made

by reorganization court under §207(b) of the Act. There are several possibilities. One would be to hold that, since the certification of a Final System Plan under the statute has now been enjoined, there is no "process" to be evaluated, and therefore no need for §207(b) findings at this time. But under §207(b) itself, implementation of which has not been enjoined, a failure by the reorganization court to make findings by July 1, 1974 would have the effect of requiring reorganization pursuant to the RRRA. A second possibility would be to treat the *Connecticut General* decision as controlling, and to hold that, since the statute is unconstitutional, it must obviously be found not to provide a process which is fair and equitable. But the majority of the *Connecticut General* court held that the issues as to the constitutional validity of the provisions of the RRRA concerning conveyances of rail properties pursuant to a Final System Plan were not yet ripe for decision. One of the reasons advanced for declining to reach those issues was the belief that reorganization courts might make 180-day findings on this subject which would preclude the possibility of such conveyances. It thus appears that the majority of the *Connecticut General* court did not regard its decision as obviating the necessity for §207(b) decisions by the reorganization courts.

At least two other factors must also be considered. The appeal period in the *Connecticut General* case has just commenced to run, and it would seem improvident to assume that there cannot possibly be any change in the situation during, or as the result of, the appellate process. Moreover, the *Connecticut General* case dealt only with issues of facial constitutionality, whereas the §207(b) process involves the actual application of the statute. Whether or not the conclusions reached must be the same, it would seem that a somewhat different approach is required.

For all of the foregoing reasons, I have concluded that a §207(b) determination should be made at this time, and should be made on essentially the same basis as if the *Connecticut General* case had not been decided. However, rather than restate the analysis from my *Connecticut General* Opinion, that Opinion is incorporated herein.

II. Background

From the very outset of this reorganization proceeding, it was apparent that in order to achieve a successful financial reorganization, there would need to be drastic changes in the Debtor's operations and in the regulatory environment in which it functioned. The initial task of the Trustees was to ascertain the dimensions of the problem, and to keep the enterprise afloat while the necessary studies were being conducted. Faced with an immediate cash shortage, contributed to in large measure by a congressionally mandated wage settlement, the Trustees were unable to borrow money on trustees' certificates unless the certificates were to be guaranteed by the federal government. Congress responded to this initial crisis by passing the Emergency Rail Services Act of 1970, pursuant to which the Trustees were able to borrow $100 million from the private sector on the basis of government guarantees.

On February 10, 1971, seven months after their appointment, and shortly after their trustees' certificates were marketed, the Trustees filed their first report on the status of the reorganization. In that report, they stated:

> ". . . It is a fact that Penn Central is presently locked by circumstances beyond managerial control into a situation which had

> best be recognized *now* as completely precluding viability unless certain constraints are removed, or other arrangements are made to compensate for their effect" (emphasis in original).

The Trustees identified four areas in which changes were necessary: (1) elimination of losses on passenger service; (2) rationalization of the freight plant through elimination or subsidy of uneconomic lines; (3) more flexible rate and division procedures; and (4) improved labor productivity through reduction of excess employees. For convenience, these goals are referred to as "conditions to viability." Within a few months thereafter, the Trustees, aided by expert consultants, had reached a tentative conclusion that reduction of the total route mileage of the Penn Central system by about 40% (*i.e.*, to a "core" of 12,000 to 15,000 miles) would probably be required in order to make the remaining system viable. Every study since that time, including the preliminary report of the DOT and the report of the Rail Services Planning Office of the ICC filed pursuant to the RRRA, has been consistent with that view.

Beginning in 1971, and continuing until immediately before enactment of the RRRA, the efforts of the Trustees were directed to attempting to achieve the conditions of viability. They met with limited success in some areas and near total failure in others. Through negotiations of contractual arrangements with Amtrak and various regional commuter authorities, the Trustees succeeded in substantially reducing, although not eliminating, the losses on passenger service. But available abandonment procedures failed to produce prompt disposition of abandonment applications. On the labor front, a nationwide

settlement of the longstanding fireman-manning dispute provided some improvement, but persistent disputes over the appropriate sizes of train crews, and over work rules, were not resolved. The Trustees' reports of February and October 1972 stressed the need for greater progress in achieving the conditions to viability.

In their January 1973 report, the Trustees reported that, as a result of interim losses and the condition of the physical plant, substantial government funds would be needed in order to make the Penn Central viable within a permissible time period. At about the same time, having exhausted the lengthy procedures of the Railway Labor Act, without success, in their attempt to obtain a resolution of the crew consist dispute, the Trustees promulgated their new work rules, designed to achieve, solely by means of attrition, reductions in the size of crews, except where arbitrators might find, in particular cases, that such reductions would impose excessive work loads or be inconsistent with safe operations. The promulgation of the new work rules precipitated a strike, and Congress responded on February 9, 1973, by the passage of Senate Joint Resolution 59-2, which, in effect, nullified the work rules changes, required the parties to maintain the *status quo* for a further period of 90 days, and directed the Department of Transportation to make a study of the problems of railroads in the northeast and to report to the Congress within 45 days.

The time within which the Trustees were permitted to ratify or disaffirm executory contracts, and within which a reorganization plan was to be filed, had been extended from time to time; the then current extension was due to expire April 1, 1973. On March 6, 1973, I filed Memorandum and Order No. 1137, granting a further extension,

but directing the Trustees, not later than July 1, 1973, to file either a plan of reorganization for the Debtor, or their proposals for liquidating the enterprise. In the course of that Memorandum, I made the following observations:

> "Whether the constitutional limit [of interim erosion] has been exceeded depends primarily upon how the remaining assets are to be valued; and this in turn may well depend upon how those assets are to be used at the conclusion of this reorganization. Under any view of the matter, it seems clear that the point of unconstitutionality is fast approaching, if it has not already arrived.
>
> "The essence of §77 of the Bankruptcy Act is that the legal remedies normally available to creditors may be held in suspension for a reasonable time in order to permit rehabilitation of the enterprise. Whenever it appears that there is no genuine likelihood of ultimate success, the legal and constitutional justification for restraining creditors from exercising their normal remedies disappears. [I]t is apparent that the required profitability cannot be achieved unless substantial further progress is made in the immediate future to meet the conditions upon which the projected profitability is based . . . .
>
> "It has long been apparent that the particular problems of Penn Central cannot be completely divorced from problems of national transportation policy. Railroads are, after all, a regulated industry. However unappealing may be the notion that a regulated

industry can become bankrupt, the Trustees' efforts to rehabilitate the Debtor are circumscribed by existing statutes and regulations. To the extent that these statutes and regulations . . . preclude the exercise of self-help in achieving profitability, the legislative and executive branches of government must be looked to for solutions, if solutions are to be forthcoming.

"And this is as it should be, for it is those branches of government which should determine whether the kind of railroad which could emerge from a private income-based reorganization would be consistent with long range goals of national transportation policy. Such matters . . . are clearly beyond the province of the Trustees, the other parties to this reorganization, and this Court.

. . . .

"The legal and constitutional rights of the parties to this reorganization should be evaluated in the light of whatever changes Congress sees fit to enact.

"By the same token, however, this Court cannot ignore the realities of the Debtor's situation. On the basis of the record to date, it appears highly doubtful that the Debtor could properly be permitted to continue to operate on its present basis beyond October 1, 1973." *In Re Penn Central Trans. Co.*, 355 F. Supp. 1343, 1344-46 (E.D. Pa. 1973).

Throughout the balance of 1973, as a result of careful and intensive effort by both Houses of Congress and the Executive Branch, the legislation which ultimately became the RRRA took shape. At the same time, the parties were proceeding before the ICC for approval of various proposed plans of reorganization/liquidation, and some of the parties were pressing in this Court for prompt termination of rail operations and dismissal of the §77 proceeding itself. By a series of actions and inactions which need not be detailed here, this Court held all such proposals in abeyance pending action by Congress on the RRRA.

It is clear that, apart from the impact of the RRRA, there has been no fundamental improvement in the Debtor's prospects. In reviewing the Debtor's situation pursuant to the initial requirement of §207(b) of the Act (the so-called "120-day findings"), I concluded:

> "[T]here is no prospect that, in the absence of fundamental changes which the Trustees are precluded from bringing about, the Debtor can be reorganized as an operating railroad. Even if the optimal configuration [of the rail system] could be achieved, it appears unlikely that the Trustees could obtain the resources to sustain operations in the interim, or that the final result would make it possible to provide for interim administration expenses and support a recapitalization on a fair and equitable basis." *In Re Penn Central Trans Co.*, (E.D. Pa. 1973), slip op. at p. 19.

Unquestionably, therefore, the presumption in favor of accepting the solution presented by the RRRA is unusually

strong, not only because the Act expressly incorporates such a presumption, but for obvious practical reasons as well. A court would be justified in precluding resort to the procedures of the RRRA only for the most compelling reasons.

III. The Merits

A.

The Indenture Trustees on behalf of their bondholders, the Institutional Investors, the New Haven Trustee, and the Penn Central Company, the sole stockholder of the Debtor, all press for a finding that the Act does not provide a fair and equitable process. Thus, opponents of the Act include all of the secured creditors, all unsecured creditor interests actively participating in the reorganization proceeding, and all of the stockholder interests. No creditor or stockholder has expressed a different view. The Trustees of the Debtor urge the Court to make a conditional finding based upon their contention that the Tucker Act provides an adequate remedy for any unconstitutional lack of fairness and equity which might result from application of the Act. In effect, they suggest a finding which would remain valid only upon condition that the availability of a Tucker Act remedy is conclusively established by a decision of the Supreme Court of the United States.

United States Railway Association and the Department of Justice, in a joint presentation, urge an affirmative finding that the Act does provide a fair and equitable process. Their contentions may be summarized as follows: Congress has determined that the Act provides a fair and equitable process, and has established machinery adequate to insure that its intention will be carried out. This Court

should not attempt to second-guess the Congressional judgment. The only possible basis for a finding that the Act does not provide fair and equitable process would be a conclusion that the end result would violate constitutional rights. In the unlikely event that such a contingency should arise, the Tucker Act provides an adequate remedy.

The record contains a great deal of opinion evidence, with supporting documentation and calculations, designed to show that it is highly improbable, even impossible, for Conrail to be a successful enterprise. Taken as a whole, this evidence is to the effect that the common stock of Conrail will have little or no value, because the corporation will be unable to generate enough net rail operating income to meet its fixed charges and leave anything significant for the stockholders; and that Conrail will run out of cash within a couple of years after commencing operation. No evidence has been offered to the contrary, nor has the government effectively challenged the salient features of the creditors' evidence. Nevertheless, I agree with the contention of the government that it would be both premature and inappropriate for this Court to express a judgment as to Conrail's prospects for viability.

USRA is required to design a rail system which is both "financially self-sustaining" and "adequate to meet the rail transportation needs and service requirements of the region." It is true, of course, that the mere existence of this Congressional mandate cannot guarantee that the attempt will be successful. But it is obviously beyond the power of a district judge to substitute his own assessment of the feasibility of a legislative program for that of Congress. Any such attempt would be squarely contrary to the concept of a tripartite form of government.

The task of designing a financially viable rail system, and therefore of making at least the initial assessment of its viability, has been committed to USRA, and not to this Court. Congress has reserved a veto power over USRA's recommendations for the Final System Plan. The task of evaluating Conrail's stock and other securities has been committed to the Special Court, and is to be performed at a time when all concerned will have more of the necessary information than is now available. It is proper to assume that, if USRA finds it impossible to design a profitable system, it will say so. In any event, the validity of its viability assessment can be tested before the Special Court at the appropriate time.

Thus, if this Court's §207(b) finding were to depend solely upon the question of the present financial prospects of Conrail, there would be nothing for this Court to decide. But §207(b) plainly contemplates a meaningful decision of some sort; I am reluctant to accept the suggestion that §207(b) was inserted merely to create the appearance of a judicial act, and not its reality, or was designed merely for camouflage purposes, so that what is really an eminent domain statute would have the appearance of a reorganization statute. I see no need to go beyond the language of §207(b) itself. In the terms of that section, this Court is required to determine whether the RRRA "provide[s] a *process* which would be fair and equitable to the estate of the railroad in reorganization . . .". I interpret these words to mean that the reorganization court is now to determine whether, if the procedures of the Act were to be followed in the case of the particular debtor, those procedures can be characterized as "fair and equitable" to the estate. The focus is upon the process; concrete assessments of the results of the process are obviously impossible at this time. (It is this very

uncertainty which makes it necessary to consider the deficiency judgment and stock issues discussed below.)

There are several areas of concern with the adequacy of the statute's procedures. In the first place, several related problems stem from the provisions of the Act regarding the conveyances of rail properties to Conrail pursuant to the Final System Plan. Understandably enough, the Act provides that, once a Final System Plan has been approved by USRA, submitted to Congress and not rejected, and certified to the Special Court, no court can change it or interfere in any way with its implementation. The Final System Plan is to represent the judgment of USRA and Congress concerning the best rail system for meeting the needs of the region, and there is no reason for participation by the parties, or by the courts, in those determinations. But the Final System Plan also represents a preliminary determination of the values of the properties to be conveyed, and of the values attributable to the consideration to be paid. Under normal concepts of due process in the administrative field, one would expect to find some opportunity for obtaining and considering the views of the affected property owners in advance of such value determinations. The drafters of this Act apparently considered that the later opportunity for hearings before the Special Court would obviate the need for administrative hearings. The validity of this approach would seem to turn upon whether the Special Court is expected to give any significant degree of deference to the administrative valuations. On that point, the statute is not altogether clear.

Under §209(b), when delivering the Final System Plan to the Special Court, USRA is required to certify, *inter alia*,

> "(3) The amount, terms, and value of the securities of the Corporation (including any obligations of the Association), to be exchanged for those rail properties to be transferred to the Corporation pursuant to the final system plan. . .".

Section 303(c) requires the Special Court, "giving due consideration to the findings contained in the final system plan," to decide, *inter alia*, whether the proposed exchanges would be fair and equitable.

While the issue is not free from doubt, I am inclined to believe that any defect inherent in the absence of administrative hearings on the questions of valuation can safely be disregarded for present purposes, on the assumption that the Special Court would give to USRA's valuation findings only such weight as would be legally permissible.

A more serious, or at least more noticeable, problem stems from the fact that the conveyances and transfers pursuant to the Final System Plan are mandated to occur in advance of any judicial scrutiny and in the absence of any judicial determination as to the fairness and equity of the proposed exchanges. Arguably, even this defect might be remedied if the Special Court were empowered to set aside the conveyances if it should find unfairness or inequity. But it is clear that the Act does not permit any such curative action by the Special Court. And finally, even this series of problems could perhaps be overlooked if the Special Court could, by some alternative means, see to it that the respective estates received the "constitutional minimum" due them from their properties. But it is entirely clear that the Special Court, upon finding that the transfers are less than fair and equitable,

is limited to reallocating the securities specified in the Final System Plan and, if the result is still unfair or inequitable, to imposing a deficiency judgment against Conrail.

USRA is authorized to issue up to $500 million of debt obligations guaranteed by the United States, and to make those securities available to Conrail for use in purchasing rail assets. The extent to which this authority would actually be exercised would apparently be determined by USRA, in formulating the Final System Plan. It is arguable, for example, that if USRA should propose a plan which did not contemplate the use of any government-guaranteed obligations as part of the consideration for rail assets, the Special Court would be unable to require such issuance. Be that as it may, it is clear on the record in this case that rail assets of Penn Central would comprise a very large percentage of the total Conrail system, and there is every reason to suppose that the included properties would be worth considerably more than $500 million. Since no one knows, or can know, at this time, the value of any stock or other securities which Conrail might issue, it would be highly imprudent to assume that there will be no need to resort to the deficiency judgment. Yet obviously, such a judgment would be relatively pointless, serving merely as a further reduction in the value of the common stock.

Another set of problems relating to the conveyance features of the Act arise from the many uncertainties concerning valuation standards. Before irretrievably committing the estate of the Debtor to the processes of the RRRA, it would be extremely helpful, and perhaps actually essential, that the ground rules concerning valuation should be clearly perceived. The statute makes clear that neither more nor less than the "constitutional minimum" payment

is intended. The legislative history of the Act suggests that many responsible public officials may be proceeding on the assumption that the common stock of Conrail (*i.e.*, the capitalized value of its prospective earnings) necessarily and automatically establishes the value of the rail assets conveyed to Conrail, even if those assets had a higher liquidation value, and even though their value for "highest and best use" might be much greater. Indeed, the government makes precisely that argument in the present proceeding. It becomes necessary, therefore, to make two comments on that subject: (1) If the government's definition of "constitutional minimum" is correct, then every railroad in reorganization would be better off in immediate liquidation, than under the processes of the RRRA. (2) If that valuation approach is incorporated in the Final System Plan submitted to Congress, but later proves to have been incorrect, then (a) at the very least, the actual capital structure and viability prospects of Conrail would be drastically different from that proposed by USRA and reviewed by Congress; and (b) if the government and the Trustees are correct in their assertion that there is a Tucker Act remedy, the direct cost to the taxpayers might prove vastly greater than Congress intended. In short, advance clarification of the valuation standards would seem to be extremely desirable from the standpoint of Congress and USRA, as well as from the standpoint of the bankrupt estates.

Another problem relating to valuation is the lack of any mechanism for establishing a relationship between the values to be assigned to the rail properties conveyed, and the valuation of the interests of secured creditors holding liens against those properties. There are several facets to that problem. In the first place, the timing is off. In determining whether a plan of reorganization is fair and

equitable, it is necessary to determine the extent to which particular groups of creditors are secured, and the value of their respective securities, so as to be sure that they will receive equivalent value before any junior classes of claimants participate. Since the exchanges under RRRA would be between Conrail and the Debtor's estate, rather than the creditors, the problem of later recognition of the correct treatment of the creditors in a reorganization plan would be rendered quite difficult.

Moreover, the valuation of the property for sale to Conrail might very well not be on a basis which would permit rational allocation of the consideration on a segment-by-segment basis for purposes of later assigning lien values. And that difficulty would itself be greatly magnified by the fact that Conrail will presumably be made up of parts of various existing railroads, blended together in a smaller system designed to handle the traffic now being handled by several different railroads.

A further difficulty with the statute is the lack of precision in defining what "other benefits of the Act" are to be taken into account as part of the purchase price for the rail properties conveyed to Conrail. For example, if the amount payable for labor protection (up to $250 million is authorized by the Act) is to be charged back against the estate as a credit against the purchase price payable for the rail properties, a major incentive for utilizing the processes of the Act would be removed.

Separately considered, the problems specifically relating to valuation issues are not necessarily such as to render the Act's procedures unfair and inequitable, but they are factors which enter into the overall assessment.

B.

As discussed in Part IV of my concurring Opinion in the *Connecticut General* case, analysis of the RRRA reveals a mixture of sale, reorganization, and eminent domain concepts. Whatever may be the appropriate label, the fundamental disagreement among the parties concerns the constitutional propriety of compelling the Debtor's estate to exchange some of its rail properties for Conrail stock. It was unnecessary to decide that question in the *Connecticut General* case, but I see no way to avoid it in the present litigation, where an evaluation of the fairness and equity of the RRRA is mandated.

All of the reported cases are uniform in ruling that, when private property is taken for public purposes in exercise of the power of eminent domain, assurance of payment in cash or equivalent is a constitutional requirement. *Almota Farmers Elev. & Whse. Co. v. U.S.*, 409 U.S. 470 (1973); *U. S. v. Reynolds*, 397 U.S. 14 (1970); *U. S. v. Miller*, 317 U.S. 369 (1943); *Olsen v. U.S.*, 292 U.S. 246 (1934); *VanHorne's Lessee v. Dorrance*, 2 Dall 304 (Cir. Ct. Pa. Dist. 1795); *see also* Nicholas, *Eminent Domain* §8-2 (3d Rev. Ed. 1970) and cases cited therein. In the present case, the government argues that the RRRA is not an exercise of the power of eminent domain, but that in any event the "just compensation" requirement of the Fifth Amendment can be fulfilled by payment in Conrail stock.

Essentially, it is the position of the government that if a secured creditor can be required to take inferior securities as part of a reorganization plan, it follows that the Debtor's estate can be required to take stock in exchange for property subject to the liens of secured creditors.

In other words, the assumption is that the kind of governmental compulsion represented by the RRRA is qualitatively identical to that represented by the provisions of §77(e) of the Bankruptcy Act relating to the confirmation and cramdown of a plan of reorganization; and that "just compensation" can be equated to §77's requirement that a plan be "fair and equitable."

While the government's argument cannot be dismissed out of hand, I believe Judge Friendly's observation in the New Haven litigation is pertinent here:

> "[T]he present case may well be one where a volume of history must prevail over a page of logic." *New York, N.Y. & H.R.R. Co. First Mortgage 4% Bondholders Committee v. U.S.*, 305 F. Supp. 1049, 1055 (S.D.N.Y. 1969).

By and large, the pre-§77 equity receiverships did not result in the dismantling of railroads, because the economic factors were such that continuation of the enterprise produced greater values than liquidation would have produced. The creditors foreclosed their liens, but because the railroad was worth more alive than dead, they continued to operate it. Sound financial planning required that fixed charges be realistic; the solution was to fix a debt-equity ratio which made it necessary for some of the bondholders to receive stock. The imposition of §77's fair and equitable standard, with the judicial gloss of the absolute priority rule, was simply a more efficient and just way of attaining the equity receivership result. For railroads plagued by over-capitalization, both the equity receivership mechanism and §77 provided a method of avoiding unnecessary losses to private interests, while fostering the public interest in rail transportation.

As pointed out in my *Connecticut General* concurrence, it is the reasonable prospect of preserving "going concern" values in excess of liquidation values which comprises the constitutional underpinning for §77 itself. And in the most pertinent precedent, the *New Haven Inclusion Cases*, 399 U.S. 392 (1970), the Supreme Court seems to suggest that even a voluntary agreement to accept stock in payment for rail properties sold pursuant to §77(b) (5) may be unfair and inequitable in the absence of sound guarantees as to the value of the stock.

There are significant differences between the distribution of stock to secured creditors in connection with a reorganization, and the scheme of the RRRA. Under the Act, a debtor whose rail properties, by definition, do not now produce income in excess of fixed charges (or for that matter in excess of operating expenses), and have no present prospect of doing so, is required to exchange its properties for the stock of Conrail. The Debtor is forced to forego obtaining whatever value there is in its rail assets, in return for the attendant risks of Conrail's equity securities. This is not to say that Conrail stock will necessarily involve excessive risk, but rather to point out that the risk is being imposed by the government, without the consent of the interested parties.

A requirement that property be exchanged for stock is in essence a denial of the railroad's right to terminate service and liquidate. It is this control over the ultimate disposition of the Debtor's assets that appears to be equivalent to an exercise of the power of eminent domain. But if there is some independent basis for sustaining compulsory continuation of rail operations, there would not necessarily be a Fifth Amendment violation in requiring acceptance of stock in exchange for the properties. The

government has now argued, for the first time, that there will never be any necessity to impose a deficiency judgment against Conrail, because, as a matter of law, the value of the Debtor's rail assets equals the value of Conrail's common stock. Ignoring for the moment the complications stemming from the fact that Conrail will be composed of properties from more than one estate, it is significant that this new valuation argument is necessarily based upon the premise that the government can properly require railroads to operate indefinitely.

The justification for any such thesis must be found in the public interest of avoiding the widespread dislocations which would result from termination of the Debtor's rail service. The issue is not whether governmental action may properly be taken to avoid such dislocations, but rather whether the method selected by Congress, the RRRA, is a constitutional method of achieving that legitimate public goal. In short, the question is whether the government can avoid such disruptions by imposing the costs and risks of a possible solution upon the Debtor's estate. Support for an affirmative answer to that question is to be found, if at all, in the concept that the privilege of a government-protected railroad monopoly gives rise to a residual claim in the public for continuation of railroad operations, to wit, the notion of "common carrier responsibility" which finds statutory expression in §1(18) of the Interstate Commerce Act.

The legitimacy of "common carrier responsibility" is, of course, not in question, but the duration of that responsibility is. Stated briefly, the issue is whether the government may treat a common carrier whose government-sponsored monopoly is no longer profitable, as if it remained profitable.

In the so-called Granger case, *Munn v. Illinois*, 94 U.S. 113 (1876), the Supreme Court articulated the "public interest" theory upon which economic regulation was based for almost 60 years:[1]

> "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to the use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to control." 94 U.S. at 126.

In the case of railroads, the right to withdraw is not unqualified. State legislatures early authorized regulatory agencies to control the abandonment and termination of services of rail carriers. Since railroads operate under government-created monopolies, that extension of regulatory power was both logical and lawful, if the carrier's total operations were profitable. Cherington, *The Regulation of Railroad Abandonments*, 17-25 (Harv. 1948).

However, when a carrier's operations are not profitable, it is unconstitutional to require their continuance. *Brooks-Scanlon Co. v. Railroad Commission*, 251 U.S. 396 (1920);

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[1] In *Nebbia v. N. Y.*, 291 U.S. 502 (1934), the Court abandoned the necessity of finding that a business activity affected the public interest as a condition precedent to state or federal regulation.

Bullock v. Florida ex rel. Railroad Commission, 254 U.S. 513 (1921); *Mississippi R.R. Commission v. Mobile & Ohio R.R. Co.*, 244 U.S. 388 (1917). Enactment of the Transportation Act of 1920, which contains what is now §1(18) of the Interstate Commerce Act, did not alter this constitutional doctrine. *Railroad Commission v. Eastern Texas R.R. Co.*, 264 U.S. 79 (1924). The Supreme Court has recently recognized the continuing validity of those cases, in the *New Haven Inclusion* case, *supra* (399 U.S. at 491). Recent decisions in the Third Circuit, *In the Matter of Penn Central Transportation Co.*, 494 F.2d 270 (3d Cir. 1974) (Columbus options case), and in the First Circuit, *In Re Boston & Maine Corp.*, 484 F.2d 369 (1st Cir. 1973), as well as the decision in *Connecticut General, supra*, are all to the same effect. Indeed, the government does not dispute, as an abstract principle of constitutional law, the doctrine that there may be a point beyond which a railroad cannot constitutionally be required to continue to provide service.

It appears to be the government's contention that in the present case the Debtor can be forced to continue rail operations, not indefinitely, perhaps, but at least for a substantial further period, without regard to whether the accruing administration expenses reduce the value of the estate, or whether the end result will be to accord to the estate less than its present liquidation value. The monopoly rationale of railroad regulation, as noted above, does not support that argument. And I am unable to perceive any basis in the general concept of police power for upholding that result.

The government may, of course, preclude uses of property which are harmful to the public, and even render valueless under certain circumstances private property

without compensation in order to obviate the harm, *e.g.*, *Miller v. Schoene*, 276 U.S. 272 (1928) (destruction of cedar trees spreading disease to apple orchards). But, except for the monopoly rationale, there is no authority for affirmatively requiring uncompensated continuation of a use of property merely because cessation of that use would be detrimental to the public.[2] Indeed, there are constitutional limits to governmental restrictions of the use of property, when such restrictions are confiscatory. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

I am satisfied, therefore, that the use of common stock to pay for the rail assets conveyed pursuant to the Final System Plan cannot be justified on the basis of any constitutional doctrine yet announced by the Supreme Court. In my view, the RRRA in its present form does violence to the Constitution, whether considered as a reorganization statute, or as an eminent domain statute, or as a combination of the two. This does not, however, necessarily mean that the use of stock as payment might not be proper in a slightly different statutory setting.

From the standpoint of creditors, interim erosion is the most pressing problem. Given protection against that ongoing loss, the delay involved in structuring a Conrail and ascertaining the reciprocal values involved would surely be constitutionally acceptable. From the standpoint of the public interest, achieving a permanently satisfactory

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[2] Grade crossing cases provide a further analogy. If the railroad's facilities are inadequate and dangerous, the railroad may be assessed the cost of the improvement. *Atchison, Topeka & S.F. Ry. v. Public Utility Commission*, 346 U.S. 346 (1953). But if the project is needed merely to improve the flow of traffic on an interstate highway, the railroad is not required to bear the cost, *Nashville & St. Louis Ry. v. Walters*, 294 U.S. 405 (1935).

rail system at minimal public cost is the important goal. The increased public cost for supporting interim operations would seem to be relatively modest in comparison to the total cost of outright condemnation.

If a solution can be found to the immediate problem of interim erosion, several possibly acceptable alternatives involving the use of Conrail stock to pay for some or all of the assets could readily be explored. The basic techniques of the RRRA might be used to produce a plan of reorganization which could properly provide for the use of stock, if the necessary procedural safeguards were added. The values assigned to the Conrail stock might be underwritten in some fashion. Or, it might be possible to construct a satisfactory constitutional theory which would permit the use of stock to the extent of the excess of going concern value over net liquidation value. All of these matters are obviously not within the proper scope of this Court's responsibility. They are mentioned here only for the purpose of emphasizing that, notwithstanding the categorical nature of some of the arguments presented in this case, I am not persuaded that the inevitable choice is between the RRRA in its present form, on the one hand, and immediate nationalization of the railroads on the other.

IV. Conclusions

Throughout the *Connecticut General* litigation and the proceedings under §207(b) of the RRRA, as well as in the post-RRRA segment of the Penn Central reorganization proceeding itself, there has been constant and repeated emphasis upon the various inadequacies of the RRRA. It is important, however, to emphasize the many positive aspects of the statute. It undoubtedly represents a constructive

and imaginative approach toward a solution of problems which have plagued this country for generations, but which have compellingly surfaced only in recent years. I agree with the Trustees that the basic approach of the statute is fundamentally sound. If I were persuaded that Congress had intended to permit recourse to a Tucker Act remedy in the event that implementation of the RRRA proved violative of constitutional rights, an affirmative §207(b) finding might be permissible. But, in the absence of any clearly expressed provision to that effect in the statute, I believe reliance on that possibility would be misplaced.

It is easy to picture the present controversy as a dispute between grasping creditors, on the one hand, and the public interest, on the other. But that simplistic picture is entirely inaccurate. In the first place, the creditors and stockholders of the Penn Central Transportation Company have exhibited commendable patience and restraint in supporting the continued operation of the railroad during reorganization, at a cost of nearly $1 billion. More importantly, the immediate impact of continued loss operations is being absorbed by state and local taxing authorities, and by prebankruptcy personal injury claimants, whose judgments have been held in abeyance for more than four years, and cannot be paid until all senior claimants are taken care of in a plan of reorganization. Whatever may be said of trade creditors and investors, surely the local taxing authorities and personal injury claimants cannot be said to have made an investment decision of any kind or to have extended credit voluntarily to the railroad.

Among the 160,000-odd stockholders, and the upwards of 50,000 bondholders, I have no doubt that a significant portion do not readily conform to the image of sophisticated

investors. And even if they were all established financial institutions, some mention should be made of the generally accepted view that our system of private enterprise can best be preserved if investor confidence is not unnecessarily jeopardized.

Be all that as it may, for the reasons discussed above, I am compelled to conclude, reluctantly, that the RRRA falls short of providing a process which would be fair and equitable to the Debtor's estate in the following respects:

1. The Act requires the Debtor to continue to operate the railroad, for its own account, until such time as the Final System Plan is implemented. There is no prospect that such operations can be conducted, except at huge losses. The Act makes no provision for compensation to the estate or its creditors for the resulting erosion.

2. The Act does not permit judicial determinations with respect to the values of the properties to be conveyed, or the value and adequacy of the consideration to be paid for such properties, in advance of the conveyance, and the subsequent judicial review of these matters does not affect the finality of the conveyance.

3. Since USRA, with the approval of Congress, is to determine the nature of the consideration to be paid for the transferred assets, and judicial remedies are limited to reallocation of the securities proposed by USRA and the entry of a deficiency judgment against Conrail, the Act does not assure that the Debtor's estate will actually receive the equivalent of the "constitutional minimum" value of the properties conveyed.

4. It is beyond the power of a reorganization court, including the Special Court, to order the conveyance of

properties free and clear of liens in exchange for common stock, except perhaps to the extent that the sale price exceeds the net liquidation value of the property conveyed. This is particularly true where there is no guarantee of the value of the stock or its future earnings.

5. Implementation of the Final System Plan pursuant to the Act cannot be regarded as equivalent to consummation of a plan of reorganization, or a step in or part of such a plan of reorganization, because (a) the conveyances would become irrevocable before there would be any opportunity for participation by the estate or its creditors in the valuation process, (b) the conveyances would become irrevocable in advance of any judicial review of fairness, valuations, etc.; (c) the conveyances would become irrevocable before there could be any determination of the relative rights of creditors and the value of their security or their treatment in the reorganization process; the creditors would merely lose their liens on the properties conveyed.

6. Implementation of the Final System Plan cannot be legally justified as a sale of property by the Trustees, or as consummation of a reorganization plan, for the reasons specified above. To the extent that the Act represents an exercise of the power of eminent domain, it is unfair and inequitable, in that it does not provide for just compensation in cash or its equivalent, assured in advance of the conveyance. There is no other basis upon which the constitutional validity, or the fairness and equity, of implementation of the Act can be upheld.

7. Under the provisions of the Act, the only judicial determinations which can have significant effect in protecting the rights of the railroad estates and their creditors

must be made at a time when substantially all of the information pertinent to those judicial decisions is unknown and unknowable.

Accordingly, an appropriate order has been entered, expressing this Court's finding that the RRRA, in its present form, does not provide a process which would be fair and equitable to the Debtor's estate.

/s/ John P. Fullam

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In the Matter of	:	In Proceedings for the Reorganization of a
PENN CENTRAL TRANSPORTATION COMPANY,	:	Railroad
Debtor	:	Bky. No. 70-347

ORDER NO. 1596

AND NOW, this 1st day of July, 1974, in conformity with the requirements of §207(b) of the Regional Rail Reorganization Act of 1973, this Court FINDS and hereby ORDERS:

1. That the Regional Rail Reorganization Act of 1973 does not provide a process which would be fair and equitable to the estate of the Debtor.

2. That the reorganization of the estate of the Debtor shall not be carried out pursuant to the Regional Rail Reorganization Act of 1973.

3. That this Finding and Order shall be stayed pending the final determination of the Special Court pursuant to the Act.

/s/ John P. Fullam
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

MEMORANDUM IN SUPPORT OF FINDINGS AND ORDERS PURSUANT TO THE SECOND CLAUSE OF § 207(b) OF THE REGIONAL RAIL REORGANIZATION ACT OF 1973 IN THE SECONDARY DEBTORS' PROCEEDINGS

FULLAM, J. July 2, 1974

Concurrently herewith, I have filed a Memorandum in support of findings and Order No. 1597 in the Penn Central proceedings, setting forth the reasons leading to my conclusion that the Regional Rail Reorganization Act of 1973 (hereinafter "RRRA" or the "Act") does not provide a process which would be fair and equitable to the Penn Central estate. Those same reasons justify the entry of similar orders in the cases of each of the Secondary Debtors. There are, however, certain issues uniquely applicable to the Secondary Debtors which require brief additional discussion.

The Secondary Debtors contend that, having been found reorganizable, they are no longer "railroad in reorganization" as defined in §102(12) of the Act. I do not believe the definition should be read so narrowly. While 12 of the 15 Secondary Debtors have been found to be reorganizable, there has not been (and, for the reasons discussed in my May 2, 1974 Memorandum in the Secondary Debtors' proceedings, cannot be) a finding that the public interest would be better served by having them reorganize under §77 alone, than by recourse to the provisions of the RRRA. The definition must be read in conjunction with §207(b). It seems reasonably clear that

Congress intended to exclude from the applicability of the Act (1) railroads as to which the reorganization court finds both that they are reorganizable and that their reorganization outside the Act is in the public interest, and (2) in addition, those railroads as to which the Act fails to provide fair and equitable process. The Secondary Debtors do not fully qualify for exclusion under (1), and it is therefore necessary to determine whether they should be excluded under (2).

As to whether it is constitutionally permissible to require the Secondary Debtors to take stock in payment for their rail properties, the issues are substantially the same as in the Penn Central case. Of course, to the extent that a given Secondary Debtor can show present profitability, or even potential independent reorganizability, it might be necessary for the Special Court to arrive at higher values for particular properties than would be proper in the case of "incurables"; but this is a matter for the Special Court.

There are serious questions concerning the applicability of the Act to rail properties operated by Penn Central but leased from lessors which are not themselves in reorganization. While technically, such issues are not directly before this Court, it has been persuasively argued that the treatment of both Penn Central and the Secondary Debtors under the Act must take into account the treatment of Penn Central's non-bankrupt rail subsidiaries. For present purposes, it suffices to note that none of the arguments put forth by the government in any of these cases seems to establish any basis, other than the power of eminent domain, for acquiring rail properties of companies which are not themselves bankrupt.

I am inclined to agree with the contention of the Secondary Debtors that it would be unfair and inequitable

to apply different standards of valuation to conveyances of rail properties from non-bankrupt lessors, than in the case of the Secondary Debtors or those similarly situated. But there is nothing in §303(c)(1)(A) of the Act which would necessarily mandate the application of different standards.

A further problem of particular relevance to the Secondary Debtors arises in connection with the provisions of the Act dealing with the so-called "northeast corridor" from Boston to Washington. Virtually all of this property is owned by the Secondary Debtors and leased to the Penn Central. In response to contentions that Conrail would not be viable, the government, in the present proceedings, has taken the position that Conrail will be able to raise $500 million in cash by acquiring the northeast corridor properties and then selling them to Amtrak pursuant to §601(d) of the Act. While the public purpose of these provisions of the statute is quite clear, the constitutionality of that approach seems particularly dubious. Certainly, if Congress were to give Amtrak the power of eminent domain, Amtrak could properly acquire the corridor properties. But I find it difficult to accept the theory that it is constitutionally permissible for the government to achieve that result by means of the RRRA, without providing the present owners of the property with cash or its equivalent. This feature of the statute provides a further reason, in the case of the Secondary Debtors, for finding that the Act fails to provide fair and equitable process.

Appropriate findings and orders have been entered in each of the Secondary Debtors' proceedings, in conformity with the views expressed herein.

/s/ John P. Fullam

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(Identical Order in Each Secondary Debtor Proceeding)

ORDER NO.

AND NOW, this 1st day of July, 1974, in conformity with the requirements of §207(b) of the Regional Rail Reorganization Act of 1973, this Court FINDS and hereby ORDERS:

1. That the Regional Rail Reorganization Act of 1973 does not provide a process which would be fair and equitable to the estate of the Secondary Debtor.

2. That the reorganization of the estate of the Secondary Debtor shall not be carried out pursuant to the Regional Rail Reorganization Act of 1973.

3. That this Finding and Order shall be stayed pending the final determination of the Special Court pursuant to the Act.

/s/ John P. Fullam
J.

DOCKET ENTRIES

in the

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

in

CONNECTICUT GENERAL INS. CORP., *ET AL.*

v.

UNITED STATES RAILWAY ASSN., *ET AL.*

No. 74-189

Date			Proceedings	Date of Judgment
1974				
1	Jan.	25	Complaint filed.	
	"	25	Summons exit.	
2	"	30	Plff's. application for three judge court, filed.	
3	Feb.	4	Order adding American National Bank & Trust Co. of Chicago, Irving Trust Co., Mellon Bank, N.A. and Wilmington Trust Co. as party plffs., filed.	
4	Feb.	4	Affidavit of service of Samuel Weller re: plff's. application for three judge court, filed.	
5	"	4	Affidavit of service of Virginia Gensel, filed.	
6	"	4	Affidavit of service of Samuel Weller upon U.S. Atty. of motion to add parties plff., filed.	
7	"	4	Affidavit of service of Jane Maley, upon defts., of motion to add parties plff., filed.	
8	"	7	Order designating Hon. Ruggero J. Aldisert and Hon. E. Mac Troutman to sit with Judge Fullam as members of the Court, etc., filed. C. Se entr. & cys. mailed 7/8/74	

1974

9	Feb.	8	Plff's. motion for preliminary injunction, with affidavit of Louis A. Craco, filed.
10	"	8	Memorandum of law in support of motion for preliminary injunction filed.
11	"	11	Order fixing hearing to show cause why an order should not issue for 2/20/74 at 11:00 a.m., filed. entr. & cys. mailed 2/12/74.
12	"	12	Affidavit of service of Eliz. Kayser re: Plff's. motion for preliminary inj., etc., filed.
13	"	15	Order dtd. 2/14/74 that Order fixing hearing for 2/20/74 re: Plff's. motion for preliminary injunction is VACATED and plff's. motion for prelim. inj. is DENIED, filed. entr. & cys. mailed 2/19/74.
14	"	15	Order that defts'. pleadings in response to complaint be filed on or before 3/4/74, filed. entr. & cys. mailed 2/19/74.
15	"	26	Summons returned "on 1/29/74 served Atty. Gen. by reg. mail and U.S. Atty" and "on 2/1/74 served all other defts." and filed.
16	Mar.	4	Answer of all defts., filed.
	"	4	CASE LISTED FOR TRIAL.
17	"	14	Order that counsel for each party of record shall furnish two copies of each document being filed to each of the three judges designated to hear this case, etc., filed. entr. & cys. mailed 3/15/74.
18	"	28	Transcript of pretrial conference 3-25-74, filed.
19	"	29	Order VACATING the assignment of this case to Hon. E. MacTroutman and assigning in his stead Hon. Alfred L. Luongo, filed. entr. & cys. mailed 4/2/74
20	Apr.	1	Deft's. advice concerning Sec. 1404(a) transfers, filed.
21	"	9	Motion of George P. Baker, et al. Trustees of Penn Central Trans. Co. to intervene as parties deft., memorandum in support and notice of motion, filed.
22	"	16	Plffs'. motion for summary judgment with notice of motion, filed.

1974

23	Apr.	16	Brief in support of plff's. motion for summary judgment, filed.
24	"	16	Affidavit of Louis A. Craco in support of motion for summary judgment with exhibits, filed.
25	"	16	Exhibit "F" to affidavit of Louis A. Craco, filed.
26	"	16	Motion of intervening defts'. for summary judgment, memorandum in support thereof, and certificate of service, filed.
27	"	18	Extracts of record of Penn Central Transportation Co., Debtor (Bkcy No. 70-347), filed.
28	"	18	Stipulation re facts set out solely for purposes of motion for summary judgment or partial summary judgment, etc., filed.
(21)	"	19	Order GRANTING motion of George P. Baker, et al. Trustees of Penn Central Trans. Co. for leave to intervene as parties deft., filed. entr. & cys. mailed 4/22/74
29	"	19	Answer of Penn Central Trustees, filed.
30	"	22	Order VACATING assignment of Judge Luongo to sit in this matter and assigning Hon. Louis C. Bechtle in his stead, filed. entr. & cys. mailed 4/23/74.
31	May	3	Order fixing hearing on motions for summary judgment for 6/3/74 and scheduling the filing of briefs and affidavits, filed. entr. & cys. mailed 5/6/74.
32	"	10	Stipulation re: Extract from record of Penn Central Bkcy. No. 70-347 and affidavit of Jerome E. Sharfman, filed.
33	"	17	Brief of Penn Central in opposition to plffs'. motion for summary judgment, filed.
34	"	17	Brief of defts'. in opposition to plffs'. motion for summary judgment and in partial opposition to intervening defts'. motion for summary judgment, filed.
35	"	20	Plffs'. response to intervening defts'. motion for summary judgment, filed.
36	"	24	Defts'. motion for summary judgment and notice of motion, filed.

1974

37	May	24	Affidavit of John W. Ingram, filed.
38	"	24	Plffs'. reply brief in support of their motion for summary judgment, filed.
39	"	28	Reply of Penn Central Trustees to "brief of defts. in opposition to plffs'. motion for summary judgment, etc." filed.
40	"	30	Joint documentary submission – extract from record of Penn Central Bkcy. – Vol. 1 items 1-35, filed.
41	"	30	Joint documentary submission – extract from record of Penn Central Bkcy. – Vol. 2 items 36 to 61, filed.
42	"	31	Legislative History of the Regional Rail Reorganization Act of 1973, filed.
43	Jun.	3	Amendment to affidavit of John W. Ingram, filed.
	"	3	Arg. re: Plff's. motion for summary judgment – C.A.V. Defts'. and intervening defts. motion for summary judgment – C.A.V.
44	"	6	Transcript of 6/3/74, filed.
45	"	25	Opinion and Order, ALDISERT, CJ; FULLAM, J. and BECHTLE, J., enjoining U.S. Railway System from certifying a Final System Plan to Special Court, etc., Enjoining defts. from taking any action to enforce provisions of Sec. 304(f) of the RRRA with respect to abandonment, etc.; enjoining all parties from enforcing any action to implement so much of Sec. 207(b) of the RRRA as purports to require dismissal of pending proceedings for reorganization under §77 of the Bankruptcy Act, entering Declaratory judgment that Sec. 303 of RRRA is null and void as contravening the Fifth Amendment, etc.; Sec. 304(f) of the RRRA is null and void as violative of the Fifth Amendment, etc.; that Sec. 207(b) of RRRA as requires reorganzation courts to dismiss pending bankruptcy proceedings as violative of Art. I Sec. 8 Clause 4 of the Constitution;

1974

45	Jun.	25	(continued) plffs. motions for partial summary judgment are granted in part and in all other respects denied; defts. motions for summary judgment are denied, filed. cys. to all parties 6/25/74 – entered 6/26/74
46	Jul.	2	Notice of appeal to the United States Supreme Court, filed.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

I.

JURISDICTION AND VENUE

1. Plaintiffs bring this action requesting this Court to declare that the Regional Rail Reorganization Act of 1973, Public Law 93-236 (the "Act"), is repugnant to the Constitution of the United States, to declare their rights with respect thereto, and to issue appropriate relief by way of permanent injunction or otherwise in connection therewith.

2. This Court has jurisdiction of this cause pursuant to Title 28 U.S.C. §§1331(a), 2201, 2202, 2282 and 2284. The amount in controversy exceeds $10,000, exclusive of interest and costs.

3. Venue with respect to this cause is properly laid in the Eastern District of Pennsylvania pursuant to Title 28 U.S.C. §1391(b) and (e). Defendants, other than the United States of America, are an agency of the United States and officers or employees of the United States or

of agencies thereof, acting in their respective official capacities and under color of legal authority pursuant to the Act. An actual controversy exists and plaintiffs' claims for relief herein arise, all within the Eastern District of Pennsylvania. Real property involved in the action is situated in the Eastern District of Pennsylvania.

4. This is a proper case for determination by a three-judge court pursuant to Title 28 U.S.C. §§ 2282 and 2284 since plaintiffs seek, among other things, a permanent injunction restraining the enforcement, operation and execution of the Act for repugnance to the Constitution of the United States.

II.

PARTIES

5. Plaintiffs are:

(a) CONNECTICUT GENERAL INSURANCE CORPORATION, which is a corporation duly organized and existing by virtue of the laws of the state of Connecticut, having its principal place of business in Hartford, Connecticut, and which owns mortgage bonds of Penn Central Transportation Company ("Penn Central") and of certain lessors of Penn Central's leased lines ("Lessors") in the aggregate principal amount of $31,025,000 secured by mortgages on rail properties and other properties of Penn Central and said Lessors;

(b) CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, which is a corporation duly organized and existing by virute of the laws of the state of Connecticut, having its principal place of business in Hartford, Connecticut, and which owns mortgage bonds of Penn Central

and of certain Lessors in the aggregate principal amount of $9,985,000 secured by mortgages on rail properties and other properties of Penn Central and said Lessors;

(c) THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, which is a corporation duly organized and existing by virtue of the laws of the state of New York, having its principal place of business in New York, New York, and which owns mortgage bonds of Penn Central and of certain Lessors in the aggregate principal amount of $147,509,000 secured by mortgages on rail properties and other properties of Penn Central and said Lessors;

(d) METROPOLITAN LIFE INSURANCE COMPANY, which is a corporation duly organized and existing by virtue of the laws of the state of New York, having its principal place of business in New York, New York, and which owns mortgage bonds of Penn Central and of certain Lessors in the aggregate principal amount of $69,687,000 secured by mortgages on rail properties and other properties of Penn Central and said Lessors;

(e) THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, which is a corporation duly organized and existing by virtue of the laws of the state of New Jersey, having its principal place of business in Newark, New Jersey, and which owns mortgage bonds of Penn Central and of certain Lessors in the aggregate principal amount of $35,395,000 secured by mortgages on rail properties and other properties of Penn Central and said Lessors;

(f) THE BANK OF NEW YORK, which is a corporation duly organized and existing by virtue of the laws of the state of New York, having its principal place of business in New York, New York, and which is, and sues

herein in its capacity as, the corporate trustee or successor corporate trustee under one or more indentures, mortgages, or deeds of trust under which bonds or other debt securities of Penn Central or a Lessor were issued or secured;

(g) BANKERS TRUST COMPANY, which is a corporation duly organized and existing by virtue of the laws of the state of New York, having its principal place of business in New York, New York, and which is, and sues herein in its capacity as, the corporate trustee or successor corporate trustee under one or more indentures, mortgages, or deeds of trust under which bonds or other debt securities of Penn Central or a Lessor were issued or secured;

(h) THE FIDELITY BANK, which is a corporation duly organized and existing by virtue of the laws of the State of Pennsylvania, having its principal corporate trust office in Philadelphia, Pennsylvania, and which is, and sues herein in its capacity as, the corporate trustee or successor corporate trustee under one or more indentures, mortgages, or deeds of trust under which bonds or other debt securities of a Lessor were issued or secured;

(i) THE FIRST PENNSYLVANIA BANKING AND TRUST COMPANY, which is a coproration duly organized and existing by virtue of the laws of the state of Pennsylvania, having its principal corporate trust office in Philadelphia, Pennsylvania, and which is, and sues herein in its capacity as, the corporate trustee or successor corporate trustee under one or more indentures, mortgages, or deeds of trust under which bonds or other debt securities of Penn Central or a Lessor were issued or secured;

(j) GIRARD TRUST BANK, which is a corporation duly organized and existing by virtue of the laws of

the state of Pennsylvania, having its principal corporate trust office in Philadelphia, Pennsylvania, and which is, and sues herein in its capacity as, the corporate trustee or successor corporate trustee under one or more indentures, mortgages, or deeds of trust under which bonds or other debt securities of Penn Central or a Lessor were issued or secured;

(k) NATIONAL COMMERCIAL BANK AND TRUST COMPANY, which is a corporation duly organized and existing by virtue of the laws of the state of New York, having its principal place of business in Albany, New York, and which is, and sues herein in its capacity as, the corporate trustee or successor corporate trustee under one or more indentures, mortgages, or deeds of trust under which bonds or other debt securities of Penn Central or a Lessor were issued or secured; and

(l) UNITED STATES TRUST COMPANY OF NEW YORK, which is a corporation duly organized and existing by virtue of the laws of the state of New York, having its principal place of business in New York, New York, and which is, and sues herein in its capacity as, the corporate trustee or successor corporate trustee under one or more indentures, mortgages, or deeds of trust under which bonds or other debt securities of Penn Central or a Lessor were issued or secured.

The aggregate principal amount of bonds issued under or secured by the indentures, mortgages, and deeds of trust of which the parties plaintiff listed above in subparagraphs (f) through (l) are corporate trustees or successor corporate trustees, including certain of the bonds held by the parties plaintiff listed above in subparagraphs (a) through (e), is in excess of $800,000,000.

6. Defendants are:

(a) the UNITED STATES RAILWAY ASSOCIATION ("Association"), which is a government corporation of the District of Columbia established by virtue of § 201 of the Act in which, by virtue of sundry provisions of the Act, the United States has a proprietary interest;

(b) CLAUDE S. BRINEGAR, who is Secretary of Transportation of the United States, and, pursuant to § 201 of the Act, one of the three individuals designated as incorporators of the Association and a member of the acting Board of Directors of the Association, and who is herein sued in each of those respective capacities;

(c) GEORGE M. STAFFORD, who is Chariman of the Interstate Commerce Commission, and, pursuant to § 201 of the Act, one of the three individuals designated as incorporators of the Association and a member of the acting Board of Directors of the Association, and who is herein sued in each of those respective capacities;

(d) GEORGE P. SHULTZ, who is Secretary of the Treasury of the United States, and, pursuant to § 201 of the Act, one of the three individuals designated as incorporators of the Association and a member of the acting Board of Directors of the Association, and who is herein sued in each of those respective capacities; and

(e) the UNITED STATES OF AMERICA.

III.

CLAIM FOR RELIEF

A. Constitutional Infirmities of the Act.

7. All as more fully set forth at length hereinafter, the Act, and various provisions thereof, are repugnant

to the Constitution of the United States on their face, and as applied to plaintiffs, deny and abridge their constitutional rights in the following respects, among others:

(a) The Act and various provisions thereof require, by force of law, the taking of plaintiffs' property for public use without payment of just compensation in lawful specie of the United States, in violation of the Fifth Amendment to the Constitution of the United States;

(b) The Act and various provisions thereof require, by force of law, the taking of plaintiffs' property for public use without the payment of just compensation or the payment of any fair and equitable equivalent of the property taken, in violation of the Fifth Amendment to the Constitution of the United States;

(c) The Act requires the continued operation of certain rail properties of Penn Central and the incurring of continued losses therefrom after there has ceased to be any possibility of halting such losses from the operation of rail properties, or of its reorganization on an income basis and, by force of law, deprives the plaintiffs of their rights presently to foreclose or otherwise enforce their liens in accordance with their respective terms, all without payment of any just compensation, in violation of the Fifth Amendment to the Constitution of the United States;

(d) The procedures required by the Act including but not limited to those by which the rights of plaintiffs and others similarly situated are to be determined, those by which the public interest is to be determined in various respects called for by the Act, and those pertaining to the transfer or conveyance of rail properties deny to plaintiffs due process of law guaranteed to them by the

Fifth Amendment to the Constitution of the United States;

(e) Insofar as the Act is applicable only to the "region" as therein defined, it does not constitute a lawful exercise of the power of Congress to make uniform laws on the subject of bankruptcies throughout the United States under Article I, Section 8 of the Constitution of the United States; and

(f) Insofar as various and sundry of its provisions separately and together effect a confiscation of the property rights of plaintiffs, ostensibly for the purpose of achieving public objectives, the Act is not a lawful exercise of the power of Congress to regulate interstate commerce under Article I, Section 8 of the Constitution of the United States.

8. By reason of the immediate and continuing operation of the Act, and by virtue of the acts taken and required to be taken by defendants pursuant to the Act which themselves and in conjunction with the further measures contemplated by the Act will irreparably injure plaintiffs, all as more fully described hereinafter, plaintiffs, Penn Central and Lessors are now subject to a process which authorizes and compels the taking of plaintiffs' properties and other abridgements of plaintiffs' constitutional rights. Plaintiffs have no other remedy at law or otherwise by which they can assert their rights, and by reason of all of the foregoing there exists an immediate and concrete case and controversy between plaintiffs and defendants for which the only full and adequate resolution is a judgment of this Court granting their relief herein sought.

B. The Operation of the Act.

9. On or about June 21, 1971, Penn Central, and subsequent thereto certain Lessors, filed petitions for reorganization pursuant to Section 77 of the Bankruptcy Act, Title 11 U.S.C. § 205, in the Eastern District of Pennsylvania, Docket No. 70-347.

10. Penn Central is a "railroad" as defined in Title 49 U.S.C. § 1(3) and in Section 102(11) of the Act, a "railroad in reorganization" as defined in Section 102(12) of the Act, and a railroad doing business in the "region" as defined in Section 102(13) of the Act.

11. Lessors own (and in some instances lease from others, or control) "rail properties", as such term is defined in Section 102(10) of the Act, in the "region" which are leased, operated, or controlled by Penn Central.

12. Penn Central owns, leases and operates approximately 19,850 road miles of railroad out of the total of approximately 27,350 road miles of railroad owned, leased and operated by "railroads in reorganization" in the "region", or approximately 73% thereof.

13. Defendants Brinegar, Stafford and Shultz pursuant to the terms of the Act are required to take such action as may be necessary to incorporate the Association and, collectively thereafter, to act as the interim Board of Directors of the Association in which capacity they are required by the Act to cause actions complained of herein to be taken by the Association.

14. Pursuant to Sections 207(c) and/or 208(b) of the Act, the Association will adopt a "final system plan", as such term is defined in Section 102(6) of the Act, which

plan is to be formulated in such a way as to provide for the "region" adequate and efficient rail service required to meet therein the needs of commerce, the national defense, the environment, and the service requirements of passengers, United States mail, shippers, states and their political subdivisions, and consumers, all in furtherance of the declaration of policy set out in Section 101(a)(3) of the Act.

15. The Act does not apply to "railroads in reorganization" other than those in the "region".

16. Only "railroads in reorganization" which are or become such prior to the adoption of a final system plan which is not thereafter disapproved by Congress under Section 208 of the Act are subject to the provisions of the Act.

17. Pursuant to Section 206(c) of the Act, the final system plan will designate "rail properties" of "railroads in reorganization" and of railroads leased, operated or controlled by any "railroad in reorganization" in the "region", which shall be transferred to the Consolidated Rail Corporation ("Corporation") to be established pursuant to Section 301 of the Act and "rail properties" which shall be offered for sale to a "profitable railroad" as such term is defined in Section 102(9) of the Act.

18. By reason of the facts alleged in Paragraphs 12 and 14 through 17 hereof, the final system plan will necessarily designate for transfer or sale rail properties of Penn Central and Lessors.

19. Pursuant to Section 303(b) of the Act, rail properties of Penn Central and Lessors will be transferred or conveyed as designated in the final system plan, free and clear of all liens and encumbrances of plaintiffs, and the liens

of plaintiffs will be thereby extinguished and taken from them.

20. Under the provisions of the Act, the final system plan will be formulated and adopted, and rail properties of Penn Central and Lessors will be designated therein as alleged in Paragraph 18 hereof, and transferred or conveyed pursuant thereto, as alleged in Paragraph 19 hereof, without approval or consent, express or implied, of plaintiffs or approval, consent, option or choice of any court having jurisdiction or power to take any such action with respect to such properties.

21. By reason of the facts alleged in Paragraph 20 hereof, plaintiffs will be deprived of their property without plaintiffs' having any choice or control with respect to the disposition thereof.

22. Pursuant to Section 206(d)(1) of the Act, transfers and conveyances of rail properties of Penn Central and of Lessors upon which plaintiffs have liens will be made to the Corporation in exchange for common stock and other securities of the Corporation (including obligations of the Association), other undefined benefits, and any judgment against the Corporation which may be rendered pursuant to Section 303(c)(2)(C) of the Act.

23. The Act makes no provision for just compensation for the plaintiffs' property taken pursuant to its terms nor for any fair and equitable equivalent of such property for, among others, the following reasons:

(a) The initially issued common stock of the Corporation substituted in the estates of the railroads in reorganization in consideration for rail properties transferred or conveyed to the Corporation pursuant to Section 303(b)

of the Act is of uncertain, if any, value in that the capital structure and the prospective earnings, if any, of the Corporation are uncertain and highly speculative, no external method is provided for assuring value in such common stock, voting and management selection attributes of such common stock will be denied to plaintiffs and other owners of such common stock, pursuant to Section 301 (e) of the Act, without their approval or consent, and no method is provided by the Act for the determination of any such value prior to the transfer and conveyance of plaintiffs' properties pursuant to the terms of the Act;

(b) The "other benefits" accruing to railroads in reorganization referred to in Section 206(d)(1) of the Act, if any, are undefined as to the nature and scope and availability to the plaintiffs, their value, if any, is uncertain and speculative, and no method is provided by the Act for the determination of such value prior to the transfer and conveyance of plaintiffs' properties pursuant to the terms of the Act;

(c) The maximum aggregate amount of Association obligations which may be issued to the trustees of all railroads in reorganization pursuant to Section 206(d) (1) of the Act is limited to $500,000,000, which sum is substantially less than the value of the liens on the rail properties of, and is also less than the aggregate principal amount of the secured indebtedness of, Penn Central and Lessors alone; and

(d) The deficiency judgment provided for by Section 303(c)(2)(C) of the Act will be illusory, valueless, and not constitute compensaton to plaintiffs, Penn Central or Lessors.

24. Pursuant to Section 207(b) of the Act, Penn Central and Lessors will be subject to the procedures of the

Act unless the United States District Court having jurisdiction of the property of Penn Central and of certain Lessors in the reorganization proceedings referred to in Paragraph 9 hereof ("Reorganization Court") finds that Penn Central and said Lessors are reorganizable on an income basis within a reasonable time under Section 77 of the Bankruptcy Act and that the public interest would be better served by such a reorganization than by application of the provisions of the Act, or that the Act does not provide a process which would be fair and equitable to the estates of Penn Central and said Lessors.

25. The Reorganization Court is required to make the determinations referred to in Paragraph 24 above at a time when the final system plan will not have been adopted and, therefore, said Court cannot know, and the record before said Court cannot show, what properties of Penn Central and Lessors will be transferred pursuant to the final system plan or what consideration will be received in exchange therefor.

26. Any finding which may be made pursuant to Section 207(b) of the Act, other than a finding with respect to the reorganizability on an income basis of Penn Central and Lessors, will be made without a meaningful hearing being afforded to plaintiffs and without an adequate record upon which the Reorganization Court can render an informed independent judgment.

27. Pursuant to Sections 207(b), 209(a) and 303(d) of the Act, plaintiffs' rights to judicial review are limited, conditioned and denied.

28. Penn Central is operating its rail properties at heavy losses, and if required to continue such operations, such losses will continue and be unavoidable. Penn Central is

not reorganizable on an income basis under Section 77 of the Bankruptcy Act.

29. Pursuant to Section 207(b) of the Act, the power of the Reorganization Court to dismiss the reorganization proceedings under Section 77(g) of the Bankruptcy Act upon a finding that Penn Central is not reorganizable under said Section 77 is eliminated.

30. By reason of the facts alleged in Paragraph 29 hereof, plaintiffs' right to foreclose their liens or otherwise enforce their rights as creditors is eliminated.

31. As of the date hereof and pursuant to Section 304(f) of the Act, Penn Central and the certain Lessors referred to in Paragraph 9 hereof may not discontinue service or abandon any line of railroad unless authorized by the Association and unless no state, local or regional transporation authority objects thereto.

32. The Act contains no provision or authorization for payment of any compensation to Penn Central, to Lessors or to plaintiffs for the forced continuation of unprofitable rail services.

IV.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that the Court make application for the convening of a three-judge district court and that said three-judge court hear this action, and upon such hearing to:

1. Order, adjudge, decree and declare that (a) the Regional Rail Reorganization Act of 1973 is repugnant to the Constitution of the United States, and (b) the duties

imposed upon defendants by the Regional Rail Reorganization Act of 1973 are not authorized or permitted by the Constitution of the United States and that the discharge of such duties will violate plaintiffs' rights under the Constitution of the United States; and further

2. Permanently enjoin and restrain defendants, their agents and assistants from the use, operation, enforcement, execution and application of the Act in any and all respects in which the same may be found to be repugnant to the Constitution of the United States; and further

3. Grant such other and further relief as to the court may seem just and proper, together with the costs and disbursements of this action.

Dated: January 25, 1974

/s/ Louis A. Craco
Louis A. Craco
1 Chase Manhattan Plaza
New York, New York 10005
(212) 248-1000

/s/ Frederic L. Ballard
Frederic L. Ballard
Land Title Building
Philadelphia, Pennsylvania 19110
(215) 567-5615

Attorneys for Plaintiffs

Willkie Farr & Gallagher
1 Chase Manhattan Plaza
New York, New York 10005
(212) 248-1000

Ballard, Spahr, Andrews & Ingersoll
Land Title Building
Philadelphia, Pennsylvania 19110
(215) 567-5615

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

ORDER

AND NOW, this 4th day of February, 1974, upon consideration of the annexed Motion to Add Parties Plaintiff,

IT IS ORDERED that the following are added as parties Plaintiff in the above captioned action, in their representative capacities as trustees under certain indentures, mortgages or deeds of trust, American National Bank and Trust Company of Chicago, Irving Trust Company, Mellon Bank, N.A., and Wilmington Trust Company, with the same force and effect as though they had been named in the original Complaint herein at the time of the commencement of this action, and it is further

ORDERED that as and for a cause of action in behalf of the said Plaintiffs, American National Bank and Trust Company of Chicago, Irving Trust Company, Mellon Bank, N.A., and Wilmington Trust Company, that all of the allegations contained in the original Complaint in behalf of the Plaintiffs Connecticut General Insurance Corporation, Connecticut Mutual Life Insurance Company, The Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, The Prudential Insurance Company of America, and, in their respective capacities as trustees under certain indentures, mortgages or deeds of trust, The Bank of New York, Bankers Trust Company, The Fidelity Bank, The First Pennsylvania Banking and Trust Company, Girard Trust Bank, National Commercial Bank and Trust Company and United States Trust Company of New York, be set forth at length as that of

Plaintiffs American National Bank and Trust Company of Chicago, Irving Trust Company, Mellon Bank, N.A., and Wilmington Trust Company, and it is further

ORDERED that the names of American National Bank and Trust Company of Chicago, Irving Trust Company, Mellon Bank, N.A., and Wilmington Trust Company in their representative capacities as trustees under certain indentures, mortgages or deeds of trust, be added to the Complaint herein and that the Clerk of this Court is hereby ordered to mark his records in the case accordingly.

/s/ John P. Fullam
U.S.D.J.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

ANSWER OF ALL DEFENDANTS

Defendants for their Answer to the Complaint answer the numbered paragraphs of the Complaint as follows:

1. Defendants admit that the allegations contained in paragraph 1 are a correct generalized description of the contents of the Complaint.

2. The allegations contained in paragraph 2 are conclusions of law which do not require answer and are accordingly neither admitted nor denied, except that defendants admit that the amount in controversy, if any, exceeds $10,000 exclusive of interest and costs.

3. The allegations contained in paragraph 3 are conclusions of law which do not require answer and are accordingly neither admitted nor denied, except that defendants deny that an actual controversy exists, that any of plaintiffs' claims for relief or causes of action, if any, arise within the Eastern District of Pennsylvania, or that any real property is involved in the action.

4. Defendants deny each and every allegation contained in paragraph 4, except that defendants admit that plaintiffs seek, among other things, a permanent injunction restraining the enforcement, operation and execution of the Regional Rail Reorganization Act of 1973, Pub. L. 93-236 (the Act), for repugnance to the Constitution of the United States.

5. Defendants:

(a) admit that Connecticut General Insurance Corporation is a corporation duly organized and existing by virtue of the laws of the State of Connecticut, having its principal place of business in Hartford, Connecticut. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 5(a).

(b) admit that Connecticut Mutual Life Insurance Company is a corporation duly organized and existing by virtue of the laws of the State of Connecticut, having its principal place of business in Hartford, Connecticut. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 5(b).

(c) admit that The Equitable Life Assurance Society of the United States is a corporation duly organized and existing by virtue of the laws of the State of New York, having its principal place of business in New York, New York. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 5(c).

(d) admit that Metropolitan Life Insurance Company is a corporation duly organized and existing by virtue of the laws of the State of New York, having its principal place of business in New York, New York. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 5(d).

(e) admit that The Prudential Insurance Company of America is a corporation duly organized and existing

by virtue of the laws of the State of New Jersey, having its principal place of business in Newark, New Jersey. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 5(e).

(f) admit that The Bank of New York is a corporation duly organized and existing by virtue of the laws of the State of New York, having its principal place of business in New York, New York. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 5(f).

(g) admit that Bankers Trust Company is a corporation duly organized and existing by virtue of the laws of the State of New York, having its principal place of business in New York, New York. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 5(g).

(h) admit that The Fidelity Bank is a corporation duly organized and existing by virtue of the laws of the State of Pennsylvania, having its principal corporate trust office in Philadelphia, Pennsylvania. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 5(h).

(i) admit that The First Pennsylvania Banking and Trust Company is a corporation duly organized and existing by virtue of the laws of the State of Pennsylvania, having its principal corporate trust office in Philadelphia, Pennsylvania. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 5(i).

(j) admit that Girard Trust Bank is a corporation duly organized and existing by virtue of the laws of the State of Pennsylvania, having its principal corporate trust office in Philadelphia, Pennsylvania. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of pargraph 5(j).

(k) admit that National Commercial Bank and Trust Company is a corporation duly organized and existing by virtue of the laws of the State of New York, having its principal place of business in Albany, New York. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 5(k).

(l) admit that United States Trust Company of New York is a corporation duly organized and existing by virtue of the laws of the State of New York, having its principal place of business in New York, New York. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 5(l).

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the last unlettered paragraph of paragraph 5.

6. Defendants:

(a) admit that the United States Railway Association (the Association) is a government corporation of the District of Columbia established by virtue of Section 201 of the Act. The remaining allegations contained in paragraph 6(a) are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

(b) admit the allegations contained in paragraph 6(b).

(c) admit the allegations contained in paragraph 6(c).

(d) admit the allegations contained in paragraph 6(d).

(e) admit the allegations contained in paragraph 6(e).

7. The allegations contained in paragraph 7 are conclusions of law which do not require answer and are accordingly neither admitted nor denied. Moreover, said paragraph purports to be a summary of allegations elsewhere in the Complaint, each of which is pleaded to in this Answer and therefore does not require separate and redundant response.

8. The allegations contained in the first sentence of paragraph 8 are conclusions of law which do not require answer and are accordingly neither admitted nor denied, except that defendants deny that the acts and measures complained of will irreparably injure plaintiffs. The allegations contained in the second sentence of paragraph 8 are conclusions of law which do not require answer and are accordingly neither admitted nor denied, except that defendants deny that plaintiffs have no other remedy at law or otherwise by which they can assert their rights, if any, or that there exists an immediate or concrete case or controversy between plaintiffs and defendants.

9. Defendants admit the allegations contained in paragraph 9, except that defendants deny that a petition for the reorganization of each Lessor is pending in the Eastern District of Pennsylvania in Docket No. 70-347.

10. Defendants admit the allegations contained in paragraph 10.

11. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11.

12. Defendants admit the allegations contained in paragraph 12.

13. The allegations contained in paragraph 13 are conclusions of law which do not require answer and are accordingly neither admitted nor denied, except that defendants deny that defendants Brinegar, Stafford and Shultz, or any of them, are required by the Act to cause to be taken by the Association any of the actions complained of in the Complaint.

14. The allegations contained in paragraph 14 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

15. The allegation contained in paragraph 15 is a conclusion of law which does not require answer and is accordingly neither admitted nor denied.

16. The allegations contained in paragraph 16 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

17. The allegations contained in paragraph 17 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

18. Defendants deny each and every allegation contained in paragraph 18.

19. The allegations contained in paragraph 19 are conclusions of law which do not require answer and are

accordingly neither admitted nor denied, except that defendants deny that it is possible to ascertain at this time which, if any, rail properties of Penn Central Transportation Company (the Penn Central) or Lessors will be transferred or conveyed pursuant to the final system plan.

20. The allegations contained in paragraph 20 are conclusions of law which do not require answer and are accordingly neither admitted nor denied, except that defendants deny that (i) the final system plan will necessarily designate rail properties of Penn Central or Lessors, (ii) rail properties of Penn Central or Lessors will necessarily be transferred or conveyed pursuant thereto, or (iii) the transfer or conveyance, if any, of rail properties of Penn Central or Lessors pursuant to the final system plan will be done without the approval, consent, option or choice of any court having jurisdiction or power to take any such action with respect to any such properties.

21. Defendants deny the allegation in paragraph 21 that plaintiffs will be deprived of their property, and further deny that, if any such deprivation should occur, it would be without plaintiffs having any choice or control with respect to the disposition thereof in view of the facts, among others, that the Trustees in Bankruptcy of Penn Central or Lessors acting for the benefit of plaintiffs could challenge or oppose the inclusion of their rail properties in the reorganization process established under the Act in judicial or administrative proceedings before one or more of the following: The United States District Court having jurisdiction over the reorganization proceeding of Penn Central, the Special Court established pursuant to the Act, the Supreme Court of the United States, the Association, the Rail Services Planning Office established pursuant to the Act, and the Interstate Commerce Commission. Further, some of plaintiffs are parties to the

reorganization proceedings of Penn Central or Lessors, and are being and will be afforded right to hearing in such proceedings.

22. The allegations contained in paragraph 22 are conclusions of law which do not require answer and are accordingly neither admitted nor denied, except that defendants deny that any rail property of Penn Central or of any Lessor upon which plaintiffs have liens will necessarily be transferred or conveyed to the Consolidated Rail Corporation; and further deny that it is possible to determine at this stage the nature or value of the consideration that will be transferred to plaintiffs in exchange for any such rail property.

23. Defendants deny:

(a) that at the time when common stock of the Consolidated Rail Corporation is exchanged for rail properties, as set forth in the Act, such stock will be of uncertain value, and that the capital structure and prospective earnings of the Consolidated Rail Corporation will be either uncertain or highly speculative. Defendants further deny that the voting and management selection attributes of such common stock will necessarily be denied to plaintiffs or to any other owners of such common stock pursuant to any provisions of the Act.

(b) that at the time when "other benefits" accrue to any railroads in reorganization referred to in § 206(d)(1) of the Act those "other benefits" will be undefined as to nature, scope or availability to the plaintiffs, and further deny that the value of such "other benefits" will be uncertain or speculative.

(c) that the sum of $500,000,000 is substantially less than the value of the liens on the rail properties of

Penn Central and Lessors. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that the sum of $500,000,000 is less than the aggregate principal amount of the secured indebtedness of Penn Central and Lessors.

(d) that a deficiency judgment will necessarily be required to be entered in favor of Penn Central or Lessors, and further deny that any such judgment as may be entered will be illusory or valueless or will not constitute compensation to plaintiffs.

Each and every other allegation contained in paragraph 23 is a conclusion of law which does not require answer, and all such allegations are accordingly neither admitted nor denied.

24. The allegations contained in paragraph 24 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

25. The allegations contained in paragraph 25 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

26. Defendants deny each and every allegation contained in paragraph 26.

27. The allegations contained in paragraph 27 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

28. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 28.

29. The allegations contained in paragraph 29 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

30. Defendants deny each and every allegation contained in paragraph 30 to the extent that it is an allegation of fact. To the extent that any allegation in paragraph 30 is not an allegation of fact, it is a conclusion of law which does not require answer and is accordingly neither admitted nor denied.

31. The allegations contained in paragraph 31 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

32. The allegations contained in paragraph 32 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Venue as alleged under 28 U.S.C. § 1391(b) and (e) is improper. The action is brought in a judicial district in which none of the claims or causes of action, if any exist, arose; and no real property is involved in the action.

THIRD DEFENSE

This Court lacks jurisdiction over the subject matter since this is a judicial proceeding with respect to the final system plan and is required by Section 209(b) of the Act to be consolidated in a single, three-judge district court of the United States (which the Act denominates as the "special court" and which is hereinafter referred to as the

Special Court) whose members are to be designated by the Judicial Panel on Multidistrict Litigation.

FOURTH DEFENSE

This Court should not take jurisdiction of the action, since primary jurisdiction is vested in and comity requires deference to the single-judge United States District Court for the Eastern District of Pennsylvania which has jurisdiction over Penn Central and certain of its Lessors in reorganization and which is required by Section 207(b) of the Act to make findings as to (1) whether the public interest would be better served by a reorganization on an income basis under Section 77 of the Bankruptcy Act (11 U.S.C. § 205) rather than by a reorganization under the Act (which finding could result in the discontinuance of any proceedings under the Act concerning the rail properties of Penn Central or Lessors) and (2) whether the Act provides a process which would be fair and equitable to the estate of Penn Central (an inquiry which would essentially duplicate the inquiry which the Court is asked to make herein).

FIFTH DEFENSE

The action is not yet ripe for adjudication. It is therefore premature and presents no actual case or controversy. Any determination as to the allegations concerning the constitutionality of the Act contained in the Complaint cannot and in any event should not be made except in one or more of certain proceedings required by the Act and by Section 77 of the Bankruptcy Act, including (a) the findings, decisions and orders of reorganization courts and the Special Court under Section 207(b) of the Act, (b) the preparation, adoption and review of a final system plan under Section 207(c) and (d) of the Act, (c) the approval and coming into effect of such plan pursuant

to Section 208 of the Act, (d) the findings, determinations and orders of the Special Court under Section 303(c) of the Act relating to the fairness and equitableness of the transfers and conveyances of rail properties pursuant to the plan, and (e) the division among the parties to the reorganization of the transferor railroads of the securities, other benefits and judgments awarded to the estates of those railroads.

SIXTH DEFENSE

Plaintiffs are not entitled to declaratory or injunctive relief because they have not suffered and are not threatened with any irreparable injury, and plaintiffs have adequate remedies at law.

WHEREFORE, having fully answered, defendants pray that the Complaint be dismissed and that they recover their costs and attorneys' fees, and that the Court grant such other relief as may be proper.

Respectfully submitted,

March 4, 1974

IRVING JAFFE
Acting Assistant Attorney General

ROBERT E. J. CURRAN
United States Attorney

DAVID J. ANDERSON
Special Litigation Counsel

Of Counsel:

RODNEY E. EYSTER
General Counsel

JEROME E. SHARFMAN
STUART C. MEISTER
MICHAEL T. HALEY
Attorneys
U.S. Department of
Transportation
Washington, D.C. 20530

/s/ James F. Dausch
JAMES F. DAUSCH
Attorney
U.S. Department of Justice
Washington, D.C. 20530

Attorneys for the United States of America, Claude S. Brinegar, George M. Stafford, and George P. Shultz

/s/ Lloyd N. Cutler
LLOYD N. CUTLER

/s/ Marshall Hornblower
MARSHALL HORNBLOWER

/s/ William R. Perlik
WILLIAM R. PERLIK

Attorneys for the United States Railway Association

Of Counsel:

BARRY E. CARTER
WILLIAM T. LAKE
J.B. STEPHENS
Wilmer, Cutler & Pickering
1666 K Street, N.W.
Washington, D.C. 2006
202–872-6000

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

MOTION FOR LEAVE TO INTERVENE

George P. Baker, Robert W. Blanchette, and Richard C. Bond, as Trustees of the property of Penn Central Transportation Company, Debtor, and not individually, Six Penn Center Plaza, Philadelphia, Pa. 19104, 215-594-2139, respectfully move for leave to intervene as parties defendant in this proceeding, and to file the attached Answer.

Applicants' grounds for their motion are fully set forth in the attached Memorandum of Points and Authorities.

Respectfully submitted,

/s/ John B. Rossi, Jr.

John B. Rossi, Jr.
John F. DePodesta
1836 Six Penn Center Plaza
Philadelphia, Penna. 19104
215-594-2271

Charles A. Horsky
Brice M. Clagett
Covington & Burling
888 Sixteenth St., N.W.
Washington, D.C. 20006
202-293-3300

Attorneys for Intervenors

Dated: April 3, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

ANSWER OF THE PENN CENTRAL TRUSTEES

1. Defendants George P. Baker, Robert W. Blanchette, and Richard C. Bond (the Trustees) are the Trustees of the property of Penn Central Transportation Company, Debtor, (Penn Central) a railroad in reorganization pursuant to Section 77 of the Bankruptcy Act in proceedings pending in the United States District Court for the Eastern District of Pennsylvania. The Trustees' principal office is in Philadelphia, Pennsylvania.

2. Penn Central is a Class 1 railroad and the Trustees own, lease, operate or control rail lines located throughout the region defined in the Regional Rail Reorganization Act of 1973 (the Act). As such, Penn Central and the Trustees are subject to procedures of the Act.

3. As their answer to the complaint herein the Trustees allege as follows:

(a) Admit the allegations of paragraph 1 through 6, except lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 5 which set forth individual ownership and aggregate amount of bonds;

(b) With respect to subsections (a) through (c) of paragraph 7, admit that the Act has resulted and may result in takings of the Trustees' property and may deprive plaintiffs of foreclosure rights but deny that such takings and deprivations are in violation of

the Fifth Amendment to the Constitution of the United States because of the right of the Trustees to obtain a judgment against the United States in the Court of Claims pursuant to the Tucker Act (Title 28 U.S.C. Section 1491) for just compensation for any and all such takings and deprivations. Because of the availability of the Tucker Act remedy, the Trustees deny the allegations of subparagraphs (d) and (f) of paragraph 7. The Trustees deny the allegations of subparagraph (e) of paragraph 7.

(c) Admit that the Act provides a procedure which may result in a taking of property and admit that a case and controversy exists but deny the remaining allegations of paragraph 8 because of the availability of a Tucker Act remedy;

(d) Admit the allegations of paragraph 9 except to allege that the Penn Central's petition for reorganization was in fact filed and approved on June 21, 1970;

(e) Admit that Penn Central is a "common carrier" as defined in Title 49 U.S.C. § 1(3) and therefore a "railroad" as defined in Section 102(11) of the Act. By further answer, the Trustees allege that at this time Penn Central is "a railroad in reorganization" only for the purposes of Section 207(b) of the Act, and may as a result of the determinations to be made pursuant to that Section become "a railroad in reorganization" as defined in Section 102(12) of the Act;

(f) Admit the allegations of paragraphs 11 through 20 but refer to the Act itself for the true and correct contents thereof;

(g) Admit the allegations of paragraphs 21 through 23 and in further answer allege that the Act does not

impair or preclude the Trustees' right to obtain a money judgment pursuant to the Tucker Act;

(h) Admit the allegations of paragraphs 24 and 25;

(i) Deny the allegations of paragraph 26;

(j) Admit that plaintiffs' rights to judicial review have been limited or conditioned by the Act but deny the further allegation in paragraph 27;

(k) Admit the allegations of paragraph 28;

(l) Deny the allegations of paragraphs 29 and 30;

(m) As to paragraph 31, admit that as of the date hereof the Trustees may not discontinue service or abandon any line of railroad unless authorized by the Association and unless no state, local or regional transportation authority *reasonably* objects thereto;

(n) Admit the allegations of paragraph 32 and further answer that the Act does not impair or preclude the Trustees' entitlement to a money judgment pursuant to the Tucker Act for the takings resulting from or occasioned by the forced continuation of rail services.

4. As a further answer the Trustees assert that they are entitled to bring an action in the Court of Claims pursuant to the Tucker Act for a money judgment against the United States for any inadequacy in the amount or kind of compensation awarded pursuant to the procedures of the Act for the takings of property pursuant to or occasioned by the Act. The entitlement of the Trustees to obtain pursuant to the Tucker Act any money judgment that may be necessary to provide just compensation is not impaired or precluded by any provision of the Act and the availability of the Tucker Act remedy assures that just

compensation will be paid for all properties, assets, rights and interests subjected to either a temporary or permanent taking by the Act.

Prayer for Relief

WHEREFORE, the Trustees pray that the Court enter an order dismissing the complaint herein and finding the Act to be valid because the Trustees are entitled to obtain any money judgment that may be necessary to provide just compensation for the takings pursuant to or occasioned by the Act by means of an action against the United States in the Court of Claims pursuant to the Tucker Act, and that the Act does not impair or preclude the Trustees' exercise of that right.

Respectfully submitted,

/s/ John B. Rossi, Jr.
John B. Rossi, Jr.
John F. DePodesta
1836 Six Penn Center Plaza
Philadelphia, Pennsylvania
19104
215-594-2271

Charles A. Horsky
Brice M. Clagett
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006
202–293-3300

Attorneys for Intervenors

Dated: April 3, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

ORDER

On consideration of the motion of George P. Baker, Robert W. Blanchette, and Richard C. Bond, as Trustees of the property of Penn Central Transporation Company, Debtor, for leave to intervene, it is

ORDERED that the aforesaid motion for leave to intervene is granted.

/s/ John P. Fullam
J.

Dated: April 19, 1974

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

It is hereby stipulated and agreed by and between the attorneys for the undersigned parties hereto that the following extracts from the Record of *In the Matter of Penn Central Transportation Company, Debtor* (Bky. No. 70-347, Eastern District of Pennsylvania) are hereby made a part of the Record in the above-captioned matter with the same force and effect as if the same had been received in evidence by the court in this matter in the first instance.

A – Extracts from Bky. 70-347

1. Petition for Reorganization, Doc. No. 1

2. Reports of Trustees on Reorganization Planning, dated February 15, 1972, April 1, 1972, July 1, 1972, October 1, 1972, January 1, 1973, February 1, 1973, April 3, 1974, Docs. No. 2637, 3033, 3827, 4428, 4911, 5043, 7304

3. Petition for leave to file a step of a Plan of Reorganization relating to abandonments, and for interim relief, Doc. No. 5152

4. Petition for leave to file a step of a Plan of Reorganization relating to passenger service and for interim relief, Doc. No. 5151

5. Trustees' Plan of Reorganization dated July 2, 1973, Doc. No. 5927.

6. Financial Statements:

   Docs. No.: 218, 256, 373, 428, 431, 630, 786, 1062, 1309, 1754, 2158, 1085, 1137, 1309,

1085, 1210, 1309, 1272, 1419, 1432, 1439,
1552, 1551, 1742, 1751, 1867, 2005, 2006,
2113, 2158, 2225, 2366, 2438, 2483, 3415,
3052, 3311, 3237, 3513, 3514, 3779, 3780,
3966, 4019, 4109, 4262, 4214, 4263, 4439,
4371, 4541, 4542, 4674, 4721, 4861, 4891,
5037, 5224, 5265, 5291, 5372, 5449, 5539,
5571, 5741, 5742, 5898, 5899, 5900, 6021,
6022, 6127, 6128, 6278, 6277, 6390, 6391,
6597, 6632, 6825, 6826, 6985 and 6986.

7. Petition of Trustees: Docs. No.: 4696, 4798, 740, 1793, 1794, 4886 and 5247, and Orders with respect thereto: Nos. 1073, 1103, 1087, 1088 and 1156.

8. Memorandum and Order No. 1137, Doc. No. 5298, and the hearings pursuant thereto.

9. Order No. 1321, Record of the Proceedings had on October 12, 1973 pursuant to said Order, including Statements of Position.

10. Petition of the Trustees for approval of the terms of and authority to enter into an Agreement with the Secretary of the Department of Transportation with respect to certain equipment obligations (Doc. No. 7024), and supporting affidavits and exhibits thereto and the transcript of proceedings in respect thereof, held on February 26, 1974.

11. Order No. 1426, Record of the Proceedings had on March 25, 1974 pursuant to said Order, including all affidavits, exhibits and testimony of witnesses.

12. Order No. 848, Record of the Proceedings had pursuant to said Order, including all affidavits, exhibits and testimony of witnesses.

13. Orders No. 1172, 1404 and 1422, Record of the Proceedings had pursuant to said Orders, including all affidavits, exhibits and testimony of witnesses.

14. Petition of Trustees: Docs. No. 2870-2874, and Orders 605 and 649, Docs. No. 2875 and 3131, Record of the Proceedings had pursuant to said Orders, including all affidavits, exhibits and testimony of witnesses.

15. Reports of trustees on Status of Reorganization Planning, dated March 22, 1971 and September 17, 1971, Docs. No. 964, 1828.

B – The Record in ICC Finance Docket 26241

1. Docs. No. 6420-6429

2. The ICC Report, September 28, 1973

It is further stipulated and agreed that the inclusion in the Record of this action of the above-specified extracts is without prejudice to the right of any party to make any other proof in the above-captioned action including proof of facts impeaching any matters asserted in the above-specified extracts and is without prejudice to the right of the parties to stipulate to the inclusion of such further extracts as may from time to time seem appropriate.

Dated: April 15, 1974
Philadelphia, Pennsylvania

/s/ Thomas L. Bryan
Attorney for Plaintiffs

/s/ William R. Perlik
Attorney for Defendant
United States Railway Association

/s/ James F. Dausch
Attorney for Defendants
Brinegar, Shultz, Stafford and
United States of America

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

LOUIS A. CRACO, being duly sworn, deposes and says:

1. I am an attorney at law, admitted to the bar of this Court *pro hac vice*, and I am a member of the firm of Willkie Farr & Gallagher, attorneys for the plaintiffs herein. I make this affidavit in support of the motion of said plaintiffs for summary judgment pursuant to F.R. Civ. P. 56 declaring the Regional Rail Reorganization Act of 1973 to be unconstitutional and granting said plaintiffs such other and further relief as may be proper under the circumstances. Except where otherwise indicated, I make this affidavit with respect to the matters herein set out on personal knowledge.

2. The parties have stipulated certain facts as true for purposes for the present motion. The original of that stipulation of facts will be separately filed with the Court. A true and correct copy of the stipulation of facts is annexed hereto for the convenience of the Court, and marked Exhibit A.

3. The parties have entered into a stipulation by the terms of which certain extracts from the record lodged in the United States District Court for the Eastern District of Pennsylvania in the matter of *Penn Central Transportation Company, Debtor* (Bky. No. 70-347) are made a part of the record before the Court in this action. The

original of that stipulation with respect to the record will be separately filed with the Court. A true and correct copy of the said stipulation is annexed hereto for the convenience of the Court, and marked Exhibit B.

4. The plaintiffs respectfully incorporate by reference the stipulated facts (Exhibit A) and the matters in evidence referred to in the stipulation with respect to the record (Exhibit B) as part of the record upon this motion.

5. On February 1, 1974, defendant Brinegar, in his capacity as the Secretary of Transportation of the United States of America, published a report entitled, "Rail Service in the Midwest and Northeast Region" which had been prepared under his supervision and was submitted in accordance with Section 204 of the Regional Rail Reorganization Act of 1973. Said report consists of Volume 1, Volume 2 (Part 1) and Volume 2 (Part 2). Thereafter on March 1, 1974, a document entitled, "Volume 2, Supplement to Local Rail Service Zone Reports", purporting to contain, in addition to certain matters with respect to the State of Wisconsin, a "table of additions and corrections," was issued by the Secretary of Transportation. Plaintiffs are causing a copy of the aforesaid documents to be deposited with the clerk of the Court simultaneously herewith and request the Court to deem said report in its entirety to be marked Exhibit F upon this motion.

6. Annexed hereto is an affidavit of C. C. Shannon, President of Wyer, Dick & Company, Transportation and Traffic Consultants, with an exhibit both with respect to the report referred to in paragraph 5 hereof. (Exhibit C)

7. Upon information and belief, on or about September 11, 1973 defendant Brinegar executed and sent a letter to Hon. John Jarman, Chairman, Subcommittee on Transportation and Aeronautics of the Interstate and Foreign Commerce Committee of the House of Representatives,

containing comments on the Subcommittee Print of H.R. 9142 (Aug. 2, 1973). A true and correct copy of said letter is annexed hereto and marked Exhibit D.

8. Upon information and belief, on or about November 14, 1973 defendant Brinegar executed and sent a letter to Hon. Warren G. Magnuson and Hon. Norris Cotton, the Chairman and Ranking Minority Member, respectively, of the Senate Committee on Commerce, containing an analysis of problems in the Rail Services Act of 1973 (Working Paper No. 1). A copy of that letter has been appended to "Rail Services Act of 1973", Rep. No. 93-601 (Sen. Committee on Commerce) (93d Cong., 1st Sess., 1973) at 130. A true and correct copy of the letter as reproduced therein is annexed hereto for the convenience of the Court and marked Exhibit E.

9. As a result of all of the above, plaintiffs submit that there is no genuine issue of material fact with respect to their right to the relief sought in their complaint, and, as the plaintiffs' brief filed herewith further shows, that they are entitled to such relief as a matter of law.

WHEREFORE, your deponent prays that this Court enter its judgment: (1) declaring that the Regional Rail Reorganization Act of 1973 is repugnant to the Constitution of the United States in the matters set out in the complaint herein; (2) enjoining the operation, execution and enforcement of the Regional Rail Reorganization Act of 1973 to the extent that such injunction may be necessary to preserving the constitutional rights of the plaintiffs herein; and (3) granting such other and further relief as the Court may deem appropriate.

Sworn to before me this
day of April, 1974

/s/ Louis A. Craco
Louis A. Craco

HELENE EINHORN
Notary Public, State of New York No. 24-6163990
Qualified in Kings County, Certificate filed in NY County,
Commission Expires March 30, 1976

[EXHIBIT A]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

It is hereby stipulated and agreed by and between the attorneys for the parties hereto that the facts hereinafter set out are deemed to be true, solely for the purposes of any motion for summary judgment or partial summary judgment made by any party in connection with the above-captioned matter, with the same force and effect as if they had been proved by competent and uncontradicted evidence. This stipulation pertains to the use of the following facts for the aforesaid purposes in this action only and in any other proceeding, cause, action, matter or context does not constitute agreement as to the accuracy of said facts.

IT IS HEREBY STIPULATED AND AGREED

1. Subsequent to June 21, 1970, the following lessors of leased lines of Penn Central Transportation Company (hereinafter respectively "Lessors" and "Penn Central") filed petitions for reorganization pursuant to Section 77 of the Bankruptcy Act in the Eastern District of Pennsylvania, Docket No. 70-347:

a. United New Jersey Railroad and Canal Co.
b. Beech Creek Railroad Co.
c. Cleveland, Cincinnati, Chicago & St. Louis Railroad Co.
d. Cleveland & Pittsburgh Railroad Co.
e. Connecting Railway Co.
f. Delaware Railroad Co.
g. Erie and Pittsburgh Railroad Co.

h. Michigan Central Railroad Co.
i. Northern Central Railway Co.
j. Penndel Co.
k. Philadelphia, Baltimore and Washington Railroad Co.
l. Philadelphia and Trenton Railroad Co.
m. Pittsburgh, Youngstown & Ashtabula Railway Co.
n. Pittsburgh, Fort Wayne & Chicago Railway Co.
o. Union Railroad Company of Baltimore

2. The following plaintiffs own the approximate principal amounts of mortgage bonds of Penn Central and of certain Lessors secured by mortgages on rail properties and other properties of Penn Central and certain Lessors set forth opposite their respective names:

a. Connecticut General Insurance Corporation	$ 31,025,000
b. Connecticut Mutual Life Insurance Company	9,985,000
c. The Equitable Life Assurance Society of the United States . .	147,509,000
d. Metropolitan Life Insurance Company	69,687,000
e. The Prudential Insurance Company of America	35,395,000

all as set forth in greater detail on pages 1 and 2 of Schedule A to Second Verified Report of Institutional Investors Penn Central Group as to Changes in Group Membership and Holdings (Doc. No. 7346).*

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* Document references are to documents of record in reorganization proceedings of Penn Central under Section 77 of the Bankruptcy Act in the Eastern District of Pennsylvania, Docket No. 70-347.

3. The unpaid principal amounts of outstanding bonds issued under or secured by the indentures, mortgages and deeds of trust of which the plaintiffs which are corporate trustees or successor corporate trustees are as set forth on the chart attached hereto as Exhibit A.

4. It is likely that some of the rail properties of Penn Central and Lessors will be designated pursuant to each subsection of Section 206(c)(1) of the Regional Rail Reorganization Act of 1973 (the "Act") for transfer, sale or other conveyance pursuant to Section 206(d) of the Act in any final system plan prepared under the Act.

5. It will not be possible to ascertain until completion of the planning and approval process required by the Act

(i) which rail properties of Penn Central and Lessors will be designated for transfer or conveyance to Consolidated Rail Corporation ("CRC");

(ii) the value of such designated properties on a liquidation basis assuming liquidation is commenced as of the date hereof or as of any other given date;

(iii) the value of such designated properties on any basis other than a liquidation basis; or

(iv) the value of the consideration which will be exchanged for such designated properties.

6. The rail properties of Penn Central and Lessors which are likely to be designated for transfer or conveyance as hereinabove stipulated are likely to include some of the rail properties on which plaintiffs have liens; any rail properties of Penn Central or Lessors which are transferred or conveyed to CRC pursuant to the final system plan will be transferred or conveyed free and clear of any liens which plaintiffs may have on such properties.

7. As of February 28, 1974, Penn Central is generating deficit net railway operating income, deficit total income, deficit income available for fixed charges and deficit net income, as those items are determined in accordance with accounting regulations of the Interstate Commerce Commission.

[Source – Doc. No. 7224]*

8. Within the meaning of Section 207(b) of the Act, Penn Central is not "reorganizable on an income basis within a reasonable period of time under Section 77 of the Bankruptcy Act."

9. Without taking into account the Act or the implementation of any provision thereof, Penn Central is not able to achieve a successful reorganization as a common carrier within a reasonable period of time under Section 77 of the Bankruptcy Act.

10. During the period beginning on June 21, 1970, and ending on December 31, 1973, Penn Central sustained ordinary net losses in an amount which approximates $851,000,000, as shown in Trustees' Financial Statements for June 22-30, 1970, third quarter 1970, October 1970, November 1970, December 1970, 1971, 1972 and 1973.

[Source – Docs. Nos. 256, 431, 630, 786, 1309, 3415, 5224 and 6986]

11. During the period beginning on June 21, 1970, and ending on December 31, 1973,

(a) Penn Central utilized in operating its rail properties approximately $137,500,000 of non-recurring cash items as follows:

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*Where appropriate, for ease of reference, the underlying source of the stipulated fact is indicated.

Source	Amount
Trustees' Certificate Drawdowns	$100,000,000
Tenants Tax Escrow Account	3,100,000
Proceeds from New Haven Property Sale	9,100,000
Sale of Freight Cars to P&LE	7,300,000
M.B.T.A. Settlement	9,100,000
Proceeds from Madison Square Garden	2,400,000
Proceeds from Sale of Continent Compensation Fund	6,500,000
Total	$137,500,000

[Source – Doc. No. 7244 (Varalli affidavit, Ex. T-1)]

(b) Penn Central expended $2,100,000 in proceeds from drawdowns from mortgage indenture funds in connection with the Selkirk Yard Improvement and $15,700,000 in proceeds from the "Agnes" Flood Loan.

[Source – Doc. No. 7244 (Varalli affidavit, Ex. T-1)]

(c) Penn Central utilized in operating its rail properties approximately $157,000,000 in income from non-rail properties as set forth in the analysis attached hereto as Exhibit B.

12. During the period beginning on June 21, 1970, and ending on December 31, 1973, Penn Central deferred approximately $241,000,000 in state and local taxes, which amount includes from $44,100,000 to $47,900,000 allocable to pre-reorganization period. These taxes ($241,000,000) are included in the ordinary net losses stipulated in item 10 above.

[Source – Doc. No. 7245 (Guest affidavit, p. 5); Tr. pp. 11,162-63,* Stipulation between

*Tr. references are to the transcript in the above-mentioned Penn Central reorganization proceedings.

counsel for Penn Central Trustees and USA, ICC Transcript p. 1497, Letter dated April 1, 1974, from counsel for Penn Central Trustees to Judge Fullam]

13. During the period beginning on June 21, 1970, and ending on December 31, 1973, Penn Central deferred approximately $101,000,000 in rentals on leased line properties. It cannot be determined at this time whether unpaid leased line rentals are in fact a valid claim against the Penn Central estate or whether the Penn Central estate has claims against the lessor companies in respect of losses incurred by Penn Central in the operation of the leased lines since bankruptcy. The deferred leased line rentals are included in the ordinary net losses stipulated in item 10 above.

[Source – Doc. No. 7245 (Guest affidavit, p. 9); Tr. pp. 11,263-64, Guest ICC Exhibit 23, p. 4, Guest Testimony, ICC Transcript pp. 1,875-76]

14. During the period beginning on June 21, 1970, and ending on Dec. 31, 1973, Penn Central deferred approximately $104,000,000 in interest on mortgage and collateral trust debt. It has not yet been determined which issues of bonds are fully secured and therefore entitled to post-bankruptcy interest. The deferred interest on mortgage and collateral trust debt is included in the ordinary net losses stipulated in item 10 above.

[Source – Doc. No. 7245 (Guest affidavit, p. 9), Guest ICC Exhibit 22, p. 7, Guest ICC Exhibit 23, p. 4]

15. The aggregate amount of trustees' certificates issued by the Trustees of Penn Central is $100,000,000.

16. Neither the Penn Central Trustees nor any plaintiff herein has sought reorganization under the Act, by petition or otherwise.

Dated: April 15, 1974

/s/ Thomas L. Bryan
Attorney for Plaintiffs

/s/ Willaim R. Perlik
Attorney for Defendant
United States Railway Association

/s/ James F. Dausch
Atrorney for Defendants
Brinegar, Shultz, Stafford and
United States of America

EXHIBIT A

BONDS OUTSTANDING UNDER INDENTURES OF SPECIFIED INDENTURE TRUSTEES

(Dollars in Thousands)

Indenture Trustee	Penn Central System	UNJ	Reach Creek	Big Four	Connecting	Michigan Central	Northern Central	PB&W	Penn Transpl & Terminal	Elmira & Williamsburg	Total	Bank Officer
The Bank of New York	$276,047										$276,047	W.L. Baker, (V.P. Ret., Morgan Guaranty Trust)
Bankers Trust Company	69,132			$32,255		$9,397					110,784	James Petterson, V.P.
The Fidelity Bank		$20,000					$14,731				34,731	John H. Clapham, Assistant Secretary
The First Pennsylvania Banking and Trust Company								$ 44,642			44,642	William Kayer, V.P.
Girard Trust Bank	191,205	8,310			$32,088					$983	232,566	O. Keller, Trust Officer
National Commercial Bank and Trust Company	4,246										4,246	James Conwell, V.P.
United States Trust Company of New York	8,054										8,054	Malcolm Hood, V.P.
American National Bank and Trust Company				46,277							46,277	Richard Guthrie, V.P.
Irving Trust Company	67,941		$4,592	3,135							75,668	James Vaughan, V.P.
Mellon Bank, N.A.								69,343			69,343	D.A. Hazlett, V.P.
Wilmington Trust Company	17,111										17,111	Walter Sullivan, V.P.
Provident National Bank									$47,000		47,000	David Robb, V.P.
TOTAL	$633,736	$28,310	$4,592	$81,677	$32,088	$9,397	$14,731	$113,985	$47,000	$983		
										GRAND TOTAL	$966,469	

ANALYSIS OF NET "NON-RAIL" INCOME
DETAIL OF COMPILATION

Source ICC Form R1: (1973 Line No. Ref.)	Item	June 21 to Dec. 31, 1970	1971	1972	1973
		($ in millions)			
Sched. 300 Line No. 33	Other Income	$26.7	$54.3	$56.5	$60.2
Less Rail Related Items:					
Sched. 300 Line No. 23	A/C 509-Inc. Lse. of R.E.	.1	.4	.3	.3
" " 26	512 Sep. Oper. Prop. Pft.	(Net Below)	.1		.1
" " 29	516 Inc. From Skg. Fds.	.8	3.5	3.6	5.2
Total	"Rail Related" Income	.9	4.0	3.9	5.6
	"Non-Rail" Income	25.3	50.3	52.6	54.6
Sched. 300 Line No. 43	Misc. Deductions	10.4	23.0	18.6	21.5
Less Rail Related Items:					
Sched. 300 Line No. 33	A/C 545-Sep. Oper. Prop. Loss	(Net) 1.4	4.2	3.5	4.3
" " 42	551 Misc. (L.V. Impairment)	2.3	8.4*	4.8	4.4
Total	"Rail-Related" Misc. Ded.	3.7	12.6	8.3	8.7
	"Non-Rail" Misc Ded	6.7	10.4	10.3	12.9
"Non-Rail" Income less "Non-Rail" Misc. Ded.		19.1	39.9	42.3	41.8
...ed. 300 Line No. 4	Tax Allocation Cr.	(4.9)	3.9	7.1	8.0
...et Non-Rail Income		$14.2	$43.8	$49.4	$49.8

*Includes Service Interruption Policy of $3.9 Million

April 15, 1974

EXHIBIT B

[EXHIBIT C]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

C. C. SHANNON, being duly sworn, deposes and says:

1. I am President of Wyer, Dick & Company, Transportation and Traffic Consultants, ("Wyer Dick"), which is a wholly owned subsidiary of Edwards & Kelcey, Inc., Engineers and Consultants. My business address is 8 Park Place, Newark, New Jersey 07102. Wyer Dick has been retained by Institutional Investors Penn Central Group to advise it in connection with the reorganization of Penn Central Transportation Company.

2. The map which is annexed hereto as Exhibit A was prepared by personnel of Wyer, Dick under my supervision and direction. Exhibit A is an accurate depiction of the treatment of the lines of the Penn Central system (subject to certain minor abandonments of track) as proposed in the Report, "Rail Service in the Midwest and Northeast Region" by the Secretary of Transportation, submitted in accordance with Section 204 of the Regional Rail Reorganization Act of 1973 and dated February 1, 1974 together with certain supplements and corrections published by the Secretary of Transportation up to the date of this affidavit (the "Report").

3. Pursuant to the Penn Central Transportation Report, Form A, as of December 31, 1972, Penn Central Transportation Company operated approximately 19,850

miles of road including both owned and leased lines. The blue lines on Exhibit A depict portions of the Penn Central system which are not denominated by the said Report as being either not necessary to serve those points recommended for service or as duplicate feeder lines. Based upon my experience with the Penn Central system and with interpreting maps of this character, I estimate that the blue lines on Exhibit A cover between 12,000 and 13,000 miles of Penn Central operated trackage.

/s/ C. C. Shannon
C. C. SHANNON

Sworn to before me this
4th day of April, 1974.

/s/ Helene Einhorn
Notary Public

HELENE EINHORN
Notary Public, State of New York
No. 24-6163590
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1976

[EXHIBIT E]

The Secretary of Transportation,
Washington, D.C., November 14, 1973.

Hon. Warren G. Magnuson,
Chairman, Senate Committee on Commerce,
Washington, D.C.

Hon. Norris Cotton,
Ranking Minority Member, Senate Committee on Commerce, Washington, D.C.

Dear Mr. Chairman and Senator Cotton: In our letter to you of November 13 concerning the Rail Services Act of 1973 (Working Paper No. 1), we promised to send you by close of business today our analysis of the problems in the draft with respect to valuation and conveyance of rail properties and abandonment of rail lines, along with suggested amendments designed to overcome them. That is the purpose of this letter.

PROBLEMS WITH THE PRESENT DRAFT

At our urging, the House Committee made extensive changes in its original H.R. 9142 in an attempt to make it clear that the transfer of rail properties to the Corporation by railroads in reorganization was to be accomplished by a court approved exchange within the context of a reorganization under section 77 of the Bankruptcy Act, and not by condemnation of those properties. The reason for this was that both we and the sponsors of the House bill were convinced that to proceed by means of what a court might deem to be condemnation, rather than by reorganization, would have two undesirable consequences: the value that would be ascribed to the rail properties would be higher and that value, whether or not it was higher, would probably have to be paid in cash or, if not,

then the stock of the Corporation would have to be valued at its initial market value, rather than on the basis of its projected earning power over a reasonable period of time. The enclosed memorandum of law cites authorities for our conclusions in this regard.

Our preliminary estimate is that a taking by condemnation would raise the price very substantially. Even if it did not, the necessity of having to pay for the rail properties in cash or Government-guaranteed bonds would eliminate all chances for having a profitable, private enterprise railroad, which is the primary object of the legislation. (The only alternative would be to have the Government put up the cash or bonds, without recourse to the Corporation. That is clearly unacceptable.) For those reasons, we feel that it is imperative to avoid acquisition of rail properties by condemnation. In our opinion, the present draft does not avoid the condemnation pitfall.

The essence of condemnation is to deprive a property owner by operation of law of its options to do anything with his property but sell it to the Government or a designated public utility. While it may well be most advantageous for a railroad in reorganization to reorganize by conveying its assets to the Corporation pursuant to this bill, if all other options available to the railroad are foreclosed by the statute, then what you have is, in legal effect, a condemnation.

The issue here is not whether the Congress has the authority to condemn property: Nobody disputes that it does. Neither is it disputed that a reorganization court has authority to require the trustees of a railroad in reorganization to exchange rail properties for stock without the transfer being labeled "condemnation". A reorganization court clearly has the authority to do so, provided the

exchange is both "consistent with the public interest" and "fair and equitable" to the debtor's estate. But to avoid "condemnation", the court must have the option not to order the exchange.

The present draft (Working Paper No. 1) would eliminate for all time the option of dismissing the reorganization proceeding (page 35), and would leave the reorganization courts with what we believe to be only an illusory option.

At pages 26 and 47-48 the draft requires the conveyance of rail properties of the railroads in reorganization to the Corporation. This conveyance is required before any court can evaluate the proposed transaction and make a judgment as to whether it would be fair to the creditors of the railroads in reorganization to proceed in this manner. Although a railroad could ostensibly reorganize without conveying assets to the Corporation under the amendment to section 77 of the Bankruptcy Act at page 35 of the draft (and it is not even clear from the language of the draft that this would free it from the mandatory taking provisions), the draft requires that such a plan of reorganization be both approved and confirmed by the time the final system plan becomes effective.

In all likelihood, it would not be possible to get a plan approved and confirmed that quickly, even for a railroad which is relatively small. Thus, the courts would probably hold the option illusory. Moreover, even if it were a real option, it would not be feasible for those railroads in reorganization if the court were to find it impossible to reorganize on an income basis under section 77. And most of the railroads in reorganization may be in that position.

The present draft (at page 35) requires an adjudication of bankruptcy for any railroad which has not reorganized under section 77 by the effective date of the final system plan. Presumably, although the language of the draft does not make this clear, its rail properties designated in the final system plan for transfer to the Corporation or profitable railroads would be conveyed to the latter in the course of the bankruptcy proceedings. The declaration of bankruptcy would come after the effective date of the final plan (that is, after expiration of the period during which the Congress could amend or reject the plan); but if the reorganization court proceeds expeditiously to carry out the mandate of the bill, bankruptcy would be declared before the transfer of assets could be consummated.

We think that this is not only unnecessary but very costly. In a bankruptcy, secured creditors are permitted to foreclose on their security and the property in the estate is liquidated expeditiously so as to yield the maximum amount to creditors. There is no obligation to take the public interest into account. In section 77 proceedings, however, creditors are not entitled to foreclose on their security or reduce all property to cash. They have a continuing obligation to keep their equity invested in a public service enterprise. And the nature and amount of the securities which they receive in satisfaction of their claims is limited by the public interest in seeing to it that the reorganized railroad does not have a debt structure which is too great for it to bear. All that is required under section 77 is that the creditors receive fair and equitable treatment. While this does not mean that they can be given worthless paper, it does permit a reasonable amount of flexibility. Accordingly, the plan should be not only approved in a reorganization context, but consummated in a reorganization context.

Moreover, it would probably be in the best interests of creditors selling to the Corporation, and thereby getting out of the railroad business, to reorganize around their non-rail properties and tax loss carryforwards rather than liquidate. To deprive them of this right might itself be deemed a condemnation for which compensation would have to be paid.

For all of these reasons, we believe that it is very unwise to have the rail properties transferred in bankruptcy rather than in reorganization proceedings. That would appear to be an unintended result, and I believe that the enclosed amendments will cure the problem.

The present draft, at pages 26 and 51, permits the abandonment, absent a subsidy, of all rail properties of a railroad in reorganization which are not designated for rail service in the final system plan. Since we believe that a meaningful choice must be given to the special court on the issue of whether or not to order the transfer of rail properties pursuant to the final system plan, we also think that it is important to give the court as much incentive as possible to order such a transfer. We therefore think the right to abandon lines not designated for service in the final system plan should be a privilege conferred only upon railroads joining the Corporation and should be considered to be part of the benefit which they receive in exchange for transferring rail properties.

We dislike very much the term "just compensation value" because the language of just compensation is unmistakably that of the eminent domain clause of the Fifth Amendment of the Constitution. Moreover, the use of such a term is unnecessary. What the special court should do on deciding the adequacy of the compensation is look at the fairness and equity of the whole transaction or matrix

of transactions constituting compliance with the final system plan as well as all the consequences of proceeding with those transactions. The special court should not merely measure the value of the securities going to the railroads in reorganization against the value of the rail properties coming from them.

OUR PROPOSED AMENDMENTS

One of the main purposes of our proposed amendments, which are enclosed, is to avoid a court determination that the rail properties were acquired by condemnation. We therefore make it clear that what is being offered to the railroads in reorganization is an opportunity to reorganize by conveying some of its rail properties to the Corporation under the final system plan. We leave open the option in the special court to turn down this course of action if it cannot be done in a way which is fair and equitable to the estate, as well as in the public interest. But we give the special court the power to amend the plan so as to reallocate the stock of the Corporation and supplement it with a limited amount of FNRA bonds if that should be necessary. By applying a traditional test of a plan of reorganization (fairness and equity to creditors) to the question of whether the transfers of rail assets should be approved, we permit the special court to consider the value to the railroad of getting out of the railroad business by abandoning lines not conveyed (a privilege only available by conveying under the plan by virtue of our amendments) and being able to reorganize around non-rail properties with the help of a large tax loss carryforward. We also permit it to consider the public interest in effectuation of the final system plan, another matter traditionally considered in section 77 reorganizations.

In order to retain the benefits of reorganization under section 77 and the attractiveness of reorganization under this Act to the creditors, we do not require or even permit a railroad in reorganization to be adjudicated bankrupt.

While we believe that, in order to avoid condemnation, it is necessary to give the special court the right to turn the final system plan down with respect to each of the railroads in reorganization, we have posed the decision for the court in a traditional reorganization context and given it the power to amend the final system plan so that we think the chances for effectuation of the plan are extremely good.

We change the provisions requiring conveyance of rail properties before termination of the litigation before the special court because we believe that those provisions pose a serious risk that a court would characterize the process as condemnation. If this is to be deemed a reorganization, the court must have the opportunity to say no to the final system plan at a time when all the relevant facts can be presented to it. Instead, we authorize the special court to order the transfer of rail properties pending appeal.

In addition to the above amendments on valuation and transfer, there are several technical or clarifying changes enclosed herewith.

We appreciate the opportunity to give you our comments on your working draft. Please let us know if we can be of any further assistance.

Sincerely,

Claude S. Brinegar.

Enclosures.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs move the Court, pursuant to Fed. R.C.P. 56, for summary judgment in their favor on the grounds that there is no genuine issue of material fact and they are entitled to judgment in their favor as a matter of law. This motion is based upon the following:

1. The Complaint and Answer.

2. The Affidavit of Louis A. Craco, Esquire, being filed contemporaneously herewith and the Exhibits attached thereto, to wit:

A. Stipulation of facts entered into by the parties for the purposes of this motion;

B. Stipulation of the parties incorporating as part of the record for purposes of this motion extracts from the record *In the Matter of Penn Central Transportation Company, Debtor* (Bky. No. 70-347), lodged in the United States District Court for the Eastern District of Pennsylvania;

C. Affidavit of C. C. Shannon;

D. Letter of Claude S. Brinegar dated September 11, 1973 addressed to Hon. John Jarman, Chairman, Subcommittee on Transportation and Aeronautics of the Interstate and Foreign Commerce Committee of the House of Representatives;

E. Letter of Claude S. Brinegar dated November 14, 1973 addressed to Hon. Warren G. Magnuson and Hon. Norris Cotton, the Chairman and Ranking Minority Member, respectively, of the Senate Committee on Commerce; and

F. Report of defendant Claude S. Brinegar in his capacity as Secretary of Transportation of the United States of America, entitled "Rail Service in the Midwest and Northeast Region" (Volume 1, Volume 2 (Part 1), and Volume 2 (Part 2)), and supplement thereto entitled "Volume 2, Supplement to Local Rail Service Zone Reports".

WHEREFORE, plaintiffs pray that this Court enter its judgment:

1. Declaring that the Regional Rail Reorganization Act of 1973 is repugnant to the Constitution of the United States in the matters set out in the Complaint herein;

2. Enjoining the operation, execution and enforcement of the Regional Rail Reorganization Act of 1973 to the extent that such injunction may be necessary to preserving the constitutional rights of the plaintiffs herein; and

3. Granting such other and further relief as the Court may deem appropriate.

/s/ Frederic L. Ballard
Frederic L. Ballard
Attorney for Plaintiffs

Of Counsel:

Willkie Farr & Gallagher
1 Chase Manhattan Plaza
New York, N. Y. 10005

Ballard, Spahr, Andrews & Ingersoll
Land Title Building
Philadelphia, Pa. 19110

Dated: April 16, 1974.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

MOTION OF INTERVENING DEFENDANTS
FOR SUMMARY JUDGMENT

Intervening defendants, George P. Baker, Robert W. Blanchette, and Richard C. Bond, Trustees of the Property of Penn Central Transportation Company, Debtor, move for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure.

Respectfully submitted,

/s/ John B. Rossi, Jr.

John B. Rossi, Jr.
John F. DePodesta
1836 Six Penn Center Plaza
Philadelphia, Pennsylvania 19104
215–594-2271

Charles A. Horsky
Brice M. Clagett
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006
202-293-3300

Attorneys for the Trustees of the property of Penn Central Transportation Company, Debtor

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants move the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment in their favor on the grounds that there is no genuine issue of material fact and that they are entitled to judgment in their favor as a matter of law. This Motion is based upon the following:

(1) Complaint and Answer;

(2) Stipulation of facts entered into by the parties for the purposes of any motion for summary judgment;

(3) Stipulation of the parties incorporating as part of the record in this Action extracts from the record in *In the Matter of Penn Central Transportation Company, Debtor* (Bky. No. 70-347), lodged in the United States District Court for the Eastern District of Pennsylvania;

(4) The portions of the record described in the preceding paragraph (3) which are cited and relied upon by Defendants in the Brief of Defendants in Opposition to Plaintiffs' Motion for Summary Judgment and in Partial Opposition to Intervening Defendants' Motion for Summary Judgment, filed in this Action on May 17, 1974;

(5) Affidavit of Jerome E. Sharfman, dated May 10, 1974;

(6) Northeastern Railroad Problem, a Report to the Congress Submitted by the Secretary of Transportation in Response to S. J. Res. 59-2, dated March 26, 1973;

(7) Report of Defendant Claude S. Brinegar in his capacity as Secretary of Transportation, entitled "Rail Service in the Midwest and Northeast Region" (Volume 1, Volume 2 (Part 1), and Volume 2 (Part 2)), and supplement thereto entitled "Volume 2, Supplement to Local Rail Service Zone Reports."

WHEREFORE, Defendants pray that this Court enter its judgment in favor of the Defendants and dismissing this Action.

May 24, 1974

CARLA A. HILLS
Assistant Attorney General

ROBERT E. J. CURRAN
United States Attorney

DAVID J. ANDERSON
Special Litigation Counsel

Of Counsel:

RODNEY E. EYSTER
General Counsel

JEROME E. SHARFMAN
STUART G. MEISTER
MICHAEL T. HALEY
Attorneys
U.S. Department of
Transportation
Washington, D.C. 20590

/s/ James F. Dausch
JAMES F. DAUSCH
Attorney
United States Department of Justice

Attorneys for United States of America, Claude S. Brinegar, George M. Stafford and George P. Shultz

/s/ William R. Perlik
WILLIAM R. PERLIK
Attorney for the United States Railway Association

Of Counsel:

Wilmer, Cutler & Pickering
1666 K Street, N.W.
Washington, D.C. 20006

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

AFFIDAVIT OF JOHN W. INGRAM

JOHN W. INGRAM, being duly sworn, deposes and says:

INTRODUCTION

1. My name is John W. Ingram. I am the Administrator of the Federal Railroad Administration within the United States Department of Transportation, a position which I have held since September 30, 1971. I was formerly the Vice-President of Marketing for the Illinois Central Railroad from 1966 to 1971; Director of Cost and Price Analysis at Southern Railway from 1961 to 1966; and Director of Profit Analysis for the New York Central Railroad from 1955-1961. I received my degree of Bachelor of Science in Business Administration from Syracuse University in 1952 and the degree of Master of Science in Transportation Economics from the Columbia Graduate School of Business in 1955.

2. This affidavit is submitted for the purpose of demonstrating that the Regional Rail Reorganization Act of 1973 ("Act"), P.L. 93-236, 87 Stat. 985, provides financial and legal resources whereby a financially self-sustaining rail system can be created around the rail system currently operated by railroads in reorganization in the Midwest and Northeast region ("region") of the Nation.

BACKGROUND OF REGIONAL RAIL PROBLEM

3. The rail industry in the region is afflicted by many special problems stemming in large part from its inability to adapt its operational patterns, most of which were laid out 50 or more years ago, to today's economic conditions. Unlike the railroads in other regions of the country which have experienced a general growth in rail traffic, eastern railroads have experienced a long-term post war decline in traffic.[1] The loss of rail traffic in the region was due to a number of factors most of which occurred concurrently, including the decline in the traditional coal and ore business which had provided the base traffic for many carriers, the shift in manufacturing activity to other regions, and the early completion of an extensive limited access highway system. Passenger traffic on eastern railroads – a service which had a significant bearing on the size and type of plant operated – declined from 24.0 billion to 3.7 billion revenue passenger miles during the period 1947 to 1973.[2]

4. Loss of traditional markets need not spell disaster for a business, of course. The normal response would be both to establish new services and gain new business, and to alter services and operations on that traffic which is declining so that the reduced volumes are handled as efficiently as possible. In either case, major changes in service, plant, and equipment are necessary. Because of a number of constraints, these changes did not occur either on a wide enough basis or rapidly enough to stem the

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[1] Source: Yearbook of Railroad Facts – 1974 Edition, Economics and Finance Dept., Association of American Railroads, page 29.

[2] *Id.* at 31.

decline of railroads operating in the region. Several of the bankrupt carriers were simply too small to develop new markets. The larger roads, which had the size to go after new traffic, found that the combined effects of a lack of capital, the natural reluctance of labor to change and the restrictive provisions of the Interstate Commerce Act made it difficult to eliminate unneeded services or to implement new services as rapidly as was required.

5. A similar situation thwarted most attempts to bring their plant and service levels down to the level required to handle lower volume efficiently. Regulatory constraints slowed attempts to reduce the level of passenger service and light density line operations. A lack of capital made reduction in the size of plant difficult to implement. For example, the New York Central, which did implement a number of plant reduction and modernization programs, was largely dependent on internal cash flow to financially support these programs. The basic source of capital for reducing their mainline from four to two tracks (using improved signalling to provide the needed capacity) was . from the sale of scrap rail from the tracks being removed, and as a result a program which was started in the mid-fifties and could have been completed in three or four years never was completely accomplished.

6. Given the constraints, the basic management response was to keep costs less than revenues by deferring maintenance thereby setting up a classic cycle where, as the plant deteriorated the service levels declined, causing further loss of revenue which forced further cost reductions. The cycle resulted in the threat of cessation of service by many of the eastern bankrupt railroads and led to the passage of the Regional Rail Reorganization Act of 1973.

ACT PROVIDES COMPREHENSIVE PLANNING PROCESS

7. The Act has for its purpose the creation of a financially self-sustaining rail system in the region. To assure that this goal is met, the Act provided for the establishment of an independent corporation, the United States Railway Association ("Association"), to plan and finance the restructuring of a rail system that will be financially self-sustaining and adequate to meet the service requirements of the region, and by providing for the establishment of a private corporation, the Consolidated Rail Corporation ("Corporation"), to operate and modernize rail properties conveyed to it under the Final System Plan.

8. The planning process for restructuring rail service within this region is to be accomplished in seven basic steps:

(a) Within 30 days of the date of enactment of the Act, the Secretary of Transportation ("Secretary") was required to submit a report ("the Secretary's Report") containing his conclusions and recommendations for rail service within and between the several geographic zones of the region and describing the criteria used in developing those conclusions and recommendations. The Secretary issued his Report on February 1, 1974.

(b) The Rail Service Planning Office ("RSPO") of the Interstate Commerce Commission ("ICC"), established pursuant to the Act, was directed to hold public hearings on the Secretary's Report and prepare a report containing an evaluation of the Secretary's recommendations. The RSPO issued its Report on May 2, 1974.

(c) The Association will prepare a Preliminary System Plan based upon the Reports prepared by the Secretary and the RSPO ("First RSPO Report").

(d) The RSPO will hold public hearings on the Preliminary System Plan and prepare a Report evaluating the Plan ("Second RSPO Report").

(e) The Association will then prepare a Final System Plan taking into consideration the changes recommended by the Second RSPO Report and its own further studies.

(f) The ICC will prepare an evaluation of the Final System Plan.

(g) The Congress will have an opportunity to reject the Final System Plan before it becomes effective. If rejected, the Plan must be revised by the Association and returned to the Congress, and the Congress again has an opportunity to reject it.

FIRST REPORTS UNDER ACT HAVE IDENTIFIED PLANNING APPROACH AND STRATEGY FOR RESTRUCTURING THE RAILROADS IN REORGANIZATION INTO A VIABLE RAIL SYSTEM

9. Congress carefully developed the critical path of the planning process so that all elements in the restructuring of the northeastern rail system would be identified and so that all affected parties would have access and input to the planning process. The Secretary's Report was the initial step. Utilizing available data and expertise, the Secretary's Report presented the general planning approach and strategy for restructuring the railroads in reorganization into a viable system. The First RSPO Report represents the second step in the planning process. The RSPO hearing process affords all interested parties the opportunity to comment on the Secretary's Report and to present specific detail regarding service requirements which were not available for the Secretary's Report. Together, these two Reports provide

a solid base for subsequent steps by the Association as it proceeds with the planning process.

10. The Secretary's outline of major conclusions and recommendations, which are set forth in Attachment A, are not directly comparable to the RSPO outline of principal recommendations, which are set out in Attachment B. The Secretary's conclusions and recommendations focus upon outlining a general planning approach and directing the restructuring process toward retention of rail service rather than the rail plant itself. The RSPO's recommendations focus in detail upon the need to refine the quantitative criteria employed in the Secretary's analysis. For example, the conclusions and recommendations in the Secretary's Report give emphasis to the need to achieve major increases in the capital productivity of the industry, suggest a two level approach to a competitive reorganization of the industry, and emphasize the importance of participation by the region's solvent carriers in the reorganization. The RSPO recommendations urged the Association to seek more complete traffic data, to scrutinize with care the rail line capacity assumptions made by the Secretary, to evaluate the extent to which intramodal rail competition can be economically sustained, and to question whether or not the Secretary's estimates as to what constitutes an efficient size train are valid.

11. A close examination of the two Reports reveals, however, that the recommendations of both the Secretary and the RSPO to the Association are basically consistent. Some of the most important principles about which the Secretary and the RSPO Reports expressed substantial agreement are as follows:

A. *Productivity* – Both the Secretary and RSPO emphasized the need and opportunity to increase the efficiency

and the capital productivity of the rail industry. Quoting from the Secretary's Report,

> "The greatest potential for improvement in capital productivity lies in increasing the rate of utilization of the fixed plant (right-of-way and yards), increasing the productivity of equipment, and eliminating unnecessary excess capacity." Vol. I, page 8.

Part I of the Secretary's Report identified those aspects of rail operations which offered the greatest opportunity for major improvements in railroad efficiency and productivity and Part II evaluated in more detail the opportunities for improving railroad operating efficiency through restructuring interstate and local service. The Secretary suggested that the restructuring should seek to consolidate redundant routes serving parallel interstate flows and should seek to reduce inefficient duplication of local service.

Regarding mainline consolidation, the First RSPO Report states:

> "In line-haul operations, too, there are opportunities for increased efficiencies and savings. . . . Where closely parallel lines exist . . . two carriers might well share both, maintaining one to high standards . . . the other at a lower standard . . . ." Page 23.

Regarding local service the Report states:

> "In the port area around Newark, New Jersey, three railroads now operate yard facilities. . . . None operates its yards to their design capacity, ...

"In . . . these situations modernization and consolidation of facilities would lead to far more efficient operation, lower costs, and far better service. The Association should look most carefully at this very fruitful field for accomplishing cost reductions and service improvements." Page 23.

B. *Competition* – Both the Secretary and RSPO emphasized that the restructuring should seek to enhance effective competition. Both Reports also recognized that there is a trade-off between intramodal competition and operating efficiency. In addition to indicating a two level approach to be taken in the restructuring process, the Secretary's Report presented a preliminary evaluation of where intramodal competition should be maintained. RSPO questioned and suggested weakness in the quantitative values employed in the Secretary's analysis, however, RSPO agreed with the analytical direction which the restructuring process should take. Quoting from the First RSPO Report,

"We think it is safe to assume that, by any criterion, the major markets in the region can sustain competing rail operations, ... At the same time, there will no doubt be situations, . . . in which cost and other considerations will militate against the success of any attempt to promote or retain viable competitive services." Page 31.

C. *Cross-Subsidies of Uneconomical Service* – Both the Secretary and RSPO agreed that the rail industry should no longer be required to subsidize unprofitable light density lines. Based upon a generalized set

of screening criteria, the Secretary identified those lines which can be categorized as potentially excess or uneconomical lines and whose financial viability should be examined in detail by the Association. The RSPO urged the Association to improve upon the quantitative values used in the Secretary's analysis but it also states:

> "It is unquestionably true that there are excess rail lines in the region. Some are branch lines which do not, and will not, generate enough traffic – or the right kind of traffic – to turn a profit or otherwise to justify their continued existence. Despite hardships to individual users, their retention cannot be supported through cross-subsidization by users of other parts of the rail system, nor are they important enough . . . to warrant their receiving public subsidies." Page 16.

12. While it is probably accurate to say that the two Reports place differing degrees of emphasis on the importance of the three foregoing principles, I feel it is quite significant that at this stage of the process there is fundamental agreement regarding the direction in which the restructuring process should proceed.

ACT PROVIDES NEW REORGANIZATIONAL LEGAL AND FINANCIAL TOOLS TO CARRY OUT PLANNING APPROACH AND TO IMPLEMENT NEW REORGANIZATION STRATEGY

13. As noted in paragraph numbers three through six above, the railroad industry in the region is afflicted by many special problems stemming in large part from the

overcapacity of the rail system and certain fundamental changes that have occurred over the years in the economy of the region. The Act provides the following special procedures for overcoming these problems:

A (1). The Act provides for a new, single program by which the rail systems of the railroads in reorganization in the region can be restructured without the limitations typically imposed by corporate history and regulatory strictures. Prior to the passage of the Act, numerous legal hurdles (such as the requirements of Sections 1(18), 5, and 13a of the Interstate Commerce Act [49 U.S.C. §§1(18), 5 and 13a], and Section 102(2)(C) of the National Environmental Policy Act of 1969 [42 U.S.C. §4332(2)(C)]) effectively precluded railroads from achieving any significant restructuring of their rail system by requiring requests for abandonments, mergers, or consolidations to be handled on a costly and time consuming, case-by-case basis.

(2). The Act provides for a change of this situation by allowing the Association, free from the restraints of existing regulatory strictures, to develop a viable regional rail system, from the rail properties of the participating railroads. See Section 304(c), which modifies the normal ICC abandonment procedures; Section 601 (a), which provides that the antitrust laws are inapplicable to the formulation or implementation of the Final System Plan; Section 601(b), which provides that the provisions of the Interstate Commerce Act and the Bankruptcy Act are inapplicable to transactions under the Act to the extent necessary to formulate and implement the Final System Plan whenever a provision of any such Act is inconsistent with this Act; and Section 601(d), which provides that the provisions of Section

102(2)(C) of the National Environmental Policy Act of 1969 shall not apply with respect to any action taken under authority of this Act before the effective date of the Final System Plan.

B (1). By planning the restructured rail system on a regional basis the Association will be able to increase the productivity of the fixed plant and equipment of the participating railroads through the elimination of uneconomical and redundant capacity and modernization of the consolidated system.

(2). The following passage from the Secretary's Report highlights the excess rail capacity on the local service level which presently burdens the eastern railroads:

> "The dimensions of the duplication of service and excess capacity problems at the local service level can be illustrated by examining the case of Philadelphia's rail system. The city's 19th century transportation requirements brought into being more than 12 different railroads, some less than two miles long. Over the years, many of them were brought under the control of the Pennsylvania Railroad (now the Penn Central). The city's growth and expansion during the subsequent period left little chance to construct new modern yards, and regulatory requirements often stymied efforts to eliminate uneconomic trackage. As a consequence, Philadelphia today has a multitude of freight yards (18 operated by Penn Central, three operated by the Reading and two operated

by the Chessie System) and a maze of duplicative and often parallel trackage (much of which runs down the center of busy streets). The 150 square mile Philadelphia area is served by four Class I railroads which operate within the area approximately 500 miles of line haul trackage and more than 300 miles of yard and siding trackage, as illustrated in Figure 8. While this trackage was constructed to serve a large number of shippers, some have since gone out of business, many are only occasional users of rail service and only a few are users of high volume rail service. For example, although the Penn Central serves more than 1,800 users (industries, coal and ore facilities, grain elevators, intermodal facilities and food terminals), only 36 of these customers account for more than half of the traffic generated in Philadelphia.

"While Philadelphia may be one of the more vivid examples of duplicate and uneconomic local rail service plant, the problem is by no means limited to metropolitan areas. The Bay City, Michigan, zone is an example of the excess capacity problem in a basically rural area. Annually, only 40,000 carloads originate or terminate in the Bay City Zone (about 110 per day), yet three different railroad lines connect the Bay City area to the south and the west (two Penn Central lines and one line of the Chessie System). Additionally, two parallel low density lines extend to the north from Bay City. Typically, each carrier maintains a separate local yard.

"As a result of this redundant railroad system at the local level there are often too many carriers vying for too little traffic with a consequent loss of efficiency, viability and service quality." Vol. I, page 69.

(3). This redundancy in rail capacity in the region is similarly acute on the interstate main line service level. As noted by the First RSPO Report:

"In line haul operations, too, there are opportunities for increased efficiencies and savings. The cost of maintaining a line to 60 mile per hour standards, for example, is far greater than cost of maintaining it to 30 mile per hour standards. In many markets, there is no real need for two railroads to expend the capital and maintenance dollars necessary to have two high speed lines. One such line, built and maintained on a shared cost basis, would supply both with the capacity they need at substantial cost savings. Where closely parallel lines exist (as they do, for instance, between Buffalo and Cleveland) two carriers might well share both, maintaining one to high standards for passenger and fast manifest trains, and the other at a lower standard for lower speed mineral trains or local freights. These are possibilities which should be considered by the Association as it makes its selection of facilities for the restructured regional rail system." Page 23.

(4). Given the planning flexibility provided by the Act, the Association will be able to devise a rail system which has a much higher capital productivity than that currently possessed by the component railroads in reorganization. The potential for increased capital productivity arises from the Association's ability to (a) consolidate yards and maintenance facilities, (b) provide for the Corporation and other profitable railroads sharing facilities and coordinating operations, (c) eliminate the existing, highly duplicative and underutilized individual railroad interstate main lines, as well as the uneconomic light density lines, thus reducing the magnitude of the capital costs that will be needed to rehabilitate the region's rail system. The product of this restructuring process will be the efficient utilization of rail capacity and freight cars, elimination of that portion of the rail network which is a drain on resources, and major improvement to the plant in order to maximize adequate and efficient service.

C (1). In addition to the unique opportunity provided by the Act for facilitating the institutional aspects of a restructuring of the region's rail system, the Act also provides the capital resources necessary to break the cycle of deferred maintenance, deteriorated facilities, poor service, and consequent loss of business.

(2). Significantly, Sections 210 and 211 of the Act authorize the Association to issue up to a billion dollars in federally guaranteed loans to the Corporation. This capital can be used for capital improvements and to eliminate deferred maintenance which would yield substantial returns in increased efficiency and, hence, increased traffic and increased profits. Furthermore, Section 215 of the Act authorizes the Secretary, with

the approval of the Association, to commit during the planning process up to $150 million in obligations of the Association for the upgrading of plant and equipment that will be in the Final System Plan. This infusion of new capital should help reverse the cycle of inadequate maintenance and capital improvements which has plagued the financial distressed railroads in the region for many years.

D. The Act provides a means for the Corporation to avoid cross-subsidization of financially non-compensatory rail lines. Rail lines of railroads reorganizing under the Act which are not included in the Final System Plan would either be abandoned (Section 304) or operated under the subsidy provisions (Section 402) of the Act. Section 402 provides up to $90 million in Federal subsidy funds to the States and local and regional transportation authorities for each of the two fiscal years including and following the effective date of the Final System Plan to pay for the transitional continuation of rail service on these lines. If the States or local or regional transportation authorities subsequently determine that it would be in their best interest to continue such rail service, Section 403 of the Act makes available acquisition and modernization loans to enable such bodies to purchase and upgrade these lines. Through this procedure the Corporation will retain the revenue to be derived from traffic moving to and from these lines, which otherwise might be lost if rail operations on such lines ceased, and yet the Corporation will not be required to underwrite the losses associated with these lines.

E. Even if the railroads in reorganization in the region had been able, on their own, to overcome the legal

hurdles and raise the necessary funds, the extremely high cost of providing protection to the rail employees who would be adversely affected by any major restructuring would have precluded necessary plant restructuring and modernization from taking place. Title V of the Act resolves this problem by permitting the Corporation to reduce its work force to the level actually needed, with the Federal Government assuming the labor protection costs up to the amount of $250 million. In addition, the Act gives the Corporation the extremely valuable right to reassign, reallocate, and consolidate its work force to any location in the system so long as the work is not removed from the coverage of collective bargaining agreements.

F. Another burden which railroads in reorganization in the region have had to bear is that of railroad passenger service deficits.

(1). In particular, Penn Central has never been able to get Amtrak to pay a return on its very substantial investment in the Boston-Washington Corridor, which is used primarily for passenger service. The Act solves this problem by requiring that the Final System Plan provide for the sale or lease to Amtrak by the Corporation of the rail properties in the Boston-Washington Corridor (Sections 206(c)(1)(C) and 601(d)(1)).

(2). With respect to commuter operations, the Act provides that the Final System Plan shall designate which rail properties of railroads which reorganize under the Act may be purchased or leased from the Corporation by a State, or local or regional transportation authority to meet the needs of commuter and intercity passenger service (Section 206(c)(1)(D)). The Association can make loans to such bodies to acquire rail

properties being abandoned pursuant to the Final System Plan and to modernize such properties (Sections 211(a) and 403). Given its planning authority under the Act, the Association will be in a strong position to assure that the Corporation is not saddled with commuter deficits.

PENDING LEGISLATION AND AN IMPROVED REGULATORY CLIMATE WILL STRENGTHEN THE RAILROAD INDUSTRY

14. Measures pending in Congress would strengthen the entire railroad industry, including, of course, Consolidated Rail Corporation.

15. The Surface Transportation Act of 1973 (H.R. 5385) ("STA") was introduced in the House last year by Representative Brock Adams, one of the sponsors of the Act. It had widespread support in both Congress and the railroad industry. STA provides up to $2 billion in loan guarantees for capital improvements in plant and facilities plus up to $3 billion in loan insurance for rolling stock. In addition, it provides $35 million for the design of a freight car information system for the purpose of improving freight car utilization. The STA also would require that rates cover variable costs, eliminate discriminatory State and local property taxation of rail assets, liberalize rail abandonment procedures, and provide for the promulgation by the ICC of standards and procedures for determining adequate rail carrier revenue levels.

16. The Secretary of Transportation has described the STA as "positive legislation"[3] and has proposed a similar

[3] Statement of Claude S. Brinegar, Secretary of Transportation, before the House Committee on Interstate and Foreign Commerce,

(Cont'd)

bill known as the Transportation Improvement Act of 1974 ("TIA") (H.R. 12891 and S. 3237).

17. The TIA does substantially everything the STA does and, in addition, contains some reform provisions dealing with rate regulation.[4]

18. While no one can predict at this time the exact content of railroad legislation which will be forthcoming, the broad consensus in Congress, the Administration and the industry that some legislation of this type is badly needed, together with increasing public recognition of the importance of the railroads to the nation and the severity of their problems, makes it reasonable to believe that some bill along these general lines is likely to be enacted within the near future.

19. The ICC's implementation of regulatory policy indicates an increasing awareness and understanding of the problems facing the railroad industry. For example, the ICC has instituted investigations of the rail freight structure, Ex Parte 270 (Sub-Nos. 1-8), and railroad revenue rate base and rate of return levels, Ex Parte No. 271. In addition, the ICC recently approved a procedure designed to allow railroads' increases in fuel costs to be passed along to shippers promptly in the form of rate increases. Special Permission Order No. 74-1825. Chairman Stafford

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(Footnote 3 cont'd)

on the Transportation Improvement Act of 1974, March 26, 1974, at p. 3.

[4] The TIA does not include the STA's provisions on rolling stock financing. Instead, it permits such financing to be guaranteed out of the $2 billion loan guarantee provisions applicable to capital improvements generally. On March 14, 1974, Congressman Adams introduced a new bill called the Rail Freight Transportation Improvement Act of 1974 which parallels the TIA in this regard (H.R. 13487).

of the ICC recently stated: "Our position of support for loan guarantees for the surface transportation industry is known. We believe they are desirable; with respect to railroads they are critical."[5] He further stated:

> Our task, as regulators, as I see it, is to do what we can to make the railroads attractive as investments once again, to render it profitable for the railroads to make the requisite expenditures for rolling stock and track rehabilitation, all, of course, consistently with the interests of the shippers and the general public.[6]

Moreover, Chairman Stafford has characterized implementation of the Act as "probably the single most important aspect of current railroad regulation. . . ."[7]

CONCLUSION

20. As the foregoing makes clear, the fact that the railroads reorganizing under the Act are not capable of reorganizing independently on an income basis under Section 77 of the Bankruptcy Act does not by any means

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[5] Statement of George M. Stafford, Chairman, Interstate Commerce Commission, before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce on H.R. 5385, H.R. 12891, H.R. 13487, and S. 1149 on March 27, 1974, at p. 52.

[6] Hearings before the Subcommittee on Department of Transportation and Related Agencies Appropriations of the House Committee on Appropriations, 93rd Congress, 2nd Session, March 28, 1974, Part 2, p. 357.

[7] *Id.* at 352.

mean that the restructured system will not be self-sustaining. On the contrary, the Act provides a mechanism, and resources designed by Congress to make that mechanism work, specifically tailored to permit the Corporation to overcome the major obstacles identified above that made the plight of the separate railroads now about to be brought into the Corporation on an integrated and slimmed down basis hopeless. The Act also provides the necessary capital to break the chronic fiscal crises of the railroads in reorganization.

/s/ John W. Ingram
John W. Ingram

DISTRICT OF COLUMBIA,
CITY OF WASHINGTON:

Subscribed and sworn to before me this 23 day of May, 1974.

/s/ Barbara Windon
Barbara Windon
Notary Public

My commission expires August 14, 1978.

ATTACHMENT A

CONCLUSIONS AND RECOMMENDATIONS OF THE SECRETARY OF TRANSPORTATION IN HIS REPORT ON RAIL SERVICE IN THE MIDWEST AND NORTHEAST REGION

The Act directed the Secretary of Transportation to submit a comprehensive report containing his conclusions and recommendations with respect to the geographic zones in the midwest and northeast region within and between which rail service should be provided. The Secretary issued his Report in accordance with the Act on February 1, 1974. The Report, consisting of two volumes, contained the following conclusions:

> "A fundamental consolidation and restructuring of the region's railroad industry (including both bankrupt and solvent carriers) is required if the public policy goals described in the Act are to be realized.
>
> "The major benefits to be realized from this consolidation and restructuring will be, first, improved capital productivity and a viable financial base for the Corporation and other railroads in the region. This improvement will then lead to higher quality rail service for the entire region.
>
> "In order to achieve improved productivity, the existing, highly duplicative and underutilized individual railroad interstate mainlines in the region should be consolidated into a high volume, upgraded interstate network.

> "In order to maintain and enhance rail competition and improve efficiency of operations within the region, the Corporation and other solvent carriers should, to the fullest extent practicable, share facilities and coordinate operations over the high volume network.
>
> "Local rail service requirements in the region should be fulfilled generally with single carrier, direct rail service in order to give the rail mode a viable economic base and to support effective intermodal competition.
>
> "The existing, highly duplicative, feeder and local service network used for local rail services should be streamlined by permitting the abandonment of rail facilities which are not financially self-sustaining." Vol. I, page 2.

Based on these conclusions, the Secretary made the following recommendations:

> "The solvent carriers in the region are urged to become full participants in the planning and restructuring of the region's rail system.
>
> "The Association should concentrate its planning efforts on two levels of the region's rail system – local rail service and high volume, interstate rail service. Each of these levels must be restructured in order to improve the economic efficiency and financial viability of rail operations in the region.

"At the local service level, continued direct rail service should be provided for nearly all of the region's normal rail freight traffic. Less than 4 percent of the region's rail traffic is originated or terminated on lines which are potentially excess and most of this traffic can be retained by the rail mode through subsidy programs or combined motor carrier/rail service.

"At the interstate level, duplicative lines and facilities should be downgraded or eliminated and service coordinated with the goal of substantially increasing utilization of the consolidated and restructured system.

"At the local level, rail pick-up and delivery service should be coordinated so that it is provided by a single railroad in a given geographic area.

"Existing interstate routes should be consolidated to establish a high volume interstate network which warrants a major modernization program.

"Rail competition should be maintained only over the high volume interstate network between major traffic generating centers which provide a sufficient volume of rail traffic to produce at least eight train loads per day each moving more than approximately 200 miles in the same general direction. In our judgment other points do not require mainline service by more than one railroad." Vol. I, pages 2-3.

ATTACHMENT B

PRINCIPAL RECOMMENDATIONS CONTAINED IN THE RAIL SERVICES PLANNING OFFICE'S MAY 2, 1974 REPORT

The Act required the RSPO to study and evaluate the Secretary of Transportation's Report on rail services in the region and submit its report thereon to the Association. The RSPO Report contained the following principal recommendations to the Association:

"THE STATUTORY GOALS

The Association should give full consideration to the social goals enumerated in section 206(a) of the Act which time constraints prevented the Secretary from addressing in depth.

TRANSPORTATION DATA

The Association should seek more complete traffic data than was used in the Secretary's Report, ideally collecting sufficient data to develop historical trends and future traffic projections. A 1980 time horizon is suggested as reasonable for traffic projections.

The Association should give consideration to obtaining information from users of rail services and other available sources, including reliable industrial and population growth projections, and not rely solely on traffic flow data furnished by the railroads.

SYSTEM DESIGN AND ITS IMPLEMENTATION

The Association should consider lines as segments of a total system and evaluate their capabilities for contributing to overall system efficiency, rather than requiring that each line or mile of track meet a test of independent profitability.

The Association should scrutinize with great care the results of any attempt, based upon purely statistical methods, to identify particular rail facilities as redundant, and should test any such statistical conclusions in the light of the practical knowledge of those with experience in conducting railroad operations.

The Association should consider for inclusion in the system facilities which will permit the routing of through traffic around, instead of through, densely populated areas and which will permit the removal of yard and switching operations from areas where they now unduly obstruct traffic or impede national urban development.

The Association should not limit its selection of prospective main lines to lines which are now equipped with automatic signal systems, as did the Secretary.

The Association should consider alternate means of handling freight traffic now moving over the Northeast passenger corridor between

Boston, New York City, and Washington. The Final System Plan should include and provide for the improvement of routes which would make it possible to remove as much freight traffic as possible from the corridor.

The Association should give priority consideration to the selection of yard and terminal facilities needed to provide rail services in the region. This should be done in conjunction with, if not prior to, the selection of mainline routes.

The Association should recognize the problems attendant upon consolidating the services and facilities of a number of individual railroads and provide in the Final System Plan for a transition period during which the Corporation, or other acquiring railroads, can do the planning and personnel training, and make the capital improvements, necessary for implementation of the Plan.

LOCAL SERVICE

The Association should reject the Secretary's method of determining branch line viability which was based primarily – if not solely – upon the number of carloads handled.

The Association should consider whether to include certain marginal branch lines in the system. Their exclusion could result in their operation as independent short-line railroads, thus commanding a division of the

joint revenues which would result in the Corporation being placed in a poorer financial position than if it had operated these lines as branches.

SYSTEM CAPACITY

The Association should scrutinize with great care the rail line capacity assumptions made by the Secretary.

- In addition to the potential design capacity of a line, such other factors as grades, curvature, clearances, sidings, train mix, and maintenance requirements should be taken into account.

- The Association should determine the capacity of yards and terminals, both as an end in itself and as yard capacity affects the ability of main lines to achieve their theoretical capacity.

- The Association should consider the deteriorated condition of much of the rail plant in the region and include in the Final System Plan, at least temporarily, facilities sufficient to meet service needs while other facilities – perhaps potentially superior – are being upgraded to a capacity level which can provide the service required.

EQUIPMENT SUPPLY AND MAINTENANCE

The Association should give consideration to the selection of car building and car and

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- The extent to which intramodal rail competition can be sustained should be addressed carefully, and consideration should be given to alternative dispositions of the properties of the railroads in reorganization which would make possible the profitable co-existence of competing rail systems in the region.

- The Secretary's assumption that the ability of a particular route, point, or market to sustain competitive rail service can be determined on the basis of the number of train operations experienced in a given period should be tested with care.

- The Association should consider whether the Secretary's conclusions as to what constitutes an 'efficient size' train are valid, and the extent to which adjustments in those conclusions would affect his recommendations concerning the degree to which competitive rail service can be provided economically.

– In determining where intramodal rail competition can be maintained, the Association should consider grouping several of the zones into which the Secretary divided the region, especially in the Northeast where the zones tend to cover small geographic areas.

JOINT USE

The Association should accept and implement the Secretary's recommendation that rail facilities be used jointly be more than one carrier wherever it is feasible and cost-effective to do so.

PASSENGER SERVICE

The Association, in making mainline selections, should consider those lines which currently carry passenger traffic, and those which have passenger service potential, in three separate categories: long-haul intercity; intermediate distance, high-density intercity; and commuter.

IMPACT UPON PROFITABLE RAILROADS

The Association should consider the competitive impact of the operation to be conducted by the Corporation upon all the surviving profitable railroads including switching and terminal companies in the region, and take steps to assure the continued viability of those carriers.

PUBLIC PARTICIPATION

The Association should scrutinize with care the material – both factual and conceptual – submitted, and to be submitted, to the Office by users of rail services, government officials at all levels, and other interested members of the public.

The Association should begin at once to devise a means for making prompt and widespread distribution of the Preliminary and Final System Plans. Otherwise effective public participation in further stages of the planning process will be impossible in view of the extremely tight statutory timetable." Pages 3-5.

DOCKET ENTRIES

in the

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

in

Smith v. *United States, et al.*,

No. C.A. 74-180

(Later transferred to
Eastern District of Pennsylvania,

No. C.A. 74-1107)

Date	Proceedings	Date of Judgment
1974		
Jan. 25	Complaint, appearance; filed	
Jan. 25	Summons, Copies (4) and Copies (4) of Complaint issued DA. Serv. 1-28-74.	
Jan. 25	APPLICATION for a Three-Judge Court. AG. Serv. 1-28-74. #2 & 3 Serv. 1-28-74.	
Feb. 12	OPPOSITION of deft. #1 to the immediate convening of a Three-Judge Court; Attachment; Exhibits A, B & C; c/s 2-12-74; appearance of James F. Dausch.	
Feb. 22	WITHDRAWAL of opposition by deft. #1 to the convening of a three-judge court; consent by deft. #3; exhibit; c/m 2-22-74.	
Feb. 25	REQUEST for designation of Three Judge Court. Parker, J.	
Mar. 1	DESIGNATION of the Honorable Harold Leventhal, United States Circuit Judge, and the Honorable Thomas A. Flannery, United States District Judge, to serve with the Honorable Barrington D. Parker, United States District Judge as members of a three-judge panel to hear and	

1974

Mar. 1 (cont'd)	determine this case. (Letters sent) J. Skelly Wright, Acting Chief Judge, U.S.C.A.
Mar. 11	ANSWER of all defts. to complaint; c/m 3-11-74; appearance of James F. Dausch.
Mar. 11	CALENDARED CD/N.
Mar. 15	APPEARANCE of William R. Perlik as counsel for deft. #3; Cal/N.
Apr. 3	MOTION of George P. Baker, Robert W. Blanchette and Richard C. Bond to intervene as party defts; P&A; Exhibit; Exhibits A&B; c/s 4-3-74; Deposit by Clagett $5.00; appearance of Brice M. Clagett.
Apr. 9	MOTION of defts. for transfer pursuant to 28 USC, 1404(a); Consent by pltf; P&A; Attachments A&B; c/m 4-9-74.
Apr. 11	CONSENT by defts. to intervention and transfer; c/m 4-11-74.
Apr. 17	ORDER granting motion of deft. to transfer this cause to the Eastern District of Pennsylvania; directing Clerk to effect the transfer. (N) Parker, J.
Apr. 29	ORIGINAL file and certified copy of docket entries mailed to Clerk, USDC for the Eastern District of Pennsylvania pursuant to order of 4-17-74.
May 3	ACKNOWLEDGMENT of receipt of original file and Certified copy of docket entries from the Clerk, USDC for the Eastern District of Pennsylvania.

Proceedings

in the

United States District Court
for the Eastern District of Pennsylvania

No. C.A. 74-1107

Date		Proceedings	Date of Judgment
1974			
1	May 1	Original Record together with certified copy of docket entries Received from U.S.D.C. District of Columbia, Washington, D.C., filed.	
2	" 1	Appearance of Spencer Ervin and W. B. Ruthrauff, Esqs. for the plff, filed.	
3	May 2	Plff's motion for summary judgment, filed.	
4	" 2	Plff's memorandum of points and authorities in support of Plff's motion for summary judgment and for expedited consideration thereof, filed.	
5	" 2	Stipulation of Plff. and Defts. as to factual matters, filed.	
6	" 3	Order GRANTING Motion of George P. Baker et al. leave to intervene in this action, filed. 5/6/74 entered and copies mailed.	
7	" 3	Stipulation by the parties that extracts from the record of *In the Matter of Penn Central Transportation Company, Debtor* be made a part of the record in this case, filed.	
8	" 3	Order FIXING 6/3/74 for a hearing on Plff's motion for summary judgment, etc., filed. 5/6/74 entered and copies mailed.	
9	May 10	Motion of George P. Baker, et al. intervenor Defts. for summary judgment, memorandum of points and authority, and certificate of service, filed.	
10	May 10	Affidavit of Jerome E. Sharfman, filed.	

1974

11	May 16	Order FIXING 6/3/74 at 10:00 A.M. for hearing on intervening Defts. motion for Summary Judgment; that all parties file responsive briefs by 5/24/74; and that intervening Defts. may file reply briefs by 5/30/74, filed. 5/17/74 entered and copies mailed.
12	May 17	Defts. brief in opposition to Plff's motion for summary judgment and in partial opposition to intervening Defts. motion for summary judgment, filed.
13	" 24	Defts' Motion for Summary Judgment, and Notice thereof, filed.
14	" 24	Affidavit of John W. Ingram, re Regional Rail Reorganization Act of 1973, etc., filed.
15	May 29	Reply of Penn Central Trustees to "Brief of Defts. in opposition to Plff's motion for Summary Judgment and in Partial opposition to intervening Defts' motion for Summary Judgment," filed.
16	May 29	Reply brief of New Haven Trustee to the joint brief of the Governmental Defts. and to the motion of the Penn Central Trustees, intervening Defts., for Summary Judgment, filed.
17	May 31	Brief of Penn Central Trustees in opposition to Plff's motion for Summary Judgment, filed.
18	May 31	Reply brief of New Haven Trustee to brief of Penn Central Trustees, Intervening Defts. dtd. 5/24/74, filed.
–	May 30	Joint documentary submission – extract from record of Penn Central Bky. Vol. 1 items 1-35, filed. (C.A. 74-189)
–	" 30	Joint documentary submission – extract – from record of Penn Central Bky. Vol. 2 items 36-61, filed. (C.A. 74-189)
–	" 30	Legislative history of the regional rail reorganization act of 1973, filed. (C.A. 74-189)
–	June 3	Argued sur: Plff's motion for summary judgment – C.A.V. Defts' and intervening defts. motion for summary judgment – C.A.V.

1974

19	June 3	Plff's motion of New Haven Trustee to Strike Affidavit of John W. Ingram, filed.
–	June 6	Transcript of 6/3/74, filed. (C.A. 74-189)
20	June 25	Copy of Opinion and Order ALDISERT, C.J., FULLAM, J. and BECHTLE, J. enjoining U.S. Railway System from certifying a Final System Plan to Special Court, etc., enjoining defts. from taking any action to enforce provisions of Sec. 304(f) of the RRRA with respect to abandonment, etc.; enjoining all parties from enforcing any action to implement so much of Sec. 207(b) of the RRRA joining all parties from enforcing any action to implement so much of Sec. 207(b) of the RRRA as purports to require dismissal of pending proceedings for reorganization under §77 of the Bankruptcy Act, entering Declaratory judgment that Sec. 303 of RRRA is null and void as contravening the Fifth Amendment, etc.; Sec. 304(f) of the RRRA is null and void as violative of the Fifth Amendment, etc.; that Sec. 207(b) of RRRA as requires reorganization courts to dismiss pending bankruptcy proceedings as violative of Art. I Sec. 8 Clause 4 of the Constitution; plffs. motions for partial summary judgment are granted in part and in all other respects denied; defts. motions for summary judgment are denied, filed. cys. to all parties 6/25/74 – entered 6/26/74.
–	July 2	Notice of appeal to the United States Supreme Court, filed. (C.A. #74-189)
21	July 3	Plff's Notice of Appeal to U.S. Supreme Court, filed.
22	July 17	Deft. U.S. Railway Association's Notice of Appeal to U.S. Supreme Court, filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

COMPLAINT

Plaintiff Richard Joyce Smith, as Trustee of the property of The New York, New Haven and Hartford Railroad Company, Debtor, by his attorneys, for his complaint alleges upon information and belief:

1. This is an action for an injunction restraining the enforcement, operation and execution of the Regional Rail Reorganization Act of 1973, Public Law 93-236 (the "1973 Act"), for repugnance to the United States Constitution, and for a declaratory judgment pursuant to the provisions of §§2201 and 2202 of Title 28, United States Code. Jurisdiction of this Court is predicated upon 28 U.S.C. §§1331, 1337 and 1651, and upon the United States Constitution, including Article I, Sections 8 and 9, Article III and the Fifth and Tenth Amendments thereto. The matter in controversy involves property having a value in excess of $10,000, exclusive of interest and costs. A three-judge district court is requested pursuant to 28 U.S.C. §§2282 and 2284.

2. This is an action to annul, enjoin and set aside one or more orders of the Interstate Commerce Commission (the "Commission") pursuant to §2321 of Title 28, United States Code. The United States is named as a party defendant pursuant to 28 U.S.C. §2322. A three-judge district court is requested pursuant to 28 U.S.C. §§2325 and 2284.

3. Plaintiff Richard Joyce Smith (the "New Haven Trustee") is the sole Trustee of the property of The New York, New Haven and Hartford Railroad Company (the "New Haven"), a Connecticut, Massachusetts and Rhode Island railroad corporation, which since 1961 has been in reorganization under §77 of the Bankruptcy Act, 11 U.S.C. §205, under the jurisdiction of the United States District Court for the District of Connecticut, Case No. 30226 (the "New Haven Reorganization Court"). Title to the assets of the New Haven are vested in the plaintiff New Haven Trustee in accordance with §77(c) of the Bankruptcy Act.

4. Among the assets owned by the New Haven Trustee is $34,025,800 principal amount of 5% Divisional First Mortgage Bonds due 1994 ("Bonds") of Penn Central Transportation Company, a Pennsylvania railroad corporation ("Penn Central"), which since June 21, 1970 has been in reorganization under §77 of the Bankruptcy Act under the jurisdiction of the United States District Court for the Eastern District of Pennsylvania, Bkcy. No. 70-347 (the "Penn Central Reorganization Court"). The Bonds were issued under, and secured by a Divisional First Mortgage dated as of December 31, 1968 ("Mortgage") from Penn Central to The Fidelity Bank and Joseph F. McDonald, as indenture trustees (the "Indenture Trustees").

5. Payment of principal of and interest on the Bonds is now due and payable as the result of the occurrence of one or more Events of Default (as that term is defined in the Mortgage), including, *inter alia*, the non-payment of interest due on the Bonds since the last interest payment on January 1, 1970.

6. The lien of the Mortgage includes land, track, stations, facilities and other valuable improvements constituting certain of the former properties of the New Haven which were conveyed by the New Haven Trustee (together with his then co-Trustee) to Penn Central on December 31, 1968 pursuant to applicable orders of the Commission and the New Haven Reorganization Court.

7. The value of the property securing the payment of the Bonds as provided in the Mortgage is in excess of $34,025,800 plus interest thereon since January 1, 1970.

8. The New Haven Trustee has filed a Proof of Claim dated May 31, 1971 with the Penn Central Reorganization Court in which the following claims are set forth:

> *Claim A:* This is a claim for the purchase price, as ordered by the Supreme Court of the United States (*New Haven Inclusion Cases*, 399 U.S. 392 (1970)) for assets of the New Haven acquired by Penn Central on December 31, 1968. The amount of the claim is for principal indebtedness of $174,635,899 plus unpaid interest to May 31, 1971 of $21,533,812; or a total claim to that date of $196,169,711. The offsets to the total claim are recognized by the New Haven as $41,939,841 producing a net claim at May 31, 1971 of $154,229,870. The security interest and liens securing such claim are the lien of the Mortgage securing $34,025,800 principal amount of Bonds; 956,576 shares of common stock of Penn Central Company, a Delaware corporation which owns 100% of the common stock of

Penn Central; an equitable lien on all of the former assets, exclusive of rolling stock, of the New Haven; and, if said equitable lien does not extend to the former interest of the New Haven in the excess income from the so-called Grand Central Terminal Properties, a constructive trust of the income applicable to such former interest.

Claims B and C: These claims relate to amounts owed by Penn Central to the New Haven Trustee under an agreement dated April 21, 1966 with the predecessors in interest of Penn Central and to an amount owed to the New Haven Trustee under an order of the Commission dated January 16, 1970.

The New Haven Trustee's Proof of Claim has not been adjudicated by the Penn Central Reorganization Court, but pending adjudication said Court has, pursuant to its Order No. 546, ordered that the New Haven Trustee has a tentative lien, indeterminate in amount and priority, upon all real property and certain personal property formerly owned by New Haven and in the possession of Penn Central on June 11, 1971.

9. Certain issues involved in the Proof of Claim relating to the claimed equitable lien and constructive trust are disputed by the Penn Central Trustees and are now pending before the Commission, which has reopened various New Haven and Penn Central proceedings for the purpose of deciding issues open on remand from the United States Supreme Court, *New Haven Inclusion Cases,* 399 U.S. 392 (1970).

10. The Mortgage provides for various legal and equitable remedies pursuant to which the properties subject to the Mortgage may, upon an Event of Default, be sold at the direction of the Indenture Trustees for the purpose of paying the principal and interest on the Bonds. Said provisions are hereinafter collectively referred to as the "Foreclosure Remedies".

11. Exercise by the Indenture Trustees of the Foreclosure Remedies is enjoined by Order No. 1, dated June 21, 1970, of the Penn Central Reorganization Court.

12. The statutory authority for the restraint against exercise of the Foreclosure Remedies by the Indenture Trustees set forth in Order No. 1 of the Penn Central Reorganization Court is the first sentence of §77(j) of the Bankruptcy Act, which reads in pertinent part as follows:

> "(j) In addition to the provisions of section 11 of this Act for the staying of pending suits against the debtor, the judge may enjoin or stay the commencement or continuation of suits against the debtor until after final decree; and may, upon notice and for cause shown, enjoin or stay the commencement or continuance of any judicial proceeding to enforce any lien upon the estate until after final decree;"

and the provisions of §11 of the Bankruptcy Act, 11 U.S.C. §29, referred to in said §77(j).

13. On January 2, 1974 the President of the United States signed the 1973 Act.

14. Defendant Claude S. Brinegar is the Secretary of the United States Department of Transportation ("DOT"; Mr. Brinegar being hereinafter referred to as the "Secretary

of DOT"). Under §204 of the 1973 Act, the Secretary of DOT must prepare a comprehensive report on rail services in the midwest and northeast sectors of the United States within 30 days after enactment of the 1973 Act. This Complaint seeks to enjoin and set aside any and all actions of the Secretary of DOT under the purported authority of the 1973 Act on the ground that said Act in its entirety, and each of its sections separately, are unconstitutional and void.

15. Defendant United States is named pursuant to 28 U.S.C. §2322 as a defendant insofar as this Complaint seeks an injunction pursuant to 28 U.S.C. §§2321 and 2325 against one or more orders of the Commission, an independent regulatory agency of the United States charged with regulation of railroads and other carriers as set forth in the Interstate Commerce Act. The Commission has responsibility for the formulation of plans of reorganization for railroads in reorganization under §77 of the Bankruptcy Act. Under §205 of the 1973 Act, the Rail Services Planning Office (the "Office") is created within the Commission. The Office is delegated the responsibility of holding hearings upon and evaluating the report of the Secretary of DOT referred to in ¶14 and holding hearings on and evaluating the "preliminary system plan" to be prepared by defendant United States Railway Association under the 1973 Act. The Commission also is delegated responsibility by Section 207(d) of the 1973 Act to evaluate the "final system plan" prepared by defendant United States Railway Association, and to submit to Congress its report thereon. This Complaint seeks to enjoin and set aside any and all orders of the Commission and the Office under the purported authority of the 1973 Act on the ground that said Act in its entirety, and each of its sections separately, are unconstitutional and void.

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fendant United States Railway Association (the n") is a nonprofit federal corporation of the Columbia, being established pursuant to §201 1973 Act. The Association has the primary ty under §207(a) of the 1973 Act for prepara- nplementation of the preliminary and final sys- of reorganization of certain railroads now in on which conduct business principally in 17 ates and the District of Columbia, defined in ct as the "region." Formulation of the pre- stem plan is to be based upon the report of y of DOT and the Office's evaluation and fi- lies, and upon the Association's independent s, consultations, research, evaluation and anal- Complaint seeks to enjoin and set aside any ons of the Association under the purported f the 1973 Act on the ground that such Act ty, and each of its sections separately, are un- al and void.

New Haven Trustee is informed, believes, and ers, that implementation of the provisions of ct by the several defendants will deprive him worth not less than $34 million in violation under the Fifth Amendment to the United itution not to be deprived of property with- cess of law.

New Haven Trustee is informed, believes and ers, that implementation of the provisions of ct by the several defendants will deprive him worth not less than $34 million and subject y to a public use in violation of his rights ifth Amendment to the United States Consti- o have his property taken for public use with- npensation.

19. The New Haven Trustee believes and therefore avers that if the defendants are not enjoined from proceeding to carry out the provisions of the 1973 Act he will suffer irreparable injury for which he has no adequate remedy at law in any court of the United States or of any State, and in support of such averment states that the legislative history of the 1973 Act discloses an intent on the part of Congress not to appropriate any moneys of the United States for the purpose of paying any amount in respect of just compensation for a taking for public use.

20. The New Haven Trustee is advised, believes and therefore avers, that the provisions of §§77(g) and (i) of the Bankruptcy Act, prior to enactment of the 1973 Act, authorized the Penn Central Reorganization Court to dismiss Penn Central's reorganization proceedings whenever it found that the constitutional limits imposed by the Fifth Amendment would be exceeded and constitutionally protected rights impaired if restraint upon creditors pursuant to the first sentence of §77(j) were continued. Upon dismissal of reorganization proceedings by the Penn Central Reorganization Court pursuant to §77(g) and institution of an equity receivership pursuant to §77(i), the Commission's Order of September 28, 1973, Finance Docket No. 26241, Penn Central Transportation Company Reorganization, – I.C.C. –, part of which requires continuation of hearings relative to a plan of reorganization under §77(d), would be vacated by operation of law, and thereafter the Commission would have no legal basis for taking any action or entering any order relative to the reorganization or other bankruptcy proceedings affecting Penn Central and its properties.

21. Sections 77(g) and (i) of the Bankruptcy Act provide the necessary "escape valve" to support the constitutionality of a restraint upon creditors' rights authorized by the first sentence of §77(j) by limiting the authority to restrain creditors to situations in which the debtor railroad can be successfully reorganized within a reasonable period of time. The foregoing interpretation of §§77(g) and (i) has been accepted in principle by numerous authorities, including the Penn Central Reorganization Court in its Memorandum and Order No. 1137, *In re Penn Central Transportation Company*, 355 F. Supp. 1343, 1345 (E.D. Pa. 1973). By its Report and Order dated September 28, 1973, in Finance Docket No. 26251, referred to in paragraph No. 20, supra, the Commission decided that it would not approve any plan for reorganization of Penn Central. In rejecting the plan for reorganization filed by the Penn Central Trustees, the Commission ruled as follows:

> "Liquidation of a railroad as envisioned by Penn Central's trustees is not, in our view, within the purview of Section 77 and certainly does not require or contemplate the use of our expertise to preside over the dismemberment of a railroad. If dismemberment and liquidation are to be the fate of Penn Central, there is ample provision in law for it to be handled elsewhere. Section 77 (g) and (i) contemplate possible dismissal of a reorganization proceeding and transfer of the properties to a receiver in equity."

22. On October 9, 1973, the New Haven Trustee filed a Motion ("New Haven Trustee's §77(g) Motion") with the Penn Central Reorganization Court seeking dismissal of Penn Central's reorganization proceedings under §77(g) of

the Bankruptcy Act and the institution of an equity receivership as contemplated by §77(i). The New Haven Trustee is advised, believes and therefore avers, that, unless the 1973 Act is declared unconstitutional and void, the relief requested by the New Haven Trustee's §77(g) Motion, namely, liquidation of Penn Central's rail properties under an equity receivership pursuant to §71(i), will be rendered impossible. Section 304(f) of the 1973 Act provides in pertinent part that:

> "After the date of enactment of this Act, no railroad in reorganization may discontinue service or abandon any line of railroad other than in accordance with the provisions of this Act, unless it is authorized to do so by the Association. . . ."

Said §304(f), together with a definition of "railroad in reorganization" in §102(12) which includes equity receiverships, effectively moots the New Haven Trustee's §77(g) Motion and destroys the constitutional safeguards of §§77 (g) and 77(i) of the Bankruptcy Act, without which the restraints upon creditors' foreclosure of liens authorized by the first sentence of §77(j) of the Bankruptcy Act is rendered unconstitutional. The effect of §304(f), in combination with other provisions of the 1973 Act, and the provisions of the first sentence of §77(j) of the Bankruptcy Act, is to take away from the New Haven Trustee, as holder of the Bonds, the contractual right under the Mortgage to demand that the Indenture Trustees exercise their Foreclosure Remedies; and such deprivation is made permanent by the provisions of the 1973 Act which are designed to compel the conveyance of the rail properties of Penn Central now subject to the Mortgage to Consolidated Rail Corporation, a governmental proprietary

corporation proposed to be created pursuant to the 1973 Act under the laws of one of the States, and to divest the lien of the Mortgage insofar as it applies to the properties so conveyed. The right to demand that the Foreclosure Remedies be exercised is a valuable property right of the New Haven Trustee that will be lost forever unless the defendants are permanently enjoined from proceeding to effectuate the provisions of the 1973 Act which are unconstitutional.

23. The New Haven Trustee is advised, believes and therefore avers, that if the 1973 Act is declared by this Court to be unconstitutional and void, such declaration will not infringe upon any matter within the exclusive jurisdiction of the Penn Central Reorganization Court, but will on the contrary enable that court to pass on the merits of the New Haven Trustee's §77(g) Motion after hearing and opportunity for parties, including the Commission, to advise the court as to their position, all as contemplated by §77(g) of the Bankruptcy Act prior to the enactment of the 1973 Act.

24. The New Haven Trustee is advised, believes and therefore avers, that the 1973 Act is unconstitutional and void as a violation of the provisions of Article III of the Constitution on the following grounds:

A. In Section 102(12) of the 1973 Act, the term "railroad in reorganization" is defined to mean

> "a railroad which is subject to a bankruptcy proceeding and which has not been determined by a court to be reorganizable or not subject to reorganization pursuant to this Act as prescribed in Section 207(b) of this Act. A 'bankruptcy proceeding' includes a

> proceeding pursuant to Section 77 of the bankruptcy act (11 U.S.C. 205) and an equity receivership or equivalent proceeding."

The first sentence of Section 207(b) of the 1973 Act requires each United States District Court or other court having jurisdiction over a railroad in reorganization, within 120 days of the enactment of the 1973 Act, to

> "decide whether the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by continuing the present reorganization proceedings than by a reorganization under this Act."

The New Haven Trustee is advised, believes and therefore avers, that said first sentence of Section 207(b) is an unconstitutional delegation to a court created pursuant to Article III of the United States Constitution of functions which are legislative and administrative and not judicial in character.

B. The second sentence of Section 207(b) of the 1973 Act requires each United States District Court or other court having jurisdiction over a railroad in reorganization, within 60 days of the filing of the Report by the Office prescribed by Section 205(d)(1) of the 1973 Act, to

> "decide whether or not such railroad shall be reorganized by means of transferring some of its rail properties to the Corporation pursuant to the provisions of this Act."

The third sentence of Section 207(b) declares

> "Because of the strong public interest in the continuance of rail transportation in the region pursuant to a system plan devised under the provisions of this Act, each such court shall order that the reorganization be proceeded with pursuant to this Act unless it (1) has found that the railroad is reorganizable on an income basis within a reasonable time under section 77 of the bankruptcy act (11 U.S.C. 205) and that the public interest would be better served by such a reorganization than by a reorganization under this Act, or (2) finds that this Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization in which case it shall dismiss the reorganization proceeding."

The New Haven Trustee is advised, believes and therefore avers, that said second and third sentences of Section 207(b) is an unconstitutional delegation to an Article III Court of functions which are legislative and administrative and not judicial in character. In addition, the third sentence of Section 207(b) is unconstitutional in that the standard prescribed by Congress in clause (2) thereof, e.g., unless the court

> "finds that this Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization,"

is unconstitutionally vague in meaning and is an unconstitutional delegation by Congress to a court of a purely legislative function, to wit, whether or not the public interest referred to in the first part of said third sentence is so

significant that, irrespective of whether the railroads in reorganization are reorganizable, they should be compelled to reorganize by conveyance of their rail properties to a new railroad, Consolidated Rail Corporation, to be created under and pursuant to the 1973 Act.

C. The fourth sentence of Section 207(b) of the 1973 Act provides that if the district court does not enter an order or make any finding, reorganization must proceed in accordance with the 1973 Act. Such sentence purports to require an Article III Court to make a finding or enter an order, even though no "case" or "controversy" be presented, and improperly prescribes a legislative consequence if the Court declines to enter such an order or make such a finding.

D. The fifth sentence of Section 207(b) of the 1973 Act provides that an appeal from an order made by a district court under Section 207(b) lies only to a special three-judge district court ("Special Court") created pursuant to Section 209 of the 1973 Act. Pursuant to Section 209(b) of the 1973 Act, the defendant Association is empowered to apply to the judicial panel on multi-district litigation authorized by 28 U.S.C. §1407 for the appointment of the Special Court. The Special Court is authorized to exercise the powers of a district judge, and its powers include those of a reorganization court, thereby confirming that the Special Court is intended by Congress to be an Article III court. The fifth sentence of Section 207(b) is unconstitutional on the grounds that it purports to confer jurisdiction upon an Article III court to review the prior findings and order of the district court which are themselves legislative and administrative and not judicial in character.

E. The sixth sentence of Section 207(b) provides:

> "There shall be no review of the decision of the special court."

Said sixth sentence is unconstitutional in that it purports to withdraw jurisdiction from all United States courts to hear a "case" or "controversy" brought by claimants to the estate of a railroad in reorganization, such as the New Haven Trustee, seeking to prevent the reorganization of a railroad, such as Penn Central, under the 1973 Act on the ground that reorganization under the 1973 Act will deprive such claimants of their property without due process of law and constitute a taking of their property for a public use without payment of just compensation. Congress is without power, under Article III of the Constitution, to preclude exercise by the United States courts of the "judicial power" referred to in Sections 1 and 2 of Article III; and is without power to preclude the exercise by the Supreme Court of its "appellate jurisdiction" referred to in the second sentence of Section 2 of Article III of the Constitution, as applied to a "case" which arises "under this Constitution." The sixth sentence in Section 207(b) is, accordingly, void as an unconstitutional limitation upon the jurisdiction of both the United States Supreme Court and the "inferior courts" in which are vested the judicial power of the United States referred to in Sections 1 and 2 of Article III.

F. Section 209(a) of the 1973 Act provides:

> "Notwithstanding any other provision of law, the final system plan which is adopted by the Association and which becomes effective after review by the Congress is not subject to review by any court except in accordance

> with this section. After the final system plan becomes effective under section 208 of this title, it may be reviewed with respect to matters concerning the value of the rail properties to be conveyed under the plan and the value of the consideration to be received for such properties."

Section 209(b) of the 1973 Act provides for defendant Association to make application to the judicial panel on multi-district litigation for the

> "consolidation in a single, three-judge district court of the United States of all judicial proceedings with respect to the final system plan."

The principal functions of the Special Court authorized by Section 209 are set forth in Section 303 of the 1973 Act: (i) Under Section 303(b), it is instructed to receive securities and compensation deposited by proposed transferees of rail properties, and to order conveyance of rail properties; and (ii) under Section 303(c), it is directed to make findings which include

> "whether the transfers or conveyances . . . are in the public interest and are fair and equitable to the estate of each railroad in reorganization in accordance with the standard of fairness and equity applicable to the approval of a plan of reorganization or a step in such a plan under section 77 of the Bankruptcy Act. . . ."

and

> "whether the transfers or conveyances are more fair and equitable than is required as a constitutional minimum."

Said provisions of Sections 209 and 303 of the 1973 Act are unconstitutional as a delegation to an Article III court of functions which are legislative and administrative in character. In addition, the determination of whether the transfers or conveyances "are more fair and equitable than is required as a constitutional minimum" imposes upon an Article III court the purely legislative function of enacting laws which comport with the United States Constitution, and is void as an unconstitutional delegation of legislative power to the judicial branch of government.

G. The first two sentences of Section 209(a) of the 1973 Act, quoted in Paragraph F above, and the last sentence of Section 303(b)(2) of the 1973 Act, which reads

> "Such conveyance shall not be restrained or enjoined by any court."

are each unconstitutional on the ground that they exceed the power of Congress under Section 2 of Article III of the Constitution to define the respective areas of jurisdiction of the several "inferior courts" in which Article III vests the "judicial power" of the United States to hear cases arising under the Constitution. The Special Court to be created pursuant to the 1973 Act is a court of limited jurisdiction which is not empowered to hear a case arising under the Constitution. The first two sentences of Section 209(a), and the last sentence of Section 303(b)(2), are accordingly void as an attempt by Congress to withdraw from the Supreme Court and the inferior courts created pursuant to Article III the judicial power to enjoin an act of Congress on constitutional grounds.

H. The last sentence of Section 303(d) of the 1973 Act, which reads

> "The Supreme Court shall dismiss any such appeal within 7 days after the entry of such an appeal if it determines that such an appeal would not be in the interest of an expeditious conclusion of the proceedings and shall grant the highest priority to the determination of any such appeals which it determines not to dismiss."

is unconstitutional on the ground that Congress lacks the power under Article III of the Constitution to infringe upon the judicial process by prescribing a legislative rule for deciding a case properly within the appellate jurisdiction of the Supreme Court. The legislative standard employed by this Section, "not in the interest of an expeditious conclusion of the proceedings," would, if not declared null and void, impair the rights of claimants to the Penn Central estate, such as the New Haven Trustee, to judicial appellate review "both as to Law and Fact" within the meaning of the second sentence of Section 2 of Article III of the Constitution. The effect of this legislative standard would also be to deprive the New Haven Trustee of property without due process of law guaranteed by the Fifth Amendment to the Constitution.

25. The New Haven Trustee is advised, believes and therefore avers, that the 1973 Act is unconstitutional in its substantive effects upon parties, such as the New Haven Trustee, who hold vested property interests in the form of mortgage liens upon the property of a railroad in reorganization, such as Penn Central, on the following grounds:

A. Pursuant to Section 303(b)(1) of the 1973 Act, the Special Court created pursuant to Section 209 of the 1973 Act is required to order the Penn Central Trustees "to convey forthwith to the Corporation [Consolidated Rail Corporation] and the respective profitable railroads operating in the region, all right, title, and interest in rail properties of such railroad in reorganization" pursuant to a "final system plan" formulated by defendant Association with the assistance of the Office and the Commission and approved or acquiesced in by the Congress of the United States pursuant to Section 208 of the 1973 Act. Pursuant to Section 303 (b)(2) of the 1973 Act, the conveyances which the Special Court is required to order are required to be made "free and clear of any liens and encumbrances" such as, for example, the lien of the Mortgage securing the $34,025,800 principal amount of Bonds owned by plaintiff New Haven Trustee. The effect of Section 303(b) of the 1973 Act will be to deprive secured creditors of Penn Central, including the New Haven Trustee, of property rights recognized by state statutory and common law, viz. their mortgages upon real property of Penn Central and their right to foreclosure remedies, without due process of law guaranteed by the Fifth Amendment to the Constitution. Such deprivation of property rights will not be compensated by the creation of other property rights of equivalent value.

B. Under the provisions of Section 303(c), the consideration for rail properties required to be conveyed to Consolidated Rail Corporation ("CRC") will be in the form of securities of CRC, together with a maximum of $500 million of obligations of defendant Association, which consideration will be delivered to the trustees of railroads in reorganization, such as Penn Central, pursuant to section 303 (c)(4). No provision of the 1973 Act is designed to provide secured creditors with a substituted lien upon such

compensation as is ordered to be paid by CRC and defendant Association. The effect of Sections 303(b) and (c) of the 1973 Act is accordingly to impair the contract rights of secured creditors of Penn Central, such as the New Haven Trustee, to demand that rail properties subject to their mortgage liens be sold at public auction and the proceeds of sale be devoted to the payment of the obligations secured thereby, in violation of the due process clause of the Fifth Amendment to the Constitution; and to provide no substitute property to be placed under the mortgage liens of said secured creditors.

C. No provision of Section 303 of the 1973 Act permits the Special Court to decline to order the conveyances therein provided for on the grounds that the effect is to deprive any claimant to the estate of Penn Central of his property without due process of law, or on the ground that the effect is to take a claimant's property for a public use without payment of just compensation, as required by the Fifth Amendment to the United States Constitution.

Section 303 of the 1973 Act accordingly lacks the statutory safeguards which are required by prior decisions of the Supreme Court upholding the constitutionality of Section 77 of the Bankruptcy Act.

26. Section 101(a) of the 1973 Act contains Congressional findings that may be paraphrased as follows:

> (1) Essential rail service in the midwest and northeast region of the United States is provided by insolvent railroads, such as Penn Central, which are attempting, so far unsuccessfully, to undergo reorganization under §77 of the Bankruptcy Act;

(2) This essential rail service is threatened with cessation because of the inability of trustees of such railroads, such as the Penn Central Trustees, to formulate acceptable plans of reorganization;

(3) The continuation of efficient rail service in the region is required to meet the needs of commerce, the national defense, the environment, and the service requirements of passengers, the United States mail, shippers, States and political subdivisions, and consumers;

(4) Continuation of efficient rail service in the region is required to maintain adequate national rail services and an efficient national rail transportation system;

(5) Rail service offers economic and environmental advantages with respect to land use, air pollution, energy efficiency and conservation, resource allocation, safety, and cost per mile to such extent that preservation and maintenance of adequate and efficient rail service is in the national interest;

(6) The needs summarized in Paragraphs (1) to (5) above cannot be met without substantial action by the Federal Government.

The New Haven Trustee is advised, believes and therefore avers, that the purpose of the 1973 Act, as revealed by Section 101(a) summarized above, is to "take" certain of the rail properties of seven railroads in the region now in reorganization, namely Penn Central, Lehigh Valley Railroad Co., Reading Company, Boston and Maine Corp., Central Railroad Co. of New Jersey, Erie Lackawanna Railway

Co. and Lehigh and Hudson River Railway Co., for a "public use," the preservation of essential rail service in the region which will cease in the absence of "substantial action" by the Federal Government. Accordingly, if enforcement of the 1973 Act is not enjoined, the defendants will be empowered to effect a "taking" for public use by the United States of the rail property of Penn Central, and of the property of the New Haven Trustee to the extent that he owns liens on the rail properties of Penn Central, without the "just compensation" required by the Fifth Amendment to the United States Constitution.

27. The New Haven Trustee is advised, believes and therefore avers that the provisions of Section 303(b) of the 1973 Act, requiring the Special Court to order conveyances of rail properties of Penn Central to Consolidated Rail Corporation ("CRC"), would if not enjoined constitute an exercise by Congress of the sovereign's power to condemn private property for the public uses specified in Section 101(a) of the 1973 Act, without the necessary just compensation being provided by the United States as required under the Fifth Amendment to the Constitution. Such just compensation is peculiarly within the power of Congress to grant, because the seventh sentence of Section 9 of Article I of the Constitution provides in pertinent part:

> "No money shall be drawn from the Treasury, but in consequence of Appropriations made by Law. . . ."

No provision of the 1973 Act contains any appropriation by the Congress of the United States of any moneys of the United States for the purpose of paying the claims of the New Haven Trustee, or other Penn Central secured

creditors, or the Penn Central estate for just compensation for the property rights which are proposed to be taken for a public use.

28. The New Haven Trustee is advised, believes and therefore avers, that CRC is in fact and in law a governmental proprietary corporation formed solely to advance the public interests of the United States referred to in Section 101 of the 1973 Act. The governmental control over CRC is set forth, *inter alia*, in Sections 301(c), (d), (e), (f) and (g), and Section 302 of the 1973 Act. As a consequence of CRC's status as a governmental proprietary corporation, the provisions of Section 303(b) of the 1973 Act requiring the Special Court to order the conveyance by Penn Central and other railroads in reorganization of their rail properties to CRC amounts in fact and in law to a taking for public use by an instrumentality of the United States of such rail properties without provision of the constitutionally required just compensation.

29. The New Haven Trustee is advised, believes and therefore avers, that the provisions of Section 303(b) of the 1973 Act which would divest the liens of creditors with mortgages upon the rail properties required to be conveyed by Penn Central to CRC constitute an implied taking of such mortgage liens for a public use within the meaning of the takings clause of the Fifth Amendment to the United States Constitution without the constitutionally required just compensation being provided to the holders of the mortgage liens whose property is so taken. The mortgage liens of the creditors divested by the 1973 Act may, by reason of Section 211 thereof, be replaced by liens in favor of the United States. Loans proposed to be made by the defendant Association to CRC may under Sections 211(d) and 211(e)(3) be secured by new

first mortgage liens upon the rail properties which CRC proposes to acquire from railroads in reorganization under Section 303(b) without the consent of persons holding valid perfected first mortgages on such properties, such as the Mortgage securing the Bonds owned by the New Haven Trustee. The effect of divestment under Section 303(b) of presently existing mortgage liens, and the Congressinal intent disclosed in Section 211 to subject properties to be acquired by CRC to new liens to secure loan obligations of CRC to defendant Association, is, in fact and in law, the same as if Congress had condemned all existing mortgage liens upon the rail properties designated in the final system plan created by defendant Association with the assistance of the Commission and defendant Secretary of DOT.

30. The New Haven Trustee is advised, believes and therefore avers, that he does not have an adequate remedy at law for damages against defendant United States for the takings described in Paragraphs 27, 28 and 29 above. Under the provisions of 28 U.S.C. §§2517 and 2518, relating to judgments of the Court of Claims, the effect of a judgment by the Court of Claims against the United States that the New Haven Trustee's property had been taken and was required to be compensated pursuant to the Fifth Amendment would be to create an obligation which would not be enforceable in the absence of an act of Congress to appropriate moneys of the United States Treasury. The seventh sentence of Section 9 of Article I of the Constitution, quoted in ¶27 above, similarly requires an appropriation by Congress to draw money from the Treasury to pay for any actual or implied taking. The legislative history of the 1973 Act establishes that Congress has determined not to appropriate any moneys of the United States Treasury for takings under the 1973 Act.

31. The New Haven Trustee is advised, believes and therefore avers, that in Section 303(c) of the 1973 Act Congress has purported to define the compensation which shall be awarded for the takings of private property for public use provided for in Section 303(b) of the 1973 Act, and has thereby exceeded its constitutional powers since the determination of what kind and amount of property constitutes "just compensation" is exclusively a judicial function. Section 303(c)(2) authorizes the Special Court to enter a judgment against CRC providing for constitutional deficiencies in consideration to be made up solely by securities of CRC and obligations of defendant Association issued to CRC pursuant to the Final System Plan. Said Section 303(c)(2) restricts the jurisdiction of the Special Court by making it impossible for the Special Court to enter a judgment requiring the "just compensation" provided for by the Fifth Amendment to be paid in legal tender of the United States, and precludes an effective judgment for a taking by the sovereign. Section 210(b) of the 1973 Act further restricts the availability of obligations of the defendant Association issued to CRC to $1 billion, of which not exceeding $500 million are available for purposes other than loans for the rehabilitation and modernization of rail properties proposed to be acquired by CRC. The effect of Section 303(c), in conjunction with Section 210(b), is to restrict the obligations of the United States with respect to payment for rail properties conveyed to CRC to a maximum of $500 million of obligations of defendant Association. Although obligations of defendant Association may be guaranteed by defendant Secretary of DOT pursuant to Section 210(c) of the 1973 Act, thereby placing the credit of the United States behind the takings authorized by the 1973 Act, the sum of $500 million is established as a legislative ceiling

upon obligations of the United States to pay for rail properties proposed to be conveyed to CRC. Such legislative ceiling bears no reasonable relation to the value of the properties to be taken as evidence by the legislative history of the $500 million ceiling and the fact that Congress enacted such ceiling prior to any valuation, determination or adjudication of the value of the properties being taken. Congress has thus made it impossible for the Special Court to fulfill the legislative standard of constitutionally adequate consideration referred to in Section 303(c). As a consequence, Section 303(c) fails to provide a constitutionally adequate mechanism for assuring that the Penn Central estate will in fact receive just compensation for its rail properties ordered to be conveyed pursuant to Section 303(b).

32. The New Haven Trustee is advised, believes and therefore avers, that notwithstanding the Congressional findings set forth in Section 101 of the 1973 Act concerning the public interest in maintaining efficient rail transportation in the region, the 1973 Act is not a valid constitutional exercise of the power of Congress to "regulate commerce . . . among the several states," on the ground that such clause of Section 8 of Article I of the Constitution does not authorize Congress to compel railroads in reorganization, such as Penn Central, their secured creditors and other claimants to their estates, to devote their respective properties to the public good without any reasonable expectation of profit or return on the fair value of their investment. No provision of the 1973 Act purports to guarantee that CRC, to which rail properties are to be conveyed under Section 303(b) of the 1973 Act, will have either earnings from railroad operations or reasonable prospect of attaining the same. The fact that railroads proposed to be reorganized under the 1973 Act will

have been found not to be reorganizable on an income basis by their respective reorganization courts under Section 207(b) of the 1973 Act establishes that CRC will not have earnings sufficient to support an income-based capitalization. The provisions of Section 303(b) of the 1973 Act requiring rail properties of railroads in reorganization to be conveyed to CRC accordingly cannot be supported under the "Commerce Clause" of Section 8 of Article I where, as here, Congress has not authorized or appropriated moneys for the purpose of exercising the sovereign's right of condemnation.

33. The New Haven Trustee is advised, believes and therefore avers, that Section 304(f) of the 1973 Act, in conjunction with other provisions of the 1973 Act and the first sentence of §77(j) of the Bankruptcy Act, deprives him, all secured creditors of Penn Central, and all other claimants of the Penn Central estate, of property of substantial value without due process of law and takes his and their property for a public use during the period of not less than 620 days from the date of enactment of the 1973 Act until the date of conveyance of Penn Central's rail properties, without providing just compensation, all in violation of the Fifth Amendment to the United States Constitution. Such deprivation of property without due process of law and such taking of property for public use without payment of just compensation will be caused by the requirement of Section 304(f) of the 1973 Act that all of Penn Central's rail operations, including numerous lines of railroad the operation of which are unprofitable as evidence by the provisions of Title IV of the 1973 Act for "rail service continuation subsidies," be continued in operation for an interim period of not less than 620 days without provision for governmental subsidies of the type provided by said Title IV of the 1973 Act.

34. The New Haven Trustee is advised, believes and therefore avers, that the 1973 Act is unconstitutional in its entirety on the ground that it deprives him, other secured creditors of Penn Central, and other claimants to the Penn Central estate, of equal protection of the laws, which protection is embraced within the "due process" clause of the Fifth Amendment to the United States Constitution, and exceeds the constitutional power of Congress to pass "uniform laws on the subject of bankruptcies throughout the United States," and in support of such averment states:

A. Section 102(13) of the 1973 Act defines "region" to mean the

> "States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, Ohio, Indiana, Michigan and Illinois; the District of Columbia; and those portions of contiguous States in which are located rail properties owned or operated by railroads doing business primarily in the aforementioned jurisdictions (as determined by the Commission by order)."

B. The 1973 Act amends Section 77 of the Bankruptcy Act as to railroads in reorganization in the "region" defined as set forth in Section 102(13), and leaves Section 77 of the Bankruptcy Act in effect without amendment as to any railroad which is in, or may hereafter file for, reorganization and which does business primarily in States other than those enumerated in Section 102(13).

C. The effect of the 1973 Act is to deprive creditors of railroads in reorganization which are located in the "region" of equal protection of the laws as compared with creditors of railroads doing business primarily in the 33 states not included in the definition of "region."

D. The 1973 Act purports to be a law "on the subject of bankruptcies" which on its face is not "uniform" and not applicable "throughout the United States," and is therefore beyond the constitutional powers conferred upon Congress by Section 8 of Article I of the Constitution.

E. The 1973 Act is unconstitutional in its entirety in that, under the last paragraph of Section 8 of Article I of the Constitution, Congress is empowered "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof," and such powers do not include the power to pass a non-uniform law on the subject of bankruptcies whereby one law is made applicable to bankrupts doing business in 17 states plus the District of Columbia and another law is made applicable to bankrupts in the same line of business doing business in the other 33 States of the Union.

35. The New Haven Trustee is advised, believes and therefore avers, that the 1973 Act is intended to provide principally for the compulsory reorganization of Penn Central and a subsidiary, Lehigh Valley Railroad Co., and as such is unconstitutional on both the ground that it is not a uniform law on the subject of bankruptcies and on the ground that it constitutes a bill of attainder proscribed by Section 9 of Article I of the Constitution.

36. The New Haven Trustee is advised, believes and therefore avers, that he will suffer irreparable injury in the event his rights to insist upon immediate exercise by the Indenture Trustees of their Foreclosure Remedies is not protected by an injunction restraining defendant Association, the Commission, and defendant Secretary of DOT, from carrying out their respective functions assigned to them by the 1973 Act, including preparation of a preliminary and final system plan for Penn Central and other railroads in reorganization, and in support of such averments, states:

A. The evidence adduced before the Commission in hearings pursuant to Section 77(d) held in August and September, 1973 (*Penn Central Transportation Company Reorganization,* Finance Docket No. 26241), discloses that continued operation of Penn Central's railroad on the present basis is causing the value of the properties available to satisfy creditor claims to be lessened, and the amount of priority administration claims to be increased, at a rate which approximates $200 million per year, this effect being characterized as the "erosion" of the Penn Central estate by the Commission in its September 28, 1973 Report and Order. Although the Commission concluded that it was unable to deal with the constitutional issue of "taking" under the Fifth Amendment on the ground that such issue was judicial in nature, the issue is now squarely presented by the provisions of the 1973 Act which will, if not enjoined, require Penn Central to continue to suffer "erosion" at the rate of $200 million per year for at least 620 days after enactment of the 1973 Act; to offset said erosion Penn Central will at best receive the major portion of $85 million of federal moneys as "emergency assistance" under Section 213 of the 1973 Act, leaving a

net uncompensated erosion of not less than $263 million during said 620 day period.

B. The constitutional issues raised by the New Haven Trustee in this complaint are ripe for adjudication at this time. The New Haven Trustee alleges that the 1973 Act is *per se* unconstitutional, and accordingly, no decision by defendant United States Railway Association as to the nature of the "final system plan" could affect the constitutional issues presented.

37. The New Haven Trustee is advised, believes and therefore avers, that he lacks an effective alternative remedy to the declaratory and injunctive relief sought by the complaint, and in support of such averment states:

A. The procedures contemplated by Section 207(b) of the 1973 Act for the making of legislative and administrative findings by the Penn Central Reorganization Court and the Special Court is not an effective alternative remedy because such proceedings are not and cannot be considered "judicial" in nature, and any order entered under Section 207(b) is void *ab initio* as not within the jurisdiction of an Article III court. The New Haven Trustee intends to raise before the Penn Central Reorganization Court the contention that Section 207(b) is void and accordingly does not confer jurisdiction upon that Court. The Penn Central Reorganization Court, however, is lacking in subject-matter jurisdiction and in jurisdiction over the persons of the defendants named in this Complaint and accordingly is unable to grant the relief requested by this Complaint.

B. The procedures contemplated by Section 303 of the 1973 Act do not provide an adequate alternative remedy because the Special Court is required by Section 303(b)

to order conveyance of properties, and divestiture of liens, before judicial review of adequacy of consideration commences under Section 303(c). The Section 303(b) functions of the Special Court are void *ab initio* because they are legislative and administrative functions improperly assigned to an Article III court; however, unless enforcement of the 1973 Act is enjoined, the conveyance of properties and divestment of liens called for by Section 303(b) will become *fait accompli* before there is any judicial review under Section 303(c).

C. Such judicial review by the Special Court as is permitted by Sections 303(c) and 303(d) of the 1973 Act fails to cure the constitutional defects in that the only remedy open to the Special Court is to enter a "judgment" against CRC in favor of the estate of a bankrupt railroad. Such a "judgment" against CRC is not property of value because it represents only a claim against an entity which has as its only assets the properties transferred to it by Penn Central and such other railroads in reorganization as are designated by their reorganization courts to be reorganized under the 1973 Act. In light of the provisions of the 1973 Act, any attempt by a railroad in reorganization which conveyed its properties to CRC to "enforce" a "judgment" against CRC by petition to sell the assets conveyed would be unsuccessful because of the provisions of Section 304(e) of the 1973 Act, which forbid abandonments of rail properties acquired by CRC absolutely for two years and thereafter unless and to the extent the same are authorized by the Commission pursuant to applicable provisions of the Interstate Commerce Act. In addition, a "judgment" against CRC would create a liability which, *pro tanto*, would reduce the value, if any, of the Common Stock of CRC which, under Section 303 of the 1973 Act, forms the principal consideration

to be given to Penn Central in exchange for its rail properties, and thus increase the deficiency of consideration.

D. The 1973 Act does not provide a constitutionally adequate mechanism for the transfer of liens on properties conveyed to CRC, thereby depriving secured creditors of their property without due process of law within the meaning of the Fifth Amendment to the Constitution. By requiring the divestment of mortgage liens as authorized by Section 303(b) of the 1973 Act without provision for mortgage liens to attach to the proceeds of sale of the properties conveyed, Congress has failed to provide the constitutional safeguard provided by Section 77(o) of the Bankruptcy Act. Under Section 77(o) of the Bankruptcy Act, liens which are divested in connection with any permitted sale of property of a railroad in reorganization are immediately transferred by operation of law to the proceeds of such sale.

E. A suit against the United States in the United States Court of Claims to recover the "just compensation" to which the New Haven Trustee is entitled under the Fifth Amendment will not provide an effective remedy at law because of material uncertainty as to whether the provisions of the 1973 Act are intended to preclude the Court of Claims from hearing such a suit, and because the enforceability of any judgment for money rendered by the Court of Claims in favor of the New Haven Trustee would depend on appropriations by Congress under Section 9 of Article I of the Constitution.

38. There being no adequate remedy at law, the defendants should be enjoined from carrying out the provisions of the 1973 Act which are repugnant to the Constitution.

WHEREFORE, plaintiff New Haven Trustee respectfully prays:

1. That a three-judge district court be convened to hear and determine this suit, pursuant to 28 U.S.C. §§2282 and 2284, and that the suit be heard and decided with the greatest possible expedition.

2. That in accordance with 28 U.S.C. §2284(2), at least five days' notice of the hearing be given to the Attorney General of the United States, to the United States Attorney for the District of Columbia, and to defendants Secretary of DOT and Association.

3. That the Court convened in accordance with 28 U.S.C. §2284, after hearing on motion for summary judgment or trial as may be deemed appropriate, enter a declaratory judgment in favor of plaintiff New Haven Trustee decreeing:

(a) That the provisions of Section 207(b) of the 1973 Act purporting to confer jurisdiction upon the several reorganization courts with jurisdiction over railroads in reorganization to make the findings and orders referred to therein are void on the ground that the jurisdiction of an Article III court can extend only to "cases" and "controversies" and not to legislative and administrative decisions, and accordingly such reorganization courts lack jurisdiction to make any findings or to enter any orders under Section 207(b); and that the Special Court to be created pursuant to Section 209 of the 1973 Act lacks jurisdiction to review any findings or orders of the several reorganization courts.

(b) That the provisions of Section 303(b) of the 1973 Act purporting to confer jurisdiction upon the Special Court to administer the deposits of money and securities

by transferees and to order the conveyance of properties of railroads in reorganization and the divestment of liens of secured creditors are void on the ground that the jurisdiction of an Article III court can extend only to "cases" and "controversies" and not to legislative and administrative decisions, and accordingly the Special Court which is to be created upon petition of defendant United States Railway Association lacks jurisdiction to take the actions or enter the orders called for by said Section 303(b).

(c) That the New Haven Trustee's property rights evidenced by the Bonds and the Mortgage, including his right to demand exercise by the Indenture Trustees of the Foreclosure Remedies against Penn Central's property which is subject to the lien of the Mortgage, be adjudged to be a property interest which, if the 1973 Act were not enjoined, would be subject to taking by governmental action without due process of law and for a public use without just compensation by the 1973 Act in violation of the Fifth Amendment to the United States Constitution.

(d) That the 1973 Act as an entirety be declared unconstitutional and void as exceeding the power of Congress under Article I, Section 8, of the Constitution to pass uniform laws on the subject of bankruptcies throughout the United States, and as constituting discriminatory legislation which amounts to a bill of attainder proscribed in Section 9 of Article I of the Constitution.

(e) That the 1973 Act as an entirety be declared unconstitutional and void as exceeding the power of Congress under Article I, Section 8, of the Constitution to pass laws regulating commerce between the several states insofar as the 1973 Act provides for divestment of creditor liens, mandatory reorganization by consolidation, and

other features which require exercise of the sovereign's power of eminent domain.

4. That said Court, after hearing on motion for Summary Judgment or trial as may be deemed appropriate, enter an order of permanent injunction restraining each of the defendants from proceeding to take any of the actions or exercise any of the functions provided for in the 1973 Act; and enjoining each of the defendants from commencing or continuing proceedings before the Special Court referred in Section 209 of the 1973 Act to the extent the same would be inconsistent with the findings and legal conclusions of said Court.

5. That said Court grant such other and further relief as it may deem appropriate.

Dated: January 25, 1973

Richard Joyce Smith,
Trustee of the property of
The New York, New Haven
and Hartford Railroad Company, Debtor, Plaintiff

By his attorneys

Joseph Auerbach
Sullivan & Worcester
225 Franklin Street
Boston, Massachusetts 02110
617/423-7474

George P. Michaely, Jr.
Sullivan & Worcester
1025 Connecticut Avenue, N. W.
Washington, D. C. 20036
202/293-6170

Of Counsel:

James Wm. Moore
54 Meadow Street
New Haven, Connecticut 06506

Sullivan & Worcester
225 Franklin Street
Boston, Massachusetts 02110

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

ANSWER OF ALL DEFENDANTS

Defendants for their Answer to the Complaint answer the numbered paragraphs of the Complaint as follows:

1. Defendants admit that the allegations contained in the first and last sentence of paragraph 1 are an accurate generalized description of the contents of the Complaint and of the relief sought. The allegations contained in the second and third sentences of paragraph 1 are conclusions of law which do not require answer and are accordingly neither admitted nor denied, except that defendants admit that the amount in controversy, if any, is in excess of $10,000, exclusive of interest and costs.

2. The allegations contained in paragraph 2 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

3. Defendants admit the allegations contained in paragraph 3, except that defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in the last sentence of said paragraph.

4. Defendants admit the allegations contained in paragraph 4.

5. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5.

6. Defendants admit the allegations contained in paragraph 6.

7. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7.

8. The allegations contained in paragraph 8 purport to be summaries or characterizations of the contents or effect of Penn Central Reorganization Court Order No. 546 the accuracy of which is neither admitted nor denied; and the Court is respectfully referred to said Order for a full and complete statement thereof.

9. The allegations contained in paragraph 9 purport to be summaries or characterizations of the nature or status of various unspecified proceedings pending before the Interstate Commerce Commission the accuracy of which is neither admitted nor denied; and the Court is respectfully referred to such proceedings for the nature and contents thereof.

10. The allegations contained in paragraph 10 purport to be summaries or characterizations of the contents or effect of the Mortgage (as defined in paragraph 4 of the Complaint) the accuracy of which is neither admitted nor denied; and the Court is respectfully referred to said Mortgage for a full and complete statement thereof.

11. Defendants admit the allegations contained in paragraph 11.

12. The allegations contained in paragraph 12 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

13. Defendants admit the allegation contained in paragraph 13.

14. Defendants admit the allegation contained in the first sentence of paragraph 14. The second sentence of paragraph 14 purports to be a summary or characterization of a provision of the Act the accuracy of which is neither admitted nor denied; and the Court is respectfully referred to such provision for a full and complete statement thereof. Defendants admit that the last sentence of paragraph 14 is an accurate general statement of the relief sought in the Complaint and of the grounds alleged in support thereof.

15. The allegations contained in paragraph 15 purport to be a summary or characterization of the contents or effects of provisions of the Act the accuracy of which is neither admitted nor denied, and the Court is respectfully referred to such provisions for full and complete statements thereof; except that defendants admit that the last sentence of paragraph 15 is an accurate general statement of the relief sought in the Complaint and of the grounds alleged in support thereof.

16. Defendants admit the allegations contained in the first sentence of paragraph 16 if the word "federal" as used therein is intended by plaintiff to have the same meaning as "government." The remaining allegations contained in paragraph 16 purport to be a summary or characterization of the contents or effects of provisions of the Act the accuracy of which is neither admitted nor denied, and the Court is respectfully referred to such provisions for full and complete statements thereof; except that the defendants admit that the last sentence of paragraph 16 is an accurate general statement of the relief sought in the Complaint and of the grounds alleged in support thereof.

17. Defendants deny each and every allegation contained in paragraph 17.

18. Defendants deny each and every allegation contained in paragraph 18.

19. Defendants deny each and every allegation contained in paragraph 19.

20. The allegations contained in paragraph 20 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

21. The allegations contained in paragraph 21 purport to be summaries or characterizations of the contents or effects of various statutory provisions or orders the accuracy of which is neither admitted nor denied; and the Court is respectfully referred to said statutory provisions and orders for full and complete statements thereof.

22. Defendants admit that the allegations contained in the first sentence of paragraph 22 are an accurate general statement of the relief sought in the "New Haven Trustee's §77(g) Motion," as that term is defined in the Complaint. The remaining allegations contained in paragraph 22 are conclusions of law which do not require answer and are accordingly neither admitted nor denied, except that defendants deny that it is possible to ascertain at this time which, if any, rail properties of Penn Central Transportation Company (the Penn Central) will be transferred or conveyed to the Consolidated Rail Corporation (the Corporation).

23. The allegations contained in paragraph 23 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

24. Defendants deny each and every allegation of fact, if any, contained in paragraph 24. All other allegations contained in paragraph 24 are conclusions of law which do not require answer and are accordingly neither admitted nor denied; except that defendants specifically deny that the Act is unconstitutional or void as alleged, and except, further, that defendants deny that it is possible to ascertain at this time whether any action will be taken pursuant to the Act which will adversely affect plaintiff's rights, if any.

25. Defendants deny each and every allegation of fact, if any, contained in paragraph 25; except that defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiff holds a vested property interest in the form of a lien on property of Penn Central. All other allegations contained in paragraph 25 are conclusions of law which do not require answer and are accordingly neither admitted nor denied; except that defendants deny that it is possible to ascertain at this time whether any action will be taken pursuant to the Act which will adversely affect plaintiff's rights, if any. Defendants further deny that the effect of Section 303 or of any other provision of the Act is to violate plaintiff's rights under the due process clause of the Fifth Amendment to the United States Constitution, or to take plaintiff's property for public use without payment of just compensation, as required by the Fifth Amendment to the United States Constitution.

26. The allegations contained in paragraph 26 purport to be summaries or characterizations of the contents or effects of various constitutional or statutory provisions the accuracy of which is neither admitted nor denied, and the Court is respectfully referred to said constitutional

and statutory provisions for full and complete statements thereof; except that defendants deny that the Act is unconstitutional as alleged. To the extent that the allegations contained in paragraph 26 may be allegations of fact, defendants deny each and every allegation.

27. The allegations contained in paragraph 27 purport to be summaries or characterizations of the contents or effects of various constitutional or statutory provisions the accuracy of which is neither admitted nor denied, and the Court is respectfully referred to said constitutional and statutory provisions for full and complete statements thereof; except that defendants deny that the Act is unconstitutional as alleged, and except further that defendants deny that it is possible to ascertain at this time whether any action will be taken pursuant to the Act which will adversely affect plaintiff's rights, if any.

28. The allegations contained in paragraph 28 purport to be summaries or characterizations of the contents or effects of various constitutional or statutory provisions the accuracy of which is neither admitted nor denied, and the Court is respectfully referred to said constitutional and statutory provisions for full and complete statements thereof; except that defendants deny that the Corporation is in fact a "governmental proprietory corporation formed solely to advance the public interests of the United States referred to in Section 101 of the 1973 Act," or that any provision of Section 303 of the Act amounts in fact to a taking for public use by an instrumentality of the United States without provision of constitutionally required just compensation.

29. The allegations contained in paragraph 29 purport to be summaries or characterizations of the contents or effects of various constitutional or statutory provisions

the accuracy of which is neither admitted nor denied; and the Court is respectfully referred to said constitutional and statutory provisions for full and complete statements thereof. Defendants deny the allegation that the effect of Section 303(b) or of any other provision of the Act is in fact the same as if Congress had condemned any or all existing mortgage liens upon the rail properties designated in the final system plan. Defendants further deny that it is possible to ascertain at the present time which rail properties will be designated in the final system plan.

30. The allegations contained in paragraph 30 purport to be summaries or characterizations of the contents or effects of various constitutional or statutory provisions the accuracy of which is neither admitted nor denied, and the Court is respectfully referred to said constitutional and statutory provisions for full and complete statements thereof; except that defendants deny plaintiff does not have an adequate remedy at law for damages, if any, against the United States.

31. The allegations contained in paragraph 31 purport to be summaries or characterizations of the contents or effects of various constitutional or statutory provisions the accuracy of which is neither admitted nor denied, and the Court is respectfully referred to said constitutional and statutory provisions for full and complete statements thereof; except that defendants deny each and every allegation contained in the last two sentences of paragraph 31. To the extent that the allegations contained in paragraph 31 are allegations of fact, defendant denies each and every allegation.

32. The allegations contained in paragraph 32 purport to be summaries or characterizations of the contents or effects of various constitutional or statutory provisions

the accuracy of which is neither admitted nor denied, and the Court is respectfully referred to said statutory provisions for full and complete statements thereof; except that defendants deny each and every allegation contained in the third sentence of paragraph 32.

33. Defendants deny each and every allegation contained in paragraph 33 to the extent that it is an allegation of fact. In all other respects, if any, said allegations purport to be summaries or characterizations of the contents or effects of various constitutional or statutory provisions the accuracy of which is neither admitted nor denied, and the Court is respectfully referred to said constitutional and statutory provisions for full and complete statements thereof; except that defendants deny that the Act, alone or in conjunction with the first sentence of Section 77(j) of the Bankruptcy Act, deprives plaintiff of any rights under the Fifth Amendment to the United States Constitution.

34. The allegations contained in paragraph 34 purport to be summaries or characterizations of the contents or effects of various constitutional or statutory provisions the accuracy of which is neither admitted nor denied, and the Court is respectfully referred to said constitutional and statutory provisions for full and complete statements thereof; except that defendants deny that the Act violates plaintiff's rights under the Fifth Amendment to the United States Constitution or exceeds the constitutional power of Congress to pass "uniform laws on the subject of bankruptcies throughout the United States."

35. To the extent that the allegations contained in paragraph 35 are allegations of fact, each and every allegation is denied. In all other respects, said allegations purport

to be summaries or characterizations of the contents or effects of various constitutional or statutory provisions the accuracy of which is neither admitted nor denied; and the Court is respectfully referred to said constitutional and statutory provisions for full and complete statements thereof.

36. The allegations contained in paragraph 36 purport to be summaries or characterizations of the contents or effects of evidence introduced into proceedings, or of various constitutional or statutory provisions or orders, the accuracy of which is neither admitted nor denied; and the Court is respectfully referred to said constitutional and statutory provisions and orders for full and complete statements thereof; except that defendants deny that if enforcement of the Act is not enjoined (i) Penn Central will suffer erosion at the rate of $200 million per year for at least 620 days after enactment of the Act, (ii) Penn Central will suffer a net uncompensated erosion of not less than $263 million during said 620 day period, and (iii) plaintiff will suffer irreparable injury. Defendants further deny that the constitutional issues raised by plaintiff are ripe for adjudication at this time.

37. The allegations contained in paragraph 37 purport to be summaries or characterizations of the contents or effects of various constitutional or statutory provisions the accuracy of which is neither admitted nor denied; and the Court is respectfully referred to said constitutional and statutory provisions for full and complete statements thereof.

38. Defendants deny the allegations contained in paragraph 38 that plaintiff lacks an adequate remedy at law, and that plaintiff is entitled to an injunction restraining enforcement of the Act.

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

This Court lacks jurisdiction over the subject matter, since this is a judicial proceeding with respect to the final system plan and is required by Section 209(b) of the Act to be consolidated in a single, three-judge district court of the United States (which the Act denominates as the "special court" and which is hereinafter referred to as the Special Court) whose members have been designated, as required, by the Judicial Panel on Multidistrict Litigation by order dated March 1, 1974.

THIRD DEFENSE

This Court should not take jurisdiction of the action, since primary jurisdiction is vested in and comity requires deference to the single-judge United States District Court for the Eastern District of Pennsylvania which has jurisdiction over Penn Central in reorganization and which is required by Section 207(b) of the Act to make findings as to (1) whether the public interest would be better served by a reorganization on an income basis under Section 77 of the Bankruptcy Act (11 U.S.C. §205) rather than by a reorganization under the Act (which finding could result in the discontinuance of any proceedings under the Act concerning the rail properties of Penn Central) and (2) whether the Act provides a process which would be fair and equitable to the estate of Penn Central (an inquiry which would essentially duplicate the inquiry which the Court is asked to make herein).

FOURTH DEFENSE

The action is not yet ripe for adjudication. It is therefore premature and presents no actual case or controversy. Any determination as to the allegations concerning the constitutionality of the Act contained in the Complaint cannot and in any event should not be made except in one or more of certain proceedings required by the Act and by Section 77 of the Bankruptcy Act, including (a) the findings, decisions and orders of reorganization courts and the Special Court under Section 207(b) of the Act, (b) the preparation, adoption and review of a final system plan under Section 207(c) and (d) of the Act, (c) the approval and coming into effect of such plan pursuant to Section 208 of the Act, (d) the findings, determinations and orders of the Special Court under Section 303(c) of the Act relating to the fairness and equitableness of the transfers and conveyances of rail properties pursuant to the plan, and (e) the division among the parties to the reorganization of the transferor railroads of the securities, other benefits and judgments awarded to the estates of those railroads.

FIFTH DEFENSE

Plaintiff is not entitled to declaratory or injunctive relief because Plaintiff has not suffered and is not threatened with any irreparable injury, and plaintiff has adequate remedies at law.

WHEREFORE, having fully answered, defendants pray that the Complaint be dismissed and that they recover their costs and attorneys' fees, and that the Court grant such other relief as may be proper.

Respectfully submitted,

March 11, 1974

Of Counsel:
RODNEY E. EYSTER
General Counsel

JEROME E. SHARFMAN
STUART G. MEISTER
MICHAEL T. HALEY
Attorneys

U.S. Department of
Transportation
Washington, D.C. 20590
(202) 426-4702

IRVING JAFFE
Acting Assistant Attorney General

EARL J. SILBERT
United States Attorney

DAVID J. ANDERSON
Special Litigation Counsel

/s/ James F. Dausch
JAMES F. DAUSCH
Attorney
U.S. Department of Justice
Washington, D. C. 20530
(202) 739-3529

Attorneys for the United States
of America and Claude S. Brinegar

/s/ Lloyd N. Cutler
LLOYD N. CUTLER

/s/ Marshall Hornblower
MARSHALL HORNBLOWER

/s/ William R. Perlik
WILLIAM R. PERLIK

Attorneys for the
United States Railway Association

Of Counsel:
BARRY E. CARTER
WILLIAM T. LAKE
J. B. STEPHENS
Wilmer, Cutler & Pickering
1666 K Street, N. W.
Washington, D. C. 20006
(202) 872-6000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

MOTION FOR LEAVE TO INTERVENE

George P. Baker, Richard C. Bond, and Jervis Langdon, Jr., as Trustees of the property of Penn Central Transportation Company, Debtor, and not individually, 6 Penn Center Plaza Philadelphia, Pa. 19104, 215-594-2139, respectfully move for leave to intervene as parties defendant in this proceeding, and to file the attached Answer.

Applicants' grounds for their motion are fully set forth in the attached Memorandum of Points and Authorities.

Respectfully submitted,

Charles A. Horsky

Brice M. Clagett

Covington & Burling
888 16th Street, N.W.
Washington, D.C. 20006
293-3300

Attorneys for Intervenors

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

ANSWER OF THE PENN CENTRAL TRUSTEES

1. Defendants George P. Baker, Richard C. Bond, and Jervis Langdon, Jr., (the Trustees) are the Trustees of the property of Penn Central Transportation Company, Debtor, (Penn Central) a railroad in reorganization pursuant to Section 77 of the Bankruptcy Act in proceedings pending in the United States District Court for the Eastern District of Pennsylvania. The Trustees' principal office is in Philadelphia, Pennsylvania.

2. Penn Central is a Class 1 railroad undergoing reorganization pursuant to Section 77 of the Bankruptcy Act and the Trustees own, lease, operate or control rail lines located throughout the region defined in the Regional Rail Reorganization Act of 1973 (the Act). As such, Penn Central and the Trustees are subject to procedures of the Act.

3. As their answer to the complaint herein the Trustees allege as follows:

(a) Admit the allegations of paragraphs 1 through 4, except to allege that the validity, ownership, amount and status of the claim arising from the bonds referred to in paragraph 4 has not been determined and the Trustees reserve all of their rights with respect thereto;

(b) Deny the allegations of paragraph 5;

(c) With respect to the allegations of paragraph 6, refer to the mortgage and the applicable orders of the

Commission and the New Haven Reorganization Court for a true and correct statement of their contents;

(d) With respect to the allegations of paragraph 7, the Trustees lack information or knowledge sufficient to form a belief as to permit an answer;

(e) With respect to the allegations of paragraph 8, admit the New Haven Trustee filed a proof of claim dated as of May 31, 1971, in the Penn Central Reorganization proceeding and refer to that document and to Order No. 546 of the Penn Central Reorganization Court for a true and correct statement of their contents;

(f) Admit the allegation of paragraph 9;

(g) With respect to the allegations of paragraph 10, refer to the mortgage for a true and correct statement of its contents and in further answer allege that under present conditions the indenture trustee may not be able to exercise the remedies provided in the mortgage;

(h) Admit the allegations of paragraph 11;

(i) With respect to the allegations of paragraph 12, refer to Sections 11 and 77(j) of the Bankruptcy Act which speak for themselves;

(j) Admit the allegations of paragraphs 13 through 16;

(k) With respect to the allegations of paragraphs 17 through 19, admit that the Act may have resulted and may result in takings of the Trustees' property but deny that such takings are in violation of the Fifth Amendment to the Constitution of the United States and that there is no adequate remedy at law because of the right to obtain a judgment against the United States in the

Court of Claims pursuant to the Tucker Act (28 U.S.C. §1491) for just compensation for any and all such takings;

(l) Deny the allegations of paragraphs 20 through 23 except to admit that the procedures of the Act may alter the remedies heretofore available to claimants in reorganization proceedings pursuant to Section 77. The Trustees in further answer allege that any alteration by the Act of the remedies heretofore available to plaintiff is not unconstitutional or otherwise contrary to law because of the right to obtain a judgment in the Court of Claims pursuant to the Tucker Act for just compensation for all takings of properties effected by the Act;

(m) Deny the allegations of paragraph 24 and refer to the provisions of the Act which speak for themselves, and in further answer allege that the Act does not impair or preclude the right to obtain a money judgment pursuant to the Tucker Act;

(n) With respect to paragraph 25, admit that the Act may have resulted and may result in takings of the Trustees' property but deny that such takings are in violation of the Fifth Amendment to the Constitution of the United States because of the right to obtain a judgment against the United States in the Court of Claims pursuant to the Tucker Act for just compensation for any and all such takings. Because of the availability of the Tucker Act remedy, the Trustees deny the remaining allegations of paragraph 25;

(o) Because of the availability of the Tucker Act remedy, deny the allegations in paragraph 26 and in further answer allege that there are 23 railroads now in reorganization under §77 of the Bankruptcy Act;

(p) Because of the availability of the Tucker Act remedy, deny the allegations of paragraphs 27 through 29;

(q) Deny the allegations of paragraph 30 because of the right to obtain a judgment against the United States pursuant to the Tucker Act, and in further answer allege that the availability of the Tucker Act remedy provides an appropriate judicial process for determining the just compensation to be paid for the takings resulting from the Act and that the right to obtain a money judgment from the Court of Claims provides adequate assurance that the just compensation so determined will be paid by the United States;

(r) Because of the availability of the Tucker Act remedy, deny the allegations in paragraphs 31 and 32;

(s) Deny the allegations of paragraph 33 except to admit that requiring the Trustees to continue to perform their rail operations at a loss may have resulted in takings of their properties on or before January 2, 1974, and in further answer allege that the Act does not impair or preclude the Trustees' entitlement to a money judgment pursuant to the Tucker Act for any takings which the Court of Claims might find to have resulted from the forced continuation of rail services;

(t) Deny the allegations of paragraphs 34 and 35;

(u) Because of the availability of the Tucker Act remedy, deny the allegations in paragraph 36, and in further answer allege that continuing rail operations will result in further erosion of the Penn Central Estate;

(v) Deny the allegations of paragraph 37 and with reference to section E thereof in further answer

allege that the availability of the Tucker Act remedy provides an appropriate judicial process for determining the just compensation to be paid for the takings resulting from the Act and the right to obtain a money judgment against the United States from the Court of Claims provides adequate assurance that the just compensation so determined will be paid by the United States;

(w) Deny the allegations of paragraph 38, because of the Tucker Act remedy.

4. As a further answer the Trustees assert that they are entitled to bring an action in the Court of Claims pursuant to the Tucker Act for a money judgment against the United States for any inadequacy in the amount or kind of compensation awarded pursuant to the procedures of the Act for the takings of property pursuant to or occasioned by the Act. The entitlement of the Trustees to obtain pursuant to the Tucker Act any money judgment that may be necessary to provide just compensation is not impaired or precluded by any provision of the Act and the availability of the Tucker Act remedy assures that just compensation will be paid for all properties, assets, rights and interests found by the Court of Claims to have been subjected to either a temporary or permanent taking by the Act.

Prayer for Relief

WHEREFORE, the Trustees pray that the Court enter an order dismissing the complaint herein and declaring the Act to be valid because the Trustees are entitled to obtain any money judgment that may be necessary to provide just compensation for the takings occasioned by or pursuant to the Act by means of an action in the Court

of Claims against the United States pursuant to the Tucker Act, and that the Act does not impair or preclude the exercise of that right.

Respectfully submitted,

Charles A. Horsky

Brice M. Clagett

Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Intervenors

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

ORDER

AND NOW, this 3rd day of May, 1974, on consideration of the Motion of George P. Baker, Robert W. Blanchette and Richard C. Bond, as Trustees of the property of Penn Central Transportation Company, Debtor, for leave to intervene, it is ORDERED that the aforesaid Motion for leave to intervene is GRANTED.

/s/ John P. Fullam

J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

STIPULATION OF PLAINTIFF AND DEFENDANTS AS TO FACTUAL MATTERS

It is hereby stipulated and agreed by and among the attorneys for the parties hereto that the facts hereinafter set out are deemed to be true, for purposes of any motion for summary judgment or partial summary judgment made by any party in connection with the above-captioned matter, with the same force and effect as if they had been proved by competent and uncontradicted evidence. This stipulation pertains to the use of the following facts for the aforesaid purposes in this action only and does not constitute agreement as to the accuracy of said facts in any other proceeding, cause, action, matter or context.

IT IS HEREBY STIPULATED AND AGREED:

1. Plaintiff, Richard Joyce Smith, Trustee of the property of The New York, New Haven and Hartford Railroad Company, Debtor in reorganization under §77 of the Bankruptcy Act ("New Haven Trustee" and "New Haven" respectively) is the registered holder of $34,025,800 principal amount of 5% Divisional Mortgage Bonds ("Bonds") of Penn Central Transportation Company, Debtor in reorganization under §77 of the Bankruptcy Act ("Penn Central"). The New Haven Trustee has filed a Proof of Claim dated as of May 31, 1971, a copy of which is attached as Exhibit B, to a Petition of the Penn Central Trustees dated June 17, 1971, to the Penn Central reorganization court,

Document No. 1372.* Said Proof of Claim has not been adjudicated (see Order No. 546 of the Penn Central Reorganization Court in Bky. 70-347).

2. The Bonds of Penn Central held by Plaintiff are secured by a Divisional Mortgage dated December 31, 1968 from Penn Central to The Fidelity Bank and Joseph F. McDonald, as indenture trustees ("Divisional Mortgage"). The Divisional Mortgage comprises a first lien on certain real estate owned by Penn Central, including land, railroad track and improvements, which is now used by Penn Central in furnishing rail freight services, suburban passenger service, and (under contract with National Railroad Passenger Corporation) inter-city rail passenger service, including *inter alia* such service between the following points: Providence, Rhode Island to the Connecticut/New York State Line; Springfield, Massachusetts to New Haven, Connecticut; and comprises a second lien on certain land, railroad track and improvements in New York, New York.

3. By its Order No. 546, dated December 31, 1971, the Penn Central reorganization court ordered that, pending adjudication of the said Proof of Claim filed by the New Haven Trustee, the New Haven Trustee shall be deemed to have a lien, indeterminate in amount and indeterminate as to priority, upon all of the real property and readily identifiable tangible personal property (exclusive of rolling stock) conveyed to Penn Central by the New Haven Trustee on December 31, 1968, and remaining in possession of the Penn Central Trustees as of June 11, 1971.

4. It is likely that some of the rail properties of Penn Central subject to the Divisional Mortgage and the

*Document references are to documents of record in reorganization proceedings of Penn Central under §77 of the Bankruptcy Act in the Eastern District of Pennsylvania, Docket No. 70-347.

indeterminate lien and other rail properties not so subject will be designated pursuant to each subsection of §206(c)(i) of the Regional Rail Reorganization Act of 1973 (the "Act") for transfer, sale or conveyance pursuant to §206(d) of the Act in any final system plan made effective under the Act.

5. It will not be possible to ascertain until completion of the planning and approval process required by the Act

(i) which rail properties of Penn Central will be designated for transfer or conveyance to Consolidated Rail Corporation ("CRC");

(ii) the liquidation value of properties designated in the final system plan for transfer to CRC;

(iii) the value of properties designated in the final system plan for transfer to CRC on any basis other than a liquidation basis; or

(iv) the value of the consideration which will be exchanged for properties designated in the final system plan for transfer to CRC.

6. Any rail properties of Penn Central which are transferred or conveyed to CRC pursuant to the final system plan will be transferred or conveyed free and clear of any liens which plaintiff may have on such properties.

7. For the two months ended February 28, 1974, Penn Central had a deficit in net railway operating income, a deficit in total income, a deficit in income available for fixed charges and deficit net income, as those items are determined in accordance with accounting regulations of the Interstate Commerce Commission. [Source - Doc. No. 7224] *

*Where appropriate, for ease of reference, the underlying source of the stipulated fact is indicated.

8. Within the meaning of §207(b) of the Act, Penn Central is not "reorganizable on an income basis within a reasonable period of time under §77 of the Bankruptcy Act."

9. Without taking into account the Act or the implementation of any provision thereof, Penn Central is not able to achieve a successful reorganization as a common carrier within a reasonable period of time under §77 of the Bankruptcy Act.

10. During the period that began June 21, 1970, and ended December 31, 1973, Penn Central sustained ordinary net losses in an amount which approximates $851,000,000, as shown in Trustees' Financial Statements for June 22-30, 1970, third quarter 1970, October 1970, November 1970, December 1970, 1971, 1972 and 1973. [Source - Doc. Nos. 256, 431, 630, 786, 1309, 3415, 5224 and 6986]

11. During the period that began June 21, 1970, and ended December 31, 1973,

(i) the Penn Central Trustees expended in operating rail properties approximately $137,500,000 of nonrecurring cash items as follows:

Trustees' Certificate Drawdowns	$100,000,000
Tenants Tax Escrow Account	3,100,000
Proceeds from New Haven Property Sale	9,100,000
Sale of Freight Cars to P&LE	7,300,000
M.B.T.A. Settlement	9,100,000
Proceeds from sale of stock of Madison Square Garden Corp.	2,400,000
Proceeds from sale of securities held in Contingent Compensation Fund	6,500,000
TOTAL	$137,500,000

[Source - Doc. No. 7244 (Varallia affidavit, Ex. T-1]

(ii) the Penn Central Trustees expended $2,100,000 in proceeds from sale of mortgaged properties in connection with the Selkirk Yard improvement and $15,700,000 in proceeds from the "Agnes" Flood Loan. [Source - Doc. No. 7244 (Varalli affidavit, Ex. T-1)]

(iii) the Penn Central Trustees expended in operating rail properties approximately $157,000,000 in income derived from Penn Central's non-rail properties as set forth in the analysis attached hereto as Exhibit A.

12. During the period beginning on June 21, 1970, and ending on December 31, 1973, the Penn Central Trustees deferred payment of approximately $241,000,000 in state and local taxes, of which some $44 million to $48 million is allocable to the pre-reorganization period. These taxes ($241,000,000) are included in the ordinary net losses stipulated in item 10 above. [Source - Doc. No. 7245 (Guest affidavit, p. 5); Tr. pp. 11,162-63,* Stipulation between counsel for Penn Central Trustees and USA, ICC Transcript p. 1497, Letter dated April 1, 1974, from counsel for Penn Central Trustees to Judge Fullam]

13. During the period that began June 21, 1970, and ended December 31, 1973, the Penn Central Trustees deferred payment of approximately $101,000,000 in rentals on leased line properties. It cannot be determined at this time whether the Penn Central estate has or will have claims against the lessor companies in respect of losses incurred by Penn Central in the operation of the leased lines since bankruptcy that would in any part offset the claim for unpaid rentals, or whether the lessors would

*Tr. references are to the transcript in the above-mentioned Penn Central reorganization proceedings.

have claims against Penn Central in addition to claims for unpaid rent. The deferred leased line rentals are included in the ordinary net losses stipulated in item 10 above. [Source - Doc. No. 7245 (Guest affidavit, p. 9); Tr. pp. 11,263-64, Guest ICC Exh. 23, p. 4, Guest Testimony, ICC Transcript, pp. 1,875-76]

14. During the period that began June 21, 1970, and ended December 31, 1973, the Penn Central Trustees deferred approximately $104,000,000 in interest on mortgage and collateral trust debt. The foregoing figure does not reflect any accrual of unpaid interest on $300 million principal amount of outstanding notes of Penn Central that are alleged by the holders thereof to be secured by all of the outstanding common stock of the Pennsylvania Company, a matter which has been litigated, and is *sub judice*, in the reorganization court (the so-called "Robinson litigation"). Both the validity of the notes and the interest thereon are involved in the litigation; if interest should be payable, interest on such notes is tied to the prime rate in effect from time to time, and unpaid interest on those notes through May 31, 1973, would have amounted to $57.7 million. It has not yet been determined which issues of bonds and notes are fully secured and therefore entitled to post-bankruptcy interest. The deferred interest on mortgage and collateral trust debt and the $300 million principal amount of notes is included in the ordinary net losses stipulated in item 10 above. [Source - Doc. No. 7245 (Guest affidavit, p. 9), Guest ICC Exhibit 22, p. 7, Guest ICC Exhibit 23, p. 4, ICC Transcript p. 1727].

15. The aggregate principal amount of trustees' certificates issued by the Trustees of Penn Central is $100,000,000.

16. Neither the Penn Central Trustees nor any private non-governmental party to Penn Central's §77 reorganization proceedings has sought reorganization under the Act, by petition or otherwise, except insofar as the trustees' motion for leave to intervene and motion for summary judgment heretofore filed on this and related actions may be deemed to have done so.

Dated: April [filed May 2, 1974]

/s/ Joseph Auerbach (DMS)
Attorney for Plaintiff

/s/ James F. Dausch
Attorney for Defendants United States of America and Brinegar, and for the Interstate Commerce Commission (as to whom the United States of America is named as defendant).

/s/ William R. Perlik
Attorney for Defendant United States Railway Association.

EXHIBIT A

ANALYSIS OF NET "NON-RAIL" INCOME
DETAIL OF COMPILATION

Source ICC Form R1:	Item	June 21 to Dec. 31, 1970	1971	1972	1973
		($ in millions)			
(1973 Line No. Ref.)					
Sched. 300 Line No. 33	Other Income	$26.7	$54.3	$56.5	$60.2
Less Rail Related Items:					
Sched. 300 Line No. 23	A/C 509-Inc. Lse. of R.E.	.1	.4	.3	.3
" " 26	512 Sep. Oper. Prop. Pft.	(Net Below)	.1		.1
" " 29	516 Inc. From Skg. Fds.	.8	3.5	3.6	5.2
Total	"Rail Related" Income	.9	4.0	3.9	5.6
	"Non-Rail" Income	25.3	50.3	52.6	54.6
Sched. 300 Line No. 43	Misc. Deductions	10.4	23.0	18.6	21.5
Less Rail Related Items:					
Sched. 300 Line No. 33	A/C 545-Sep. Oper. Prop. Loss	(Net) 1.4	4.2	3.5	4.3
" " 42	551 Misc. (L.V. Impairment)	2.3	8.4*	4.8	4.4
Total	"Rail-Related" Misc. Ded.	3.7	12.6	8.3	8.7
	"Non-Rail" Misc. Ded	6.7	10.4	10.3	12.9
"Non-Rail" Income less "Non-Rail" Misc. Ded.		19.1	39.9	42.3	41.8
Sched. 300 Line No. 4	Tax Allocation Cr.	(4.9)	3.9	7.1	8.0
Net Non-Rail Income		$14.2	$43.8	$49.4	$49.8

*Includes Service Interruption Policy of $3.9 Million

[CAPTION]

Stipulation as to the record, dated April 15, 1974

(Identical to the stipulation in the Connecticut General case, item 3h)

[CAPTION]

Affidavit of John W. Ingram, dated May 23, 1974 (as amended by affidavit of May 30, 1974)

(Identical to 3m)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

MOTION OF NEW HAVEN TRUSTEE TO
STRIKE AFFIDAVIT OF JOHN W. INGRAM

Plaintiff Richard Joyce Smith, Trustee of the Property of The New York, New Haven and Hartford Railroad Company, Debtor (the "New Haven Trustee"), hereby moves to strike the Affidavit of John W. Ingram (the "Affidavit") on the following grounds:

I. If the Affidavit is submitted in opposition to the New Haven Trustee's Motion for Summary Judgment it should be stricken as being wholly irrelevant to the issues raised by such Motion because whether the proposed Consolidated Rail Corporation ("CRC") is or is not "financially self-sustaining" (Affidavit, ¶ 2) is not relevant to the contention of the New Haven Trustee that compensation for the railroad properties to be compulsorily transferred to CRC must be solely in money or its perfect equivalent, and that securities of CRC, no matter how valuable, will not be the perfect equivalent of money.

II. If the Affidavit is submitted in support of Defendants' Motion for Summary Judgment, it should be stricken on the ground that it fails to meet the requirements of Rule 56(e) of the Federal Rules of Civil Procedure in that it is not "made on personal knowledge", it does not "set forth such facts as would be admissible in evidence", and it does not "show affirmatively that the affiant is competent to testify to the matters stated therein". The Affidavit is on its face inadmissible on the grounds that

it is non-factual, argumentative and conclusory in nature; it relies on non-admissible hearsay; and, if offered as expert testimony, it is unsupported by reference to recognized, competent texts or treatises or to any competent factual compilations or analyses.

Moreover, the Affidavit is inconsistent with the Stipulation of Plaintiff and Defendants as to Factual Matters among all the parties to the proceeding, who stipulated, *inter alia*, that "[i]t will not be possible to ascertain until completion of the planning and approval process required by the [Regional Rail Reorganization] Act [of 1973] ... the value of the consideration which will be exchanged for properties designated in the final system plan for transfer to CRC."

WHEREFORE, the New Haven Trustee prays that this Court strike the Affidavit of John W. Ingram.

Dated: June 3, 1974

Respectfully submitted,

Joseph Auerbach
Morris Raker
Charles W. Morse, Jr.
225 Franklin Street
Boston, Massachusetts 02110
Tel. (617) 423-7474

Attorneys for Richard Joyce Smith, Trustee of the Property of The New York, New Haven and Hartford Railroad Company, Debtor

Of Counsel:

James Wm. Moore
54 Meadow Street
New Haven, Connecticut
06506

Sullivan & Worcester
225 Franklin Street
Boston, Massachusetts 02110

Gratz, Tate, Spiegel, Ervin
& Ruthrauff
1900 Two Girard Plaza
Philadelphia, Pennsylvania
19102

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

MOTION FOR SUMMARY JUDGMENT

Plaintiff moves the Court as follows:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment in Plaintiff's favor for the relief sought in the Complaint in subparagraphs (c), (d) and (e) of Paragraph 3, and in Paragraph 4, of the prayer for relief, to wit, that the Court declare and adjudge that the Regional Rail Reorganization Act of 1973, Public Law 93-236 (the "1973 Act") is unconstitutional and void, and that the Plaintiff's property rights have been taken or are threatened by a taking for public use without just compensation within the meaning of the Fifth Amendment to the United States Constitution; and that the Court enter an order of permanent injunction restraining each of the defendants from proceeding to take any of the actions or exercise any of the functions provided in the 1973 Act to be taken or exercised by them. The grounds for Plaintiff's Motion is that he is, as a matter of law, entitled to the relief requested, that all material facts which have any bearing upon the issues of law are in the record before this Court pursuant to stipulation among the parties embodying evidence in the proceedings of Penn Central Transportation Company under §77 of the Bankruptcy Act in this District (Bky. No. 70-347), and in proceedings of the Interstate Commerce Commission, Finance Docket No. 26241, and that no genuine issue exists among the parties as to material facts

relevant to a determination of the issues of law presented by this Motion.

2. That this Motion be granted expedited consideration for the reason that the prompt determination of the constitutionality of the 1973 Act is in the national interest as well as the interest of justice, and that irreparable injury is being suffered by the Plaintiff pending adjudication of his Complaint.

3. If summary judgment upon the whole case or for all the relief asked is resisted by any Defendant, and a claim is made that a trial is necessary, that the Court, at the hearing on this Motion, by examining the pleadings and the evidence before it and by interrogating counsel as it may deem appropriate, ascertain whether and, if so, what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without substantial controversy and which would permit the Court to proceed on this Motion as one for partial summary judgment, and directing such further proceedings in the action and in this Motion as are just.

Plaintiff's grounds for his Motion are fully set forth in the attached Memorandum of Points and Authorities.

Dated: April 29, 1974

Respectfully submitted,

Of Counsel:

James Wm. Moore
54 Meadow Street
New Haven, Connecticut
06506

Sullivan & Worcester
225 Franklin Street
Boston, Massachusetts 02110

Gratz, Tate, Spiegel, Ervin
& Ruthrauff
1900 Two Girard Plaza
Philadelphia, Pennsylvania 19102

Joseph Auerbach
Morris Raker
Charles W. Morse, Jr.
225 Franklin Street
Boston, Massachusetts 02110
Tel. (617) 423-7474

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

MOTION OF INTERVENING DEFENDANTS
FOR SUMMARY JUDGMENT

Intervening defendants, George P. Baker, Robert W. Blanchette, and Richard C. Bond, Trustees of the Property of Penn Central Transportation Company, Debtor, move for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure.

Respectfully submitted,

/s/ John B. Rossi, Jr.

John B. Rossi, Jr.
John F. DePodesta
1836 Six Penn Center Plaza
Philadelphia, Pennsylvania 19104
215–594-1165
Charles A. Horsky
Brice M. Clagett
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006
202-293-3300

Attorneys for the Trustees of the property of Penn Central Transportation Company, Debtor

Dated: May 10, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

NOTICE OF MOTION

TO: Joseph Auerbach, Esq.
Sullivan & Worcester
225 Franklin Street
Boston, Massachusetts 02110

Gratz, Tate, Spiegel, Ervin
& Ruthrauff
1900 Two Girard Plaza
Philadelphia, Pennsylvania 19102

John B. Rossi, Esq.
Office of Counsel for the
Trustees
Penn Central Transportation Co.
1836 Six Penn Center Plaza
Philadelphia, Pennsylvania 19104

Charles A. Horsky, Esq.
Covington & Burling
888 16th Street, N. W.
Washington, D. C. 20006

PLEASE TAKE NOTICE that on May 24, 1974, Defendants will file with the Clerk of the United States District Court for the Eastern District of Pennsylvania the within Motion for Summary Judgment. In support of said Motion Defendants incorporate by reference the Brief of Defendants in Opposition to Plaintiff's Motion for Summary Judgment and in Partial Opposition to Intervening Defendants' Motion for Summary Judgment, filed in this Action on May 17, 1974.

CARLA A. HILLS
Assistant Attorney General

ROBERT E. J. CURRAN
United States Attorney

DAVID J. ANDERSON
Special Litigation Counsel

Of Counsel:
RODNEY E. EYSTER
General Counsel

/s/ James F. Dausch

JAMES F. DAUSCH
Attorney
United States Department of Justice

JEROME E. SHARFMAN
STUART G. MEISTER
MICHAEL T. HALEY
Attorneys
U.S. Department of
Transportation
Washington, D.C. 20590

Attorneys for United States of America, Claude S. Brinegar, George M. Stafford and George P. Schultz

/s/ William R. Perlik

WILLIAM R. PERLIK

Of Counsel:
Wilmer, Cutler & Pickering
1666 K Street, N. W.
Washington, D. C. 20006

Attorney for the United States Railway Association

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants move the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in their favor on the grounds that there is no genuine issue of material fact and that they are entitled to judgment in their favor as a matter of law. This Motion is based upon the following:

(1) Complaint and Answer;

(2) Stipulation of facts entered into by the parties for the purposes of any motion for summary judgment;

(3) Stipulation of the parties incorporating as part of the record in this Action extracts from the record in *In the Matter of Penn Central Transportation Company, Debtor* (Bky. No. 70-347), lodged in the United States District Court for the Eastern District of Pennsylvania;

(4) The portions of the record described in the preceding paragraph (3) which are cited and relied upon by Defendants in the Brief of Defendants in Opposition to Plaintiff's Motion for Summary Judgment and in Partial Opposition to Intervening Defendants' Motion for Summary Judgment, filed in this Action on May 17, 1974;

(5) Affidavit of Jerome E. Sharfman, dated May 10, 1974;

(6) Northeastern Railroad Problem, A Report to the Congress Submitted by the Secretary of Transportation in Response to S. J. Res. 59-2, dated March 26, 1973; and

(7) Report of Defendant Claude S. Brinegar in his capacity as Secretary of Transportation, entitled "Rail Service in the Midwest and Northeast Region" (Volume 1, Volume 2 (Part 1), and Volume 2 (Part 2)), and supplement thereto entitled "Volume 2, Supplement to Local Rail Service Zone Reports".

WHEREFORE, defendants pray that this Court enter its judgment dismissing all claims set forth in the Complaint except those claims which rest on allegations that the Regional Rail Reorganization Act of 1973 exceeds the authority of Congress under Article III of the Constitution, said claims being those referred to in paragraphs 3(a) and 3(b) of the prayer for relief of the Complaint.

May 24, 1974

CARLA A. HILLS
Assistant Attorney General

ROBERT E. J. CURRAN
United States Attorney

DAVID J. ANDERSON
Special Litigation Counsel

/s/ James F. Dausch
JAMES F. DAUSCH
Attorney
United States Department of Justice

Attorneys for United States of America, Claude S. Brinegar, George M. Stafford and George P. Schultz

Of Counsel:
RODNEY E. EYSTER
General Counsel

JEROME E. SHARFMAN
STUART G. MEISTER
MICHAEL T. HALEY
Attorneys
U.S. Department of Transportation
Washington, D. C. 20590

/s/ William R. Perlik
WILLIAM R. PERLIK

Attorney for the United States Railway Association

Of Counsel:
Wilmer, Cutler & Pickering
1666 K Street, N. W.
Washington, D. C. 20006

[CAPTION]

Affidavit of Jerome E. Sharfman, dated May 10, 1974, together with Exhibit A thereof

(Not printed, but appears in the Joint Documentary Submission as Item 60)

DOCKET ENTRIES

in the

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

in

Penn Central Company v.
Claude S. Brinegar, et al.

No. C.A. 74-195

(Later transferred to
Eastern District of Pennsylvania,
No. C.A. 74-1149)

Date	Proceedings
1974	
Jan. 29	Complaint, appearance, filed.
Jan. 29	Summons, Copies (6) and Copies (6) of Complaint issued, defts. ser. 2-1-74.
Jan. 29	APPLICATION for convening of Three-Judge District Court; P&A.
Feb. 12	OPPOSITION of deft. #6 to application for convening of Three-Judge Court; attachment; exhibit A; c/m 2-12-74. Appearance of James F. Dausch.
Feb. 22	WITHDRAWAL of the opposition of Deft. #6 to the immediate convening of a three-judge court; exhibit; c/m 2-22-74.
Feb. 25	REQUEST for designation of Three Judge Court. (Del. to USCA) Parker, J.
Mar. 1	DESIGNATION of the Honorable Harold Leventhal, United States Circuit Judge and the Honorable Thomas A. Flannery, United States District Judge, to serve with the Honorable Barrington D. Parker, United States District Judge, as members of a three judge court to hear and determine this case. Wright, Acting Chief Judge, USCA.

1974

Mar. 11	ANSWERS of defts. to complaint; c/m 3-11-74. Appearance of James F. Dausch.
Mar. 11	CALENDARED CD/N.
Mar. 15	APPEARANCE of William R. Perlik, Wilmer, Cutler & Pickering as counsel for Deft. #5. CD/N.
Mar. 18	LETTER dated 3-14-74 re: Answer of Interstate Commerce Commission.
Apr. 3	MOTION by George P. Baker, Robert W. Blanchette, and Richard C. Bond, trustees of the property of Penn Central Transportation Company, debtor, to intervene; exhibit; P&A's; exhibit A; exhibit B; c/s 4-3-74. Deposit $5.00 by Charles Horsky. Appearance of Brice M. Clagett (888 – 16th St., N. W.)
Apr. 12	MOTION of defendants for transfer; plaintiffs consent; memorandum; attachment A.
Apr. 17	ORDER granting motion of deft. to transfer this cause to the Eastern District of Pennsylvania; directing Clerk to effect the transfer. (N) Parker, J.
Apr. 29	ORIGINAL file mailed to Clerk, U.S. District Court for the Eastern District of Pennsylvania pursuant to order of April 17, 1974.
May 9	ACKNOWLEDGMENT of receipt of original file from Eastern District of Pennsylvania.

Proceedings

in the

United States District Court
for the Eastern District of Pennsylvania

No. C.A. 74-1149

Date			Proceedings	Date of Judgment
1974				
1	May	6	Original record and certified copy of docket entries transferred from USDC District of Columbia, filed.	
2	"	16	Order reassigning this case to Judge Fullam, filed. entr. & cys. mailed 5/17/74.	
3	"	16	Order GRANTING motion of George P. Baker, Robert W. Blanchette and Richard C. Bond, as Trustees of Penn Central Trans. Co. to intervene, filed. entr. & cys. mailed 5/17/74.	
4	"	17	Order that summary judgment motions and supporting briefs be filed on or before May 22, 1974, opposing affidavits etc., shall be filed on 5/30/74, etc. and hearing on summary judgment motions will be held on 6/3/74, filed. entr. & cys. mailed 5/21/74.	
5	"	20	Motion of intervening defts. for summary judgment, memorandum in support and certificate of service, filed.	
6	"	22	Plff's. motion for summary judgment and memorandum in support, filed.	
7	"	29	Brief of intervening defts. in opposition to plff's. motion for summary judgment, filed.	
8	"	30	Defts'. brief in opposition to plff's. motion for summary judgment and memorandum in support and in partial opposition to intervening deft's. motion for summary judgment, filed.	
9	"	30	Deft's. incorporation of brief by reference, filed.	

1974

10	"	30	Submission of affidavit of John P. Ingram in compliance with ¶2 of Order of 5/17/74, filed.
11	"	30	Affidavit of John W. Ingram, filed.
12	"	30	Joint documentary submission of plffs., defts. and intervening defts., filed.
13	"	30	Plff's. memorandum in opposition to defts. motions for summary judgment, filed.
14	"	31	Defts'. motion for summary judgment, notice of motion, filed.
15	"	31	Suppl. joint documentary submission of plffs., defts. and intervening defts., filed.
	Jun.	3	Arg. re: Plff's. motion for summary judgment and deft's. and intervening defts'. motion for summary judgment, C.A.V.
16	"	4	Stipulation as to the record in this proceeding, filed.
17	"	4	Stipulation as to factual matters, filed.
–	"	6	Transcript of 6/3/74, filed. (C.A. #74-189).
18	"	25	Copy of Opinion and Order, ALDISERT, CJ., FULLAM, J. and BECHTLE, J. enjoining U.S. Railway System from certifying a Final System Plan to Special Court, etc., Enjoining defts. from taking any action to enforce provisions of Sec. 304(f) of the RRRA with respect to abandonment, etc.; enjoining all parties from enforcing any action to implement so much of Sec. 207(b) of the RRRA as purports to require dismissal of pending proceedings for reorganization under §77 of the Bankruptcy Act, entering Declaratory judgment that Sec. 303 of RRRA is null and void as contravening the Fifth Amendment, etc.; Sec. 304(f) of the RRRA is null and void as violative of the Fifth Amendment, etc.; that Sec. 207(b) of RRRA as requires reorganization courts to dismiss pending bankruptcy proceedings as violative of Art. I Sec. 8 Clause 4 of the Constitution; plffs. motions for partial summary judgment are granted in part and in all other respects denied; defts. motions for summary judgment are denied, filed. cys. to all parties 6/25/74 – entered 6/26/74.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
[Caption omitted in printing]

COMPLAINT

ACTION UNDER THE CONSTITUTION OF THE UNITED STATES REQUESTING THE DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

JURISDICTION, VENUE AND NATURE OF ACTION

1. This Court has jurisdiction of the action pursuant to Title 28 U.S.C. §§1331(a), 1337, 2201, 2202, 2282, 2284 and 1651. The amount in controversy exceeds $10,000 exclusive of interest and costs.

2. Venue over this action lies in the District of Columbia pursuant to 28 U.S.C. §1391(b) and (e). All defendants reside in the District of Columbia, the claim arises in the District of Columbia, each defendant is an officer or employee of the United States or an agent thereof, acting in his official capacity, or an agency of the United States, and real property involved in this action is situated in the District of Columbia.

3. Plaintiff brings this action seeking a declaratory judgment from the Court that the Regional Rail Reorganization Act of 1973, Public Law 93-236 (hereinafter the "Act"), is in contravention of the Constitution of the United States, and seeking the issuance of relief by way of permanent injunction and/or such other relief as the Court deems appropriate.

4. Plaintiff requests determination of this action by a three-judge court pursuant to Title 28 U.S.C. §§2282 and

2284. This is a proper case for determination by a three-judge court as plaintiff seeks a permanent injunction restraining the enforcement, operation, and execution of the Act as violative of the United States Constitution.

PARTIES

5. Plaintiff, Penn Central Company, is a Pennsylvania Corporation with its principle place of business in Philadelphia, Pennsylvania. Plaintiff is the parent company of Penn Central Transportation Company (hereinafter "P.C.T.C.") owning 100% of the stock of PCTC. Plaintiff is also a creditor of PCTC in the approximate amount of $43 million.

6. (a) Defendant Claude S. Brinegar is Secretary of Transportation of the United States, an incorporator of the United States Railway Association, and a member of the Board of Directors of the Association, and is sued herein in each of these capacities.

(b) Defendant George M. Stafford is Chairman of the Interstate Commerce Commission, an incorporator of the United States Railway Association, and a member of the Board of Directors of the Association, and is sued herein in each of these capacities.

(c) Defendant George P. Shultz is Secretary of the Treasury of the United States, an incorporator of the United States Railway Association, and a member of the Board of Directors of the Association, and is sued herein in each of these capacities.

(d) The defendant United States Railway Association is a governmental corporation of defendant United States of America established in the District of Columbia by Section 201 of the Act.

(e) The defendant Interstate Commerce Commission is an agency of the defendant United States of America. The Rail Services Planning Office established pursuant to Section 205 (a) of the Act is an office of the defendant Commission.

BACKGROUND OF THIS ACTION

7. On June 21, 1970, PCTC filed a petition for reorganization pursuant to Section 77 of the Bankruptcy Act, 11 U.S.C. §205, in the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 70-347.

8. This Act became law on January 2, 1974.

9. PCTC owns, leases, and/or operates approximately 19,850 miles of railroad.

10. PCTC is a railroad within the meaning of the Interstate Commerce Act, 49 U.S.C. §1(3), and under the provisions of the Act, Section 102(11).

11. PCTC is a "railroad in reorganization" pursuant to Section 102(12) of the Act and is a railroad doing business in the "region" as defined in Section 102(13) of the Act.

12. There are approximately 27,350 total miles of railroad owned, leased, and/or operated by "railroads in reorganization" in the "region" as defined in the Act. Approximately 73% of this total is owned, leased, and/or operated by PCTC.

13. This Act applies only to "railroads in reorganization" in the "region" as defined in Sections 102(12) and 102(13) of the Act, and not to other railroads in

the United States or to other "railroads in reorganization" outside of these defined regions.

14. Within 30 days of the enactment of this Act, the Secretary of Transportation, pursuant to Section 204(a) of the Act, is directed to prepare a report containing his conclusions and recommendations with respect to the geographic zones within the region in and between which rail service should be provided and the criteria upon which such conclusions and recommendations are based.

15. Pursuant to Section 205(d) (1) of the Act, the Rail Services Planning Office, an office of the Interstate Commerce Commission, is directed to study and evaluate the Secretary of Transportation's §204(a) report and to submit its report thereon to the United States Railway Association within 120 days after the date of enactment of the Act.

16. The United States Railway Association, established by the Act, is authorized, in Sections 202, 207 and 208, to prepare and implement a "final system plan," the purpose of which is to create, through a process of reorganization of the "railroads in reorganization," a self-sustaining rail service system in the "region" adequate to meet the needs, *inter alia*, of commerce, national defense, environment, passenger service, shippers, states, and consumers in the "region."

17. Pursuant to Section 207(b) of the Act, within 120 days after enactment of the Act, each United States district court having jurisdiction over a "railroad in reorganization" in the "region" must decide whether the railroad is reorganizable on an income basis within a reasonable time under Section 77 of the Bankruptcy Act.

18. Pursuant to Section 207(b) of the Act, within 60 days after the issuance of the Report of the Rail Services Planning Office, outlined in paragraph 15 above, each Court having jurisdiction over a "railroad in reorganization" shall decide whether such railroad shall be reorganized pursuant to the Act. Section 207(b) states that each reorganization court shall order that the reorganization of the railroad under its jurisdiction shall proceed pursuant to the Act unless the Court (1) has found that the railroad is reorganizable on an income basis within a reasonable time under Section 77 of the Bankruptcy Act and that the public interest would be better served by such a reorganization than by a reorganization under the Act, or (2) finds that the Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization, in which case it shall dismiss the reorganization proceedings.

19. The final system plan will designate certain "rail properties" of the "railroads in reorganization" and of those railroads leased, operated or controlled by such railroads in the "region," which are to be transferred thereafter to the Consolidated Rail Corporation, established in Section 301 of the Act, a corporation which is an instrumentality and agency of the United States government, and certain "rail properties" which will be offered for sale thereafter to "profitable railroads" as defined in Section 102(9) of the Act.

20. By reason of the provisions of the Act, as designated above, rail properties of PCTC will be transferred to the Consolidated Rail Corporation and/or sold.

21. Under the Act, the "final system plan" will be adopted and rail properties of PCTC transferred and/or sold without the consent or approval of plaintiff, and

any other creditor or lienholder, and without the consent or approval of any court with jurisdiction over the railroad's property. Plaintiff will thus be deprived of its property without having any choice, control or participation in its disposition.

22. PCTC is and has been since at least February 8, 1973, operating its railroad properties, in the public interest, at continuing losses, and continuation of such operation will increase such losses.

23. The Act contains no provision or authorization for payment of compensation to PCTC or to plaintiff for the forced continuation of rail services.

CAUSE OF ACTION

24. The Act and its various provisions violate on their face and are in contravention of the Constitution of the United States as applied or as applicable to plaintiff Penn Central Company, are inconsistent with the letter and spirit of the Constitution of the United States, and deny and abridge the constitutional rights of the plaintiff, *inter alia*, in the following manner:

(A) The Act is unconstitutional in that it is violative of the express provisions of the Fifth Amendment to the United States Constitution in the following respects:

(1) it provides for the taking by the United States of the private property of the plaintiff for a public use without the payment of just compensation;

(2) it provides for the continued taking by the United States of the private property of the plaintiff for public

use during the implementation of the Act without the concomitant payment of just compensation;

(3) it denies to plaintiff the payment of just compensation for the taking by the United States of private property of the plaintiff for public use which occurred prior to the enactment of the Act.

(B) The Act is unconstitutional in that its application is limited to those entities, regions, and periods of time which are defined therein, and thereby is violative of the requirements of Art. I, Section 8, Clause 4 of the Constitution of the United States that Congress enact uniform laws on the subject of bankruptcies throughout the United States.

(C) The Act is unconstitutional in that it improperly circumscribes, limits, and denies to the plaintiffs access to the courts and judicial review; and furthermore, improperly circumscribes the scope of such judicial review as is granted under the Act, all in violation of the plaintiff's right to due process as guaranteed by the Fifth Amendment to the United States Constitution and in violation of the provisions of Article III, Sections 1 and 2 of the United States Constitution.

(D) The Act is unconstitutional in that it expressly forecloses judicial review of numerous provisions of, and actions which are to be carried out pursuant to the Act in violation of Article III, Section 2 of the United States Constitution.

(E) The Act is unconstitutional in that the provisions of the Act are, in numerous instances, vague and unintelligible and, thereby, denies the rights guranteed by the Due Process Clause of the Fifth Amendment to the United States Constitution.

(F) The Act is unconstitutional in that numerous provisions thereof improperly and illegally delegate certain powers vested by the Constitution in the Congress of the United States to other branches of government and, in particular, to the judicial branch of the United States Government, all in violation of Article I, Section 1 of the United States Constitution.

(G) The Act is unconstitutional in that its provisions illegally remove certain powers vested by the Constitution in the judicial branch of the United States Government to other branches of the Government and, in particular, to the Congress of the United States, all in violation of Article III, Section 2 of the United States Constitution.

(H) The Act is unconstitutional in that it establishes procedures which, *inter alia*, limit the manner in which the rights of the plaintiff are to be determined, limit the manner in which the interests of the public under the Act are to be determined, and limit the manner in which the transfer or conveyance of railroad properties under the Act are to be determined, all in violation of the plaintiff's right to due process as guaranteed by the Fifth Amendment to the United States Constitution.

25. By reason of the facts alleged in paragraphs 7 through 24, and by actions already taken and required to be taken by the defendants pursuant to the Act, plaintiff, PCTC and others have been and will be irreparably injured by the Act's abridgement of their constitutional rights. Plaintiff has no other remedy at law and can be accorded full satisfaction only by a judgment of this Court granting the relief requested.

WHEREFORE, Plaintiff prays that a three-judge court be commenced and that such court:

1. Enter a decree declaring the Regional Rail Reorganization Act of 1973, or such provisions thereof, in violation of the Constitution of the United States;

2. Permanently enjoin and prohibit the defendants from enforcing and implementing or attempting to enforce and implement the Act or any provisions thereof;

3. Grant such other and further relief as the Court may deem just, proper and necessary, together with the costs and disbursements of this action.

/s/ David Berger

David Berger
Leonard Barrack
Gerald J. Rodos
Michael K. Simon
Edward H. Rubenstone
1622 Locust Street
Philadelphia, PA 19103
(215) 732-8000

and

Charles Pilzer
Jacobs, Pilzer, Steiller
1101 Seventeenth Ave., N.W.
Washington, DC 20026
(202) 785-9000

Attorneys for Plaintiff

OF COUNSEL:
David Berger, P.A.,
Attorneys-At-Law

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

ANSWER OF ALL DEFENDANTS

Defendants for their Answer to the Complaint answer the numbered paragraphs of the Complaint as follows:

1. The allegations contained in paragraph 1 are conclusions of law which do not require answer and are accordingly neither admitted nor denied, except that defendants admit that the amount in controversy, if any, exceeds $10,000 exclusive of interest and costs.

2. The allegations contained in paragraph 2 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

3. Defendants admit that the allegations contained in paragraph 3 are a correct generalized description of the contents of the Complaint.

4. Defendants deny each and every allegation contained in paragraph 4, except that defendants admit that plaintiff seeks from a three-judge court, among other things, the issuance of a permanent injunction restraining the enforcement, operation and execution of the Regional Rail Reorganization Act of 1973, Pub. L. 93-236 (the Act), for repugnance to the Constitution of the United States.

5. Defendants admit that plaintiff Penn Central Company is a Pennsylvania corporation with its principal place of business in Philadelphia, Pennsylvania. Defendants are without knowledge or information sufficient to form a

belief as to the truth of the remaining allegations of paragraph 5.

6. Defendants:

(a) admit the allegations contained in paragraph 6(a).

(b) admit the allegations contained in paragraph 6(b).

(c) admit the allegations contained in paragraph 6(c).

(d) admit the allegations contained in paragraph 6(d).

(e) admit the allegations contained in paragraph 6(e).

7. Defendants admit the allegations contained in paragraph 7.

8. Defendants admit the allegations contained in paragraph 8.

9. Defendants admit the allegations contained in paragraph 9.

10. Defendants admit the allegations contained in paragraph 10.

11. Defendants admit the allegations contained in paragraph 11.

12. Defendants admit the allegations contained in paragraph 12.

13. The allegations contained in paragraph 13 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

14. The allegations contained in paragraph 14 purport to be a summary or characterization of the contents or effect of a provision of the Act the accuracy of which

is neither admitted nor denied and as to which reference is made to the Act for a full and complete statement thereof.

15. The allegations contained in paragraph 15 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

16. The allegations contained in paragraph 16 purport to be a summary of or characterization of the contents or effect of a provision of the Act the accuracy of which is neither admitted nor denied and as to which reference is made to the Act for a full and complete statement thereof.

17. The allegations contained in paragraph 17 purport to be a summary or characterization of the contents or effect of a provision of the Act the accuracy of which is neither admitted nor denied and as to which reference is made to the Act for a full and complete statement thereof.

18. The allegations contained in paragraph 18 purport to be a summary or characterization of the contents or effect of a provision of the Act the accuracy of which is neither admitted nor denied and as to which reference is made to the Act for a full and complete statement thereof.

19. The allegations of paragraph 19 consist in part of conclusions of law which do not require answer and are accordingly neither admitted nor denied and is part of a summary or characterization of the contents or effect of provisions of the Act the accuracy of which is neither admitted nor denied and as to which the Court is respectfully referred to the Act for a full and complete statement thereof.

20. Defendants deny that it is possible to determine at the present time which rail properties of Penn Central Transportation Company, if any, will be transferred to the Consolidated Rail Corporation and/or sold.

21. The allegations contained in paragraph 21 are conclusions of law which do not require answer and are accordingly neither admitted nor denied, except that defendants deny that (i) the final system plan will necessarily designate rail properties of Penn Central Transportation Company, (ii) rail properties of Penn Central Transportation Company will necessarily be transferred or conveyed pursuant thereto, or (iii) the transfer or conveyance, if any, of rail properties of Penn Central Transportation Company pursuant to the final system plan will be done without the approval, consent, option or choice of any court having jurisdiction or power to take any such action wtih respect to any such properties.

22. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 22.

23. The allegations contained in paragraph 23 are conclusions of law which do not require answer and are accordingly neither admitted nor denied.

24. Defendants deny each and every allegation contained in paragraph 24 to the extent that it is an allegation of fact. To the extent that any allegation contained in paragraph 24 is not an allegation of fact, it is a conclusion of law which does not require answer and is accordingly neither admitted nor denied.

25. Defendants deny the allegations contained in paragraph 25 that plaintiff is faced with irreparable injury, or that plaintiff has no other remedy at law. To the extent that the remaining allegations contained in paragraph 25

are allegations of fact, defendants deny each and every allegation. To the extent that the remaining allegations contained in paragraph 25 are conclusions of law, they do not require answer and are accordingly neither admitted nor denied.

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

This Court lacks jurisdiction over the subject matter, since this is a judicial proceeding with respect to the final system plan and is required by Section 209 (b) of the Act to be consolidated in a single, three-judge district court of the United States (which the Act denominates as the "special court" and which is referred to elsewhere in this Answer as the Special Court) whose members are to be designated by the Judicial Panel on Multidistrict Litigation.

THIRD DEFENSE

This Court should not take jurisdiction of the action, since primary jurisdiction is vested in and comity requires deference to those single-judge United States District Court which has jurisdiction over the Penn Central Transportation Company is reorganization and which is required by Section 207(b) of the Act to make findings as to (1) whether the public interest would be served by a reorganization on an income basis under Section 77 of the Bankruptcy Act (11 U.S.C. §205) rather than by a

reorganization under the Act (which finding could result in the discontinuance of any proceedings under the Act concerning the rail properties of the Penn Central Transportation Company) and (2) whether the Act provides a process which would be fair and equitable to the estate of the Penn Central Transportation Company (an inquiry which would essentially duplicate the inquiry which this Court is asked to make herein).

FOURTH DEFENSE

The action is not yet ripe for adjudication. It therefore is premature and presents no actual case or controversy. Any determination as to the allegations concerning the constitutionality of the Act contained in the Complaint cannot and in any event should not be made except in one or more of certain pending or future proceedings required by the Act and by Section 77 of the Bankruptcy Act, including (a) the findings, decisions and orders of reorganization courts and the Special Court under Section 207(b) of the Act, (b) the preparation, a adoption and review of a final system plan under Section 207(c) and (d) of the Act, (c) the approval and coming in effect of such plan pursuant to Section 208 of the Act, (d) the findings, determinations and orders of the Special Court under Section 303(c) of the Act relating to the fairness and equitableness of the transfers and conveyances of rail properties pursuant to the plan, and (e) the division among the parties to the reorganizations of the transferor railroads of the securities, other benefits and judgments awarded to the estates of those railroads.

FIFTH DEFENSE

Plaintiff is not entitled to declaratory or injunctive relief becuse it has not suffered and is not threatened with any irreparable injury, and plaintiff has adequate remedies at law.

WHEREFORE, having fully answered, defendants pray that the Complaint be dismissed and that they recover their costs and attorneys' fees, and that the Court grant such other relief as may be proper.

Respectfully submitted,

Dated: March 6, 1974

IRVING JAFFE
Acting Assistant Attorney General

ROBERT E. J. CURRAN
United States Attorney

DAVID J. ANDERSON
Special Litigation Counsel

Of Counsel:

RODNEY E. EYSTER
General Counsel

JEROME E. SHARFMAN
STUART G. MEISTER
MICHAEL T. HALEY
Attorneys
U.S. Department of
Transportation
Washington, D.C. 20590

JAMES F. DAUSCH
Attorney
United States Department
of Justice

Attorneys for the United States
of America, Claude S. Brinegar,
George M. Stafford, and George
P. Schultz

Of Counsel:

BARRY E. CARTER
WILLIAM T. LAKE
J. B. STEPHENS
Wilmer, Cutler & Pickering
1666 K Street, N.W.
Washington, D.C. 20006
202 872-6000

LLOYD N. CUTLER

MARSHALL HORNBLOWER

WILLIAM R. PERLIK

Attorneys for the United States
Railway Association

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

MOTION FOR LEAVE TO INTERVENE

George P. Baker, Robert W. Blanchette and Richard C. Bond, as Trustees of the property of Penn Central Transportation Company, Debtor, and not individually, 6 Penn Center Plaza, Philadelphia, Pa. 19104, 215-594-2139, respectfully move for leave to intervene as parties defendant in this proceeding, and to file the attached Answer.

Applicants' grounds for their motion are fully set forth in the attached Memorandum of Points and Authorities.

Respectfully submitted,

/s/ Charles A. Horsky
CHARLES A. HORSKY

/s/ Brice M. Clagett
BRICE M. CLAGETT
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006
293-3300

Paul R. Duke
General Counsel
Penn Central Transportation Company
Six Penn Center Plaza
Philadelphia, Pa. 19107

Attorneys for Intervenors

April 3, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

ANSWER OF THE
PENN CENTRAL TRUSTEES

1. Defendants George P. Baker, Robert W. Blanchette and Richard C. Bond (the Trustees) are the Trustees of the property of Penn Central Transportation Company, Debtor, (Penn Central) a railroad in reorganization pursuant to Section 77 of the Bankruptcy Act in proceedings pending in the United States District Court for the Eastern District of Pennsylvania. The Trustees' principal office is in Philadelphia, Pennsylvania.

2. Penn Central is a Class 1 railroad undergoing reorganization pursuant to Section 77 of the Bankruptcy Act and the Trustees own, lease, operate or control rail lines located throughout the region defined in the Regional Rail Reorganization Act of 1973 (the Act). As such, Penn Central and the Trustees are subject to procedures of the Act.

3. As their answer to the complaint herein the Trustees allege as follows:

(a) Admit the allegations of paragraphs 1 through 9, except to deny the allegation in paragraph 5 that plaintiff is a creditor of Penn Central in the approximate amount of $43 million;

(b) With respect to the allegations of paragraph 10, admit that Penn Central is a common carrier within the meaning of § 1(3) of the Interstate Commerce

Act and is a railroad as defined in § 102(11) of the Act;

(c) Admit the allegations of paragraph 11 except to allege that at this time Penn Central is "a railroad in reorganization" only for the purposes of Section 207(b), and may as a result of the determinations to be made pursuant to that section become "a railroad in reorganization" as defined in Section 102(12) of the Act;

(d) Admit the allegations of paragraph 12;

(e) With respect to the allegations of paragraph 13, admit that the Act applies to railroads in reorganization in the region as defined in §§ 102(12) and 102(13) thereof, but deny that it may not apply to other railroads as well;

(f) Admit the allegations of paragraphs 14 through 19 except refer to the Act for a true and correct statement of its terms;

(g) With respect to the allegations of paragraphs 20 and 21, refer to the provisions of the Act which speak for themselves;

(h) Admit the allegations of paragraphs 22 and 23 and in further answer allege that the Trustees have been compelled to continue operating their rail properties in the public interest at heavy losses and that the Trustees are entitled to a money judgment pursuant to the Tucker Act for any takings the Court of Claims might find resulted from such forced continuation of rail services.

(i) With respect to Section A of paragraph 24, admit that the Act may have resulted and may result

in takings of the Trustees' property but deny that such takings are in violation of the Fifth Amendment to the Constitution of the United States because of the right to obtain a judgment against the United States in the Court of Claims pursuant to the Tucker Act for just compensation for any and all such takings. Because of the availability of the Tucker Act remedy, the Trustees deny the allegations of Sections (B) through (H) of paragraph 24.

(j) Because of the availability of the Tucker Act remedy, deny the allegations of paragraph 25.

4. As a further answer the Trustees assert that they are entitled to bring an action in the Court of Claims pursuant to the Tucker Act for a money judgment against the United States for any inadequacy in the amount or kind of compensation awarded pursuant to the procedures of the Act for the takings of property pursuant to or occasioned by the Act. The entitlement of the Trustees to obtain pursuant to the Tucker Act any money judgment that may be necessary to provide just compensation is not impaired or precluded by any provision of the Act and the availability of the Tucker Act remedy assures that just compensation will be paid for all properties, assets, rights and interests found by the Court of Claims to have been subjected to either a temporary or permanent taking by the Act.

Prayer for Relief

WHEREFORE, the Trustees pray that the Court enter an order dismissing the complaint herein and declaring the Act to be valid because the Trustees are entitled to obtain any money judgment that may be necessary to provide just compensation for the takings pursuant to

the Act by means of an action in the Court of Claims against the United States pursuant to the Tucker Act, and that the Act does not impair or preclude the Trustees' exercise of that right.

Respectfully submitted,

/s/ Charles A. Horsky
Charles A. Horsky

/s/ Brice M. Clagett
Brice M. Clagett
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Paul R. Duke
General Counsel
Penn Central Transportation Company
Company
Six Penn Center Plaza
Philadelphia, Pa. 19107

Attorneys for Intervenors

April 3, 1974

IN T
FOR TH

'HE UNITED STATES DISTRICT COURT
E EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

Affidavit of John W. Ingram,
dated May 23, 1974 (as amended)

(Identical to the affidavit
in Connecticut General case,
item 3m)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

ORDER

AND NOW, this 16th day of May, 1974, on consideration of the Motion of George P. Baker, Robert W. Blanchette and Richard C. Bond, as Trustees of the property of Penn Central Transportation Company, Debtor, for leave to intervene, it is ORDERED that the aforesaid Motion for leave to intervene is GRANTED.

/s/ John P. Fullam

J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

MOTION OF PLAINTIFF PENN CENTRAL COMPANY FOR SUMMARY JUDGMENT

Plaintiff, Penn Central Company, hereby moves this Honorable Court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and submits in support of this motion the attached memorandum of law.

/s/ David Berger

David Berger
Gerald Jay Rodos
Paul J. McMahon
Edward Rubenstone
1622 Locust Street
Philadelphia, PA 19103

Attorneys for Plaintiff
Penn Central Company

OF COUNSEL:

DAVID BERGER, P.A.,
ATTORNEYS AT LAW
1622 Locust Street
Philadelphia, PA 19103

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

MOTION OF INTERVENING DEFENDANTS
FOR SUMMARY JUDGMENT

Intervening defendants, George F. Baker, Robert W. Blanchette and Richard C. Bond, Trustees of the Property of Penn Central Transportation Company, Debtor, move for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure.

Respectfully submitted,

/s/ John B. Rossi, Jr.
John B. Rossi, Jr.
John F. DePodesta
1836 Six Penn Center Plaza
Philadelphia, Pennsylvania 19104
215-594-1165

Charles A. Horsky
Brice M. Clagett
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006
202-293-3300

Attorneys for the Trustees of
the property of Penn Central
Transportation Company, Debtor

Dated: May 20, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants move the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment in their favor on the grounds that there is no genuine issue of material fact and that they are entitled to judgment in their favor as a matter of law. This Motion is based upon the following:

(1) Complaint and Answer;

(2) Any stipulation of facts entered into by the parties for the purposes of any motion for summary judgment;

(3) Any stipulation of the parties incorporating as part of the record in this Action extracts from the record in *In the Matter of Penn Central Transportation Company, Debtor* (Bky. No. 70-347), lodged in the United States District Court for the Eastern District of Pennsylvania;

(4) The portions of the record described in the preceding paragraph (3) which are cited and relied upon by Defendants in the Brief of Defendants in Opposition to Plaintiffs' Motion for Summary Judgment and in Partial Opposition to Intervening Defendants' Motion for Summary Judgment, to be filed in this Action on or before May 30, 1974;

(5) Affidavit of Jerome E. Sharfman, dated May 10, 1974;

(6) Affidavit of John P. Ingram, dated May 23, 1974;

(7) Northeastern Railroad Problem, a Report to the Congress Submitted by the Secretary of Transportation in Response to S. J. Res. 59-2, dated March 26, 1973; and

(8) Report of Defendant Claude S. Brinegar in his capacity as Secretary of Transportation, entitled "Rail Service in the Midwest and Northeast Region" (Volume 1, Volume 2 (Part 1), and Volume 2 (Part 2)), and supplement thereto entitled "Volume 2, Supplement to Local Rail Service Zone Reports."

WHEREFORE, Defendants pray that this Court enter its judgment in favor of the Defendants and dismissing this Action.

May 31, 1974

CARLA A. HILLS
Assistant Attorney General

ROBERT E. J. CURRAN
United States Attorney

DAVID J. ANDERSON
Special Litigation Counsel

/s/ James F. Dausch (IS)
JAMES F. DAUSCH
Attorney
United States Department of Justice

Attorneys for United States of America, Claude S. Brinegar, George M. Stafford and George P. Shultz

Of Counsel:
RODNEY E. EYSTER
General Counsel

JEROME E. SHARFMAN
STUART G. MEISTER
MICHAEL T. HALEY
Attorneys
U.S. Department of Transportation
Washington, D.C. 20590

Wilmer, Cutler & Pickering
1666 K Street, N.W.
Washington, D.C. 20006
Of Counsel:

/s/ William R. Perlik
WILLIAM R. PERLIK
Attorney for the United States Railway Association

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

Stipulation as to the record,
dated April 15, 1974

(Identical to the stipulation in
the Connecticut General case,
item 3h)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

STIPULATION OF PLAINTIFF AND DEFENDANTS AS TO FACTUAL MATTERS

It is hereby stipulated and agreed by and among the attorneys for the parties hereto that the facts hereinafter set out are deemed to be true, solely for purposes of any motion for summary judgment or partial summary judgment made by any party in connection with the above-captioned matter, with the same force and effect as if they had been proved by competent and uncontradicted evidence. This stipulation pertains to the use of the following facts for the aforesaid purposes in this action only and does not constitute agreement as to the accuracy of said facts in any other proceeding, cause, action, matter or context.

IT IS HEREBY STIPULATED AND AGREED:

1. Plaintiff, Penn Central Company, is the sole stockholder of Penn Central Transportation Company ("Debtor" or "Penn Central") in reorganization under Section 77 of the Bankruptcy Act owing 100% of the stock of the Debtor.

2. Plaintiff is an unsecured creditor of the Debtor in the approximate amount of $41,800,000.

3. It is likely that some of the rail properties of the Debtor will be designated pursuant to each subsection of Section 206(c)(i) of the Regional Rail Reorganization Act

of 1973 (the "Act") for transfer, sale or conveyance pursuant to Section 206(d) of the Act in any final system plan made effective under the Act.

4. It will not be possible to ascertain until completion of the planning and approval process required by the Act.

(i) which rail properties of Penn Central will be designated for transfer or conveyance to Consolidated Rail Corporation ("CRC");

(ii) the liquidation value of properties designated in the final system plan for transfer to CRC;

(iii) the value of properties designated in the final system plan for transfer to CRC on any basis other than a liquidation basis; or

(iv) the value of the consideration which will be exchanged for properties designated in the final system plan for transfer to CRC.

5. Any rail properties of Penn Central which are transferred or conveyed to CRC pursuant to the final system plan will be transferred or conveyed free and clear of any liens.

6. For the two months ended February 28, 1974, Penn Central had a deficit in net railway operating income, a deficit in total income, a deficit in income available for fixed charges and deficit net income, as those items are determined in accordance with accounting regulations of the Interstate Commerce Commission. [Source - Doc. No. 7224]*

*Where appropriate, for ease of reference, the underlying source of the stipulated fact is indicated.

7. Within the meaning of §207(b) of the Act, Penn Central is not "reorganizable on an income basis within a reasonable period of time under §77 of the Bankruptcy Act."

8. Without taking into account the Act or the implementation of any provision thereof, Penn Central is not able to achieve a successful reorganization as a common carrier within a reasonable period of time under §77 of the Bankruptcy Act.

9. During the period that began June 21, 1970, and ended December 31, 1973, Penn Central sustained ordinary net losses in an amount which approximates $851,000,000, as shown in Trustees' Financial Statements for June 22-30, 1970, third quarter 1970, October 1970, November 1970, December 1970, 1971, 1972, and 1973. [Source - Doc. Nos. 256, 431, 630, 786, 1309, 3415, 5224 and 6986].

10. During the period that began June 21, 1970, and ended December 31, 1973,

(i) the Penn Central Trustees expended in operating rail properties approximately $137,500,000 of non-recurring cash items as follows:

Trustees' Certificate Drawdowns	$100,000,000
Tenants Tax Escrow Account	3,100,000
Proceeds from New Haven Property Sale	9,100,000
Sale of Freight Cars to P&LE	7,300,000
M.B.T.A. Settlement	9,100,000
Proceeds from sale of stock of Madison Square Garden Corp.	2,400,000
Proceeds from sale of securities held in Contingent Compensation Fund	6,500,000
TOTAL	$137,500,000

[Source - Doc. No. 7244 (Varalli Aff., Ex. T-1)]

(ii) the Penn Central Trustees expended $2,100,000 in proceeds from sale of mortgaged properties in connection with the Selkirk Yard improvement and $15,700,000 in proceeds from the "Agnes" Flood Loan. [Source - Doc. No. 7244 (Varalli Aff., Ex. T-1]

(iii) the Penn Central Trustees expended in operating rail properties approximately $157,000,000 in income derived from Penn Central's non-rail properties as set forth in the analysis attached hereto as Exhibit A.

11. During the period beginning on June 21, 1970, and ending on December 31, 1973, the Penn Central Trustees deferred payment of approximately $241,000,000 in state and local taxes, of which some $44 million to $48 million is allocable to the pre-reorganization period. These taxes ($241,000,000) are included in the ordinary net losses stipulated in item 9 above. [Source - Doc. No. 7245 (Guest Aff., p. 5); Tr. pp. 11,162-63,* Stipulation between counsel for Penn Central Trustees and USA, ICC Transcript p. 1497, Letter dated April 1, 1974, from counsel for Penn Central Trustees to Judge Fullam].

12. During the period that began June 21, 1970, and ended December 31, 1973, the Penn Central Trustees deferred payment of approximately $101,000,000 in rentals on leased line properties. It cannot be determined at this time whether the Penn Central estate has or will have claims against the lessor companies in respect of losses incurred by Penn Central in the operation of the leased lines since bankruptcy that would in any part offset the claim for unpaid rentals or whether the lessors would have claims against Penn Central in addition to claims for

*Tr. references are to the transcript in the above-mentioned Penn Central reorganization proceedings.

unpaid rent. The deferred leased line rentals are included in the ordinary net losses stipulated in item 9 above. [Source - Doc. No. 7245 (Guest Aff., p. 9); Tr. pp. 11,263-64, Guest ICC Exh. 23, p. 4, Guest Testimony, ICC Transcript, pp. 1,875-76].

13. During the period that began June 21, 1970, and ended December 31, 1973, the Penn Central Trustees deferred approximately $104,000,000 in interest on mortgage and collateral trust debt. The foregoing figure does not reflect any accrual of unpaid interest on $300 million principal amount of outstanding notes of Penn Central that are alleged by the holders thereof to be secured by all of the outstanding common stock of the Pennsylvania Company, a matter which has been litigated, and is *sub judice*, in the reorganization court (the so-called "Robinson litigation"). Both the validity of the notes and the interest thereon are involved in the litigation; if interest should be payable, interest on such notes is tied to the prime rate in effect from time to time, and unpaid interest on those notes through May 31, 1973, would have amounted to $57.7 million. It has not yet been determined which issues of bonds and notes are fully secured and therefore entitled to post-bankruptcy interest. The deferred interest on mortgage and collateral trust debt and the $300 million principal amount of notes is included in the ordinary net losses stipulated in item 9 above. [Source - Doc. No. 7245 (Guest Aff., p. 9), Guest ICC Exhibit 22, p. 7, Guest ICC Exhibit 23, p. 4, ICC Transcript p. 1727].

14. The aggregate principal amount of trustees' certificates issued by the Trustees of Penn Central is $100,000,000.

15. Neither the Penn Central Trustees nor the Plaintiff herein has sought reorganization under the Act, by petition

or otherwise, except insofar as the Trustees' motion for leave to intervene and motion for summary judgment heretofore filed on this and related actions may be deemed to have done so.

/s/ David Berger
Attorney for Plaintiff

/s/ James Dausch
Attorney for Defendants

/s/ William R. Perlik
Attorney for Defendant United States Railway Association.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

SUPPLEMENTARY JOINT DOCUMENTARY SUBMISSION OF PLAINTIFFS, DEFENDANTS AND INTERVENING DEFENDANTS

In addition to the Joint Documentary Submission filed May 30, 1974 in this action, the parties hereby submit the following documents:

(1) The Petition of Penn Central Company for Termination Of Rail Operations And Severance Of Rail Properties From Non-Rail Properties. (Exhibit A)

(2) Pages 12,303-12,304, Transcript of May 6, 1974 Hearing in this Penn Central Reorganization proceeding. (Exhibit B)

/s/ David Berger
David Berger
Attorney for plaintiff
and
Lloyd N. Cutler
Attorney for Defendant United States Railway Association
and
James F. Dausch
Attorney for other defendants
and
Paul R. Duke
Attorney for Trustees of Penn Central Transportation Company

May 31, 1974

(Exhibit A)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted in printing]

PETITION OF PENN CENTRAL COMPANY FOR TERMINATION OF RAIL OPERATIONS AND AND SEVERANCE OF RAIL PROPERTIES FROM NON-RAIL PROPERTIES

1. Penn Central Company is the parent company of the Debtor, owning 100% of the Debtor stock. Penn Central Company is also a creditor of the Debtor in the approximate amount of $43 million.

2. On October 12, 1973, Penn Central Company filed a memorandum and statement urging that continuance of the Debtor's rail operations past December 31, 1973 should be conditioned upon explicit action by the United States of America on or before November 30, 1973. No order was issued in response thereto despite the fact that no action was forthcoming from the United States.

3. Since the reorganization of the Debtor began in June, 1970, railroad operating losses have totaled more than $600 million. Taxes, rentals, interest on mortgage and debt have been deferred.

4. The Trustees have used non-operating funds to support rail operations of the Debtor.

5. Despite the deferral of the Debtor's obligations and the use of non-operating cash, the Debtor is unable to maintain working capital and railroad losses continue to

increase. In addition, the Trustees have stated before this Court that they have no hopes for any improvement in the financial position of Debtor's rail operations.

6. To compel the continuation of the rail operations of the Debtor at a loss constitutes a continuing taking of Penn Central Company property which requires the United States to pay just compensation in accordance with the Fifth Amendment of the United States Constitution.

7. The Regional Rail Reorganization Act of 1973 (the "Act") is neither adequate nor sufficient to stem the unconstitutional erosion because, *inter alia*, there is no provision for payment of taxes, interest or maintenance and no explicit provision for compensation for the taking of private property which will occur pursuant to the Act.

8. Petitioner herein will promptly file an action in the Court of Claims requiring just compensation for the taking of its property by the United States of America.

9. Under all the circumstances and recognizing the great public interest in the continuation of rail services, petitioner requests that unless the United States of America, no later than April 30, 1974, in a forthright manner acknowledges that the continued operations of the rail services of the Debtor are exclusively for the benefit of the public and will be justly compensated for in accordance with the provisions of the Fifth Amendment of the United States Constitution, this Court should order the prompt termination of all rail services thereafter.

10. It is the position of Penn Central Company that, while both the estate of the Debtor and the interest of the stockholders of Petitioner have been and continue to be seriously damaged by the continuation of the Debtor's rail service, given the unique nature of this proceeding

and given the enormous significance and importance of the rail operations of the Debtor to the public health and welfare of this country, any abrupt termination of the Debtor's rail operations would be disastrous to the public. It is for this reason that Penn Central Company requests the Court to issue a conditional Order to Terminate Rail Operations, so that the appropriate governmental agencies could, if they so desire, take that action which is required to bring about the continuation of rail operations in the northeastern United States.

11. By the same token, it is the position of Penn Central Company that since the public interest has demanded the continuation of these rail operations to date, the response to that demand has been and continues to be an interim taking within the meaning of the Fifth Amendment to the United States Constitution and thereby requires the payment of just compensation thereunder.

12. "Railroad" properties are defined in Section 1(3) of the Interstate Commerce Act, 49 U.S.C. §1(3) as:

> "all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property."

13. The Act, by its very terms, is applicable to and is an attempt to reorganize only the rail properties

of the Debtor as is indicated in numerous provisions of the Act. See, *e.g.* Sections 202(b), 204(a), 205(d), and 206 and 207.

14. It is now apparent that the railroad properties of the Debtor, as defined, cannot be reorganized and may be terminated, as is requested in this Petition.

15. Therefore, in order to carry out, in efficient and orderly manner, the mandates of the Act, Petitioner prays that the Court order that the non-rail properties in the estate of the Debtor be severed from and treated separately and distinctly from the Debtor's rail properties and that these non-rail properties be permitted to continue to be reorganized pursuant to these proceedings and the provisions of Section 77 of the Bankruptcy Act.

WHEREFORE, Petitioner respectfully prays:

1. That this Court set this matter down for hearing;

2. That the non-rail properties be severed from and treated separately and distinctly from the rail properties and that these non-rail properties be permitted to continue to be reorganized pursuant to these proceedings;

3. That unless the United States of America, no later than April 30, 1974, in a forthright manner, acknowledges that the continuing operations of the rail services of the Debtor are exclusively for the benefit of the public and will be justly compensated for in accordance with the provisions of the Fifth Amendment to the United States Constitution, the Court should order the Trustees to terminate all rail operations of the Debtor as soon after April 30, 1974 so as to assure orderly termination and protection of the assets of the Debtor; and in the interim period, the Court should order the Trustees to open negotiations

immediately with governmental and non-governmental bodies in order to obtain sufficient funds to permit a continuation of rail operations pending final termination thereof. Failing in the above, that the Court should order the Trustees to open negotiations with governmental and non-governmental bodies to determine that disposition of the rail properties of the Debtor which will be in the best interests of the estate of the Debtor.

4. That this Court grant such other relief as it deems just and appropriate.

/s/ Edward Rubenstone
David Berger
Gerald J. Rodos
Edward H. Rubenstone
1622 Locust Street
Philadelphia, PA 19103

Attorneys for Penn Central Company

OF COUNSEL:

DAVID BERGER, P.A.,
ATTORNEYS-AT-LAW

(Exhibit B)

* * * 12,303

creditors and stockholders in the situation, which is not like Brooks-Scanlon.

In other words, if we don't have a Brooks-Scanlon situation, then I think the rights of the stockholders and the unsecured creditors are not the same as the rights of the secured creditors.

The secured creditors in our view—and I think the Louisville Joint Stock Bank and the cases that discuss all of the protection that has to be given to the secured creditors while approving a plan of reorganization that wipes stockholders and unsecured creditors out—that the secured creditors have a special property relationship to the property that secures their debt, and they have a right to look to it for the payment of their debt.

Now, I haven't been able to find any case which says that about unsecured creditors or stockholders.

Justice Brandeis in the Radford case said flat out the rights of secured creditors with respect to their property are much different from unsecured creditors. Unfortunately, he didn't go on to elaborate about what the difference is, but I think the inference of that opinion, in the context of what goes before and after it, is that the rights of the secured creditors stand on a somewhat higher plane.

This is not the Brooks-Scanlon case, because [12,304] if we have a Brooks-Scanlon case, then nobody's interest can be eroded.

If the erosion of the estate to date or till 1975 were to erode, eat into—it obviously has to eat into the

stockholders' account, if there is anything left for them, and I don't know about that. The books of the company show they have a substantial equity, but you never can tell.

If that should erode their interest, I don't think even if it was entirely, I don't think that as long as it wasn't unreasonable erosion and that a successful reorganization was possible that that would be unconstitutional.

The Rio Grande case, the Ecker v. Pacific case, approved plans of reorganization that completely wiped out stockholders, and in the Ecker case, somebody said, in bankruptcy somebody loses.

I would point out with respect to the stockholders–

THE COURT: Can somebody make a finding in retrospect as of the date of the filing of the petition they didn't have any equity and, therefore, they didn't have anything to lose?

MR. DAUSCH: There isn't any evidence in the case which indicates the stockholders had any equity in the beginning.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption of all three cases omitted in printing]

NOTICE OF APPEAL

Notice is hereby given that George P. Baker, Robert W. Blanchette and Richard C. Bond, as Trustees of the property of Penn Central Transportation Company, Debtor, intervening-defendants in the above-entitled actions, hereby appeal to the United States Supreme Court from the judgment and order entered on June 25, 1974 by the three-judge United States District Court for the Eastern District of Pennsylvania. The appeal is taken pursuant to 28 U.S. Code, Sections 1252 and 1253.

/s/ Charles A. Horsky
Charles A. Horsky
Paul R. Duke
Counsel for Intervening-Defendants

Dated: July 1, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption *Smith* v. *United States, et al.* omitted in printing]

NOTICE OF APPEAL

An appeal having been taken July 2, 1974 by Intervening Defendants below, Notice is hereby given that Richard Joyce Smith, Trustee of the property of the New York, New Haven and Hartford Railroad Company, hereby appeals to the United States Supreme Court from the Judgment and Order entered June 25, 1974 by the Three-Judge United States District Court for the Eastern District of Pennsylvania. The appeal is taken pursuant to 28 U.S.C. §§1252, 1253.

Dated: July 3, 1974

WILBUR BOURNE RUTHRAUFF
Attorney for Richard Joyce Smith,
Trustee of the property of the New
York, New Haven & Hartford Railroad
Company, Debtor

Of Counsel:

Sullivan & Worcester
225 Franklin Street
Boston, Massachusetts 02110

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption in each of three cases omitted in printing]

NOTICE OF APPEAL

Notice is hereby given that the United States Railway Association, one of the defendants above-named, hereby appeals to the Supreme Court of the United States from the final order granting plaintiff's motion for summary judgment entered in this action on June 25, 1974.

This appeal is taken pursuant to 28 U.S.C. §1252 and 28 U.S.C. §1253.

Respectfully submitted,

/s/ Lloyd N. Cutler
LLOYD N. CUTLER

/s/ Marshall Hornblower
MARSHALL HORNBLOWER

/s/ William R. Perlik
WILLIAM R. PERLIK

Attorneys for the United States Railway Association

Of Counsel:
Wilmer, Cutler & Pickering
1666 K Street, N. W.
Washington, D. C. 20006
202-872-6000

July 17, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption in each of three cases omitted in printing]

NOTICE OF APPEAL

Notice is hereby given that the United States of America hereby appeals to the United States Supreme Court from the Judgment and Order entered June 25, 1974 by the United States District Court for the Eastern District of Pennsylvania. This appeal is taken under 28 U.S.C. Sections 1252 and 1253.

Dated: July 22, 1974

CARLA A. HILLS
Assistant Attorney General

Robert E. J. Curran
United States Attorney

David J. Anderson
Special Litigation Counsel

/s/ James F. Dausch

JAMES F. DAUSCH
Attorney
Department of Justice
Washington, D. C. 20530

Attorneys for the
United States of America

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption in *Smith* v. *United States, et al.* omitted in printing]

NOTICE OF APPEAL

Notice is hereby given that Defendant Brinegar hereby appeals to the United States Supreme Court from the Judgment and Order entered June 25, 1974 by the United States District Court for the Eastern District of Pennsylvania. This appeal is taken under 28 U.S.C. Sections 1252 and 1253.

DATED: July 24, 1974

CARLA A. HILLS
Assistant Attorney General

ROBERT E. J. CURRAN
United States Attorney

DAVID J. ANDERSON
Special Litigation Counsel

/s/ James F. Dausch
JAMES F. DAUSCH,
Attorney
Department of Justice
Washington, D. C. 20530

Attorneys for the Defendant
Brinegar

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption in *Connecticut General* case omitted in printing]

NOTICE OF APPEAL

Notice is hereby given that Defendants Brinegar, Stafford and Shultz hereby appeal to the United States Supreme Court from the Judgment and Order entered June 25, 1974 by the United States District Court for the Eastern District of Pennsylvania. This appeal is taken under 28 U.S.C. Sections 1252 and 1253.

DATED: July 24, 1974

CARLA A. HILLS
Assistant Attorney General

ROBERT E. J. CURRAN
United States Attorney

DAVID J. ANDERSON
Special Litigation Counsel

/s/ James F. Dausch
JAMES F. DAUSCH
Attorney
Department of Justice
Washington, D. C. 20530

Attorneys for the Defendants
Brinegar, Stafford and Shultz.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption in *Penn Central Co.* case omitted in printing]

NOTICE OF APPEAL

Notice is hereby given that Defendants Brinegar, Stafford, Shultz and the Interstate Commerce Commission hereby appeal to the United States Supreme Court from the Judgment and Order entered June 25, 1974 by the United States Distrist Court for the Eastern District of Pennsylvania. This appeal is taken under 28 U.S.C. Sections 1252 and 1253.

Dated: July 24, 1974

CARLA A. HILLS,
Assistant Attorney General

ROBERT E. J. CURRAN,
United States Attorney

DAVID J. ANDERSON,
Special Litigation Counsel

/s/ James F. Dausch

JAMES F. DAUSCH,
Attorney
Department of Justice
Washington, D. C. 20530

Attorneys for the Defendants
Brinegar, Stafford, Shultz and
Interstate Commerce Commission

REGIONAL RAIL REORGANIZATION ACT OF 1973

Public Law 93-236
93rd Congress, H.R. 9142
January 2, 1974

87 Stat. 985

An Act

87 STAT. 985

To authorize and direct the maintenance of adequate and efficient rail services in the Midwest and Northeast region of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act, divided into titles and sections according to the following table of contents, may be cited as the "Regional Rail Reorganization Act of 1973". Regional Rail Reorganization Act of 1973.

TABLE OF CONTENTS

TITLE I—GENERAL PROVISIONS

Sec. 101. Declaration of policy.
Sec. 102. Definitions.

TITLE II—UNITED STATES RAILWAY ASSOCIATION

Sec. 201. Formation and structure.
Sec. 202. General powers and duties of the Association.
Sec. 203. Access to information.
Sec. 204. Report.
Sec. 205. Rail Services Planning Office.
Sec. 206. Final system plan.
Sec. 207. Adoption of final system plan.
Sec. 208. Review by Congress.
Sec. 209. Judicial review.
Sec. 210. Obligations of the Association.
Sec. 211. Loans.
Sec. 212. Records, audit, and examination.
Sec. 213. Emergency assistance pending implementation.
Sec. 214. Authorization for appropriations.
Sec. 215. Maintenance and improvement of plant.

TITLE III—CONSOLIDATED RAIL CORPORATION

Sec. 301. Formation and structure.
Sec. 302. Powers and duties of the Corporation.
Sec. 303. Valuation and conveyance of rail properties.
Sec. 304. Termination of rail service.

TITLE IV—LOCAL RAIL SERVICES

Sec. 401. Findings and purposes.
Sec. 402. Rail service continuation subsidies.
Sec. 403. Acquisition and modernization loans.

TITLE V—EMPLOYEE PROTECTION

Sec. 501. Definitions.
Sec. 502. Employment offers.
Sec. 503. Assignment of work.
Sec. 504. Collective-bargaining agreements.
Sec. 505. Employee protection.
Sec. 506. Contracting out.
Sec. 507. Arbitration.
Sec. 508. Acquiring railroads.
Sec. 509. Payment of benefits.

TITLE VI—MISCELLANEOUS PROVISIONS

Sec. 601. Relationship to other laws.
Sec. 602. Annual evaluation by the Secretary.
Sec. 603. Freight rates for recyclables.
Sec. 604. Separability.

DECLARATION OF POLICY

SEC. 101. (a) FINDINGS.—The Congress finds and declares that—

(1) Essential rail service in the midwest and northeast region of the United States is provided by railroads which are today insolvent and attempting to undergo reorganization under the Bankruptcy Act.

30 Stat. 544.
11 USC 1 note.

(2) This essential rail service is threatened with cessation or significant curtailment because of the inability of the trustees of such railroads to formulate acceptable plans of reorganization. This rail service is operated over rail properties which were acquired for a public use, but which have been permitted to deteriorate and now require extensive rehabilitation and modernization.

(3) The public convenience and necessity require adequate and efficient rail service in this region and throughout the Nation to meet the needs of commerce, the national defense, the environment, and the service requirements of passengers, United States mail, shippers, States and their political subdivisions, and consumers.

(4) Continuation and improvement of essential rail service in this region is also necessary to preserve and maintain adequate national rail services and an efficient national rail transportation system.

(5) Rail service and rail transportation offer economic and environmental advantages with respect to land use, air pollution, noise levels, energy efficiency and conservation, resource allocation, safety, and cost per ton-mile of movement to such extent that the preservation and maintenance of adequate and efficient rail service is in the national interest.

(6) These needs cannot be met without substantial action by the Federal Government.

(b) PURPOSES.—It is therefore declared to be the purpose of Congress in this Act to provide for—

(1) the identification of a rail service system in the midwest and northeast region which is adequate to meet the needs and service requirements of this region and of the national rail transportation system;

(2) the reorganization of railroads in this region into an economically viable system capable of providing adequate and efficient rail service to the region;

(3) the establishment of the United States Railway Association, with enumerated powers and responsibilities;

(4) the establishment of the Consolidated Rail Corporation, with enumerated powers and responsibilities;

(5) assistance to States and local and regional transportation authorities for continuation of local rail services threatened with cessation; and

(6) necessary Federal financial assistance at the lowest possible cost to the general taxpayer.

DEFINITIONS

SEC. 102. As used in this Act, unless the context otherwise requires—

(1) "Association" means the United States Railway Association, established under section 201 of this Act;

(2) "Commission" means the Interstate Commerce Commission;

(3) "Corporation" means the Consolidated Rail Corporation required to be established under section 301 of this Act;

(4) "effective date of the final system plan" means the date on which the final system plan or any revised final system plan is deemed approved by Congress, in accordance with section 208 of this Act;

(5) "employee stock ownership plan" means a technique of corporate finance that uses a stock bonus trust or a company stock money purchase pension trust which qualifies under section 401 (a) of the Internal Revenue Code of 1954 (26 U.S.C. 401(a)) in connection with the financing of corporate improvements, transfers in the ownership of corporate assets, and other capital requirements of a corporation and which is designed to build beneficial equity ownership of shares in the employer corporation into its employees substantially in proportion to their relative incomes, without requiring any cash outlay, any reduction in pay or other employee benefits, or the surrender of any other rights on the part of such employees. 68A Stat. 134; 76 Stat. 809.

(6) "final system plan" means the plan of reorganization for the restructure, rehabilitation, and modernization of railroads in reorganization prepared pursuant to section 206 and approved pursuant to section 208 of this Act;

(7) "includes" and variants thereof should be read as if the phrase "but is not limited to" were also set forth;

(8) "Office" means the Rail Services Planning Office established under section 205 of this Act;

(9) "profitable railroad" means a railroad which is not a railroad in reorganization. The term does not include the Corporation, the National Railroad Passenger Corporation, or a railroad leased, operated, or controlled by a railroad in reorganization in the region;

(10) "rail properties" means assets or rights owned, leased, or otherwise controlled by a railroad which are used or useful in rail transportation service; except that the term, when used in conjunction with the phase "railroads leased, operated, or controlled by a railroad in reorganization", shall not include assets or rights owned, leased, or otherwise controlled by a Class I railroad which is not wholly owned, operated, or leased by a railroad in reorganization but is controlled by a railroad in reorganization;

(11) "railroad" means a common carrier by railroad as defined in section 1(3) of part I of the Interstate Commerce Act (49 U.S.C. 1(3)). The term includes the Corporation and the National Railroad Passenger Corporation; 41 Stat. 474.

(12) "railroad in reorganization" means a railroad which is subject to a bankruptcy proceeding and which has not been determined by a court to be reorganizable or not subject to reorganization pursuant to this Act as prescribed in section 207(b) of this Act. A "bankruptcy proceeding" includes a proceeding pursuant to section 77 of the Bankruptcy Act (11 U.S.C. 205) and an equity receivership or equivalent proceeding; 49 Stat. 911; 76 Stat. 572.

(13) "Region" means the States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, Ohio, Indiana, Michigan, and Illinois; the District of Columbia; and those portions of contiguous States in which are located rail properties owned or operated by railroads doing business primarily in the aforementioned jurisdictions (as determined by the Commission by order);

(14) "Secretary" means the Secretary of Transportation or his delegate, unless the context indicates otherwise; and

(15) "State" means any State or the District of Columbia.

TITLE II—UNITED STATES RAILWAY ASSOCIATION

FORMATION AND STRUCTURE

SEC. 201. (a) ESTABLISHMENT.—There is established, in accordance with the provisions of this section, an incorporated nonprofit association to be known as the United States Railway Association.

(b) ADMINISTRATION.—The Association shall be directed by a Board of Directors. The individuals designated, pursuant to subsection (d) (2) of this section, as the Government members of such Board shall be deemed the incorporators of the Association and shall take whatever steps are necessary to establish the Association, including filing of articles of incorporation, and serving as an acting Board of Directors for a period of not more than 45 days after the date of incorporation of the Association.

(c) STATUS.—The Association shall be a government corporation of the District of Columbia subject, to the extent not inconsistent with this title, to the District of Columbia Nonprofit Corporation Act (D.C. Code, sec. 29-1001 et seq.). Except as otherwise provided, employees of the Association shall not be deemed employees of the Federal Government. The Association shall have succession until dissolved by Act of Congress, shall maintain its principal office in the District of Columbia, and shall be deemed to be a resident of the District of Columbia with respect to venue in any legal proceeding.

76 Stat. 265.

(d) BOARD OF DIRECTORS.—The Board of Directors of the Association shall consist of 11 individuals, as follows:

(1) the Chairman, a qualified individual who shall be appointed by the President, by and with the advice and consent of the Senate;

(2) three Government members, who shall be the Secretary, the Chairman of the Commission, and the Secretary of the Treasury, or their duly authorized representatives; and

(3) seven nongovernment members, who shall be appointed by the President, by and with the advice and consent of the Senate, on the following basis—

(A) one to be selected from a list of qualified individuals recommended by the Association of American Railroads or its successor who are representatives of profitable railroads;

(B) one to be selected from a list of qualified individuals recommended by the American Federation of Labor and Congress of Industrial Organizations or its successor who are representative of railroad labor;

(C) one to be selected from a list of qualified individuals recommended by the National Governors Conference;

(D) one to be selected from a list of qualified individuals recommended by the National League of Cities and Conference of Mayors;

(E) two to be selected from lists of qualified individuals recommended by shippers and organizations representative of significant shipping interests including small shippers;

(F) one to be selected from lists of qualified individuals recommended by financial institutions, the financial community, and recognized financial leaders.

As used in this paragraph, a list of qualified individuals shall consist of not less than three individuals.

Except for the members appointed under paragraphs (1) and (3) (A), (B), (E), and (F), no member of the Board may have any employment or other direct financial relationship with any railroad.

Compensation.

A member of the Board who is not otherwise an employee of the Fed-

eral Government may receive $300 per diem when engaged in the actual performance of his duties plus reimbursement for travel, subsistence, and other necessary expenses incurred in the performance of such duties.

(e) TERMS OF OFFICE.—The terms of office of the nongovernment members of the Board of Directors of the Association first taking office shall expire as designated by the President at the time of nomination—two at the end of the second year; two at the end of the fourth year; and three at the end of the sixth year. The term of office of the Chairman of such Board shall be 6 years. Successors to members of such Board shall be appointed in the same manner as the original members and, except in the case of government members, shall have terms of office expiring 6 years from the date of expiration of the terms for which their predecessors were appointed. Any individual appointed to fill a vacancy occurring prior to the expiration of any term of office shall be appointed for the remainder of that term.

(f) QUORUM.—Beginning 45 days after the date of incorporation of the Association, six members of the Board, including three of the nongovernment members, shall constitute a quorum for the transaction of any function of the Association.

(g) PRESIDENT.—The Board of Directors of the Association, upon the recommendation of the Secretary, shall appoint a qualified individual to serve as the President of the Association at the pleasure of the Board. The President of the Association, subject to the direction of the Board, shall manage and supervise the affairs of the Association.

(h) EXECUTIVE COMMITTEE.—The Board of Directors of the Association shall have an executive committee which shall consist of the Chairman of the Board, the Secretary, the Chairman of the Commission, and two other members who shall be selected by the members of the Board.

(i) MISCELLANEOUS.—(1) The Association shall have a seal which shall be judicially recognized.

(2) The Administrator of General Services shall furnish the Association with such offices, equipment, supplies, and services as he is authorized to furnish to any other agency or instrumentality of the United States.

(3) The Secretary is authorized to transfer to the Association or the Corporation rights in intellectual property which are directly related to the conduct of the functions of the Association or the Corporation, to the extent that the Federal Government has such rights and to the extent that transfer is necessary to carry out the purposes of this Act.

(j) USE OF NAMES.—No person, except the Association, shall hereafter use the words "United States Railway Association" as a name for any business purpose. No person, except the corporation directed to be established under section 301 of this Act, shall hereafter use the words "Consolidated Rail Corporation" as a name for any business purpose. Violations of these provisions may be enjoined by any court of general jurisdiction in an action commenced by the Association or the Corporation. In any such action, the Association or the Corporation may recover any actual damages flowing from such violation, and, in addition, shall be entitled to punitive damages (regardless of the existence or nonexistence of actual damage) in an amount not to exceed $100 for each day during which such violation was committed. The district courts of the United States shall have jurisdiction over actions brought under this subsection, without regard to the amount in controversy or the citizenship of the parties. Penalty.

GENERAL POWERS AND DUTIES OF THE ASSOCIATION

SEC. 202. (a) GENERAL.—To carry out the purposes of this Act, the Association is authorized to—

(1) engage in the preparation and implementation of the final system plan;

(2) issue obligations under section 210 of this title and make loans under section 211 of this title; Post, p. 1000.

(3) provide assistance to States and local or regional transportation authorities in accordance with section 403 of this Act;

(4) sue and be sued, complain and defend, in the name of the Association and through its own attorneys; adopt, amend, and repeal bylaws governing the operation of the Association and such rules and regulations as are necessary to carry out the authority granted under this Act; conduct its affairs, carry on operations, and maintain offices;

(5) appoint, fix the compensation, and assign the duties of such attorneys, agents, consultants, and other full- and part-time employees as it deems necessary or appropriate; except that (1) no officer of the Association, including the Chairman, may receive compensation at a rate in excess of that prescribed for level I of the Executive Schedule under section 5312 of title 5, United States Code; and (2) no individual may hold a position in violation of regulations which the Secretary shall establish to avoid conflicts of interest and to protect the interests of the public; 80 Stat. 460; 84 Stat. 776.

(6) acquire and hold such real and personal property as it deems necessary or appropriate in the exercise of its responsibilities under this Act, and to dispose of any such property held by it;

(7) consult with the Secretary of the Army and the Chief of Engineers and request the assistance of the Corps of Engineers, and the Secretary of the Army may direct the Corps of Engineers to cooperate fully with the Association, the Corporation, or any entity designated in accordance with section 206(c)(1)(C) in order to carry out the purposes of this Act;

(8) consult on an ongoing basis with the Chairman of the Federal Trade Commission and the Attorney General to assess the possible anticompetitive effects of various proposals and to negotiate provisions which would, to the greatest extent practicable in accordance with the purposes of this Act and the goal set forth in section 206(a)(5) of this title, alleviate any such anticompetitive effects;

(9) consult with representatives of science, industry, agriculture, labor, environmental protection and consumer organizations, and other groups, as it deems advisable; and

(10) enter into, without regard to section 3709 of the Revised Statutes of the United States (41 U.S.C. 5), such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its functions and duties with any person (including a government entity).

(b) DUTIES.—In addition to its duties and responsibilities under other provisions of this Act, the Association shall—

(1) prepare a survey of existing rail services in the region, including patterns of traffic movement; traffic density over identified lines; pertinent costs and revenues of lines; and plant, equipment, and facilities (includng yards and terminals);

Study.

(2) prepare an economic and operational study and analysis of present and future rail service needs in the region; the nature and volume of the traffic in the region now being moved by rail or

likely to be moved by rail in the future; the extent to which available alternative modes of transportation could move such traffic as is now carried by railroads in reorganization; the relative economic, social, and environmental costs that would be involved in the use of such available alternative modes, including energy resource costs; and the competitive or other effects on profitable railroads;

(3) prepare a study of rail passenger services in the region, in terms of scope and quality;

(4) consider the views of the Office and of all government officials and persons who submit views, reports, or testimony under section 205(d)(1) of this title or in the course of proceedings conducted by the Office; Post, p. 994.

(5) consider methods of achieving economies in the cost of rail system operations in the region including consolidation, pooling, and joint use or operation of lines, facilities, and operating equipment; relocation; rehabilitation and modernization of equipment, track, and other facilities; and abandonment of lines consistent with meeting needs and service requirements; together with the anticipated economic, social, and environmental costs and benefits of each such method;

(6) consider the effect on railroad employees of any restructuring of rail services in the region;

(7) make available to the Secretary, the Director of the Office and appropriate committees of the Congress all studies, data, and other information acquired or developed by the Association.

(c) INVESTMENT OF FUNDS.—Uncommitted funds of the Association shall be kept in cash on hand or on deposit, or invested in obligations of the United States or guaranteed thereby, or in obligations, participations, or other investments which are lawful investments for fiduciary, trust, or public funds.

(d) EXEMPTION FROM TAXATION.—The Association, including its franchise, capital reserves, surplus, security holdings, and income shall be exempt from all taxation now or hereafter imposed by the United States, any commonwealth, territory, dependency, or possession thereof, or by any State or political subdivision thereof, except that any real property of the Association shall be subject to taxation to the same extent according to its value as other real property is taxed.

(e) ANNUAL REPORT.—The Association shall transmit to the Congress and the President, not later than 90 days after the end of each fiscal year, a comprehensive and detailed report on all activities of the Association during the preceding fiscal year. Each such report shall include (1) the Association's statement of specific and detailed objectives for the activities and programs conducted and assisted under this Act; (2) statements of the Association's conclusions as to the effectiveness of such activities and programs in meeting the stated objectives and the purposes of this Act, measured through the end of the preceding fiscal year; (3) recommendations with respect to any legislation or administrative action which the Association deems necessary or desirable; (4) a statistical compilation of the obligations issued and loans made under this Act; (5) a summary of outstanding problems confronting the Association, in order of priority; (6) all other information required to be submitted to the Congress pursuant to any other provision of this Act; and (7) the Association's projections and plans for its activities and programs during the next fiscal year. Report to Congress and President.

(f) BUDGET.—The receipts and disbursements of the Association (other than administrative expenses referred to in subsection (g) of

87 STAT. 992

this section) in the discharge of its functions shall not be included in the totals of the budget of the United States Government, and shall be exempt from any annual expenditure and net lending (budget outlays) limitations imposed on a budget of the United States Government. The Chairman of the Association shall transmit annually to the Congress a budget for program activities and for administrative expenses of the Association. The Chairman shall report annually to the Congress the amount of net lending of the Association, which would be included in the totals of the budgets of the United States Government, if the Association's activities were not excluded from those totals as a result of this section.

Budget transmittal to Congress.

(g) ACCOUNTABILITY.—(1) Section 201 of the Government Corporation Control Act (31 U.S.C. 856) is amended by striking out "and" at the end of clause (6) and by inserting immediately before the period at the end thereof the following: ", (8) the United States Railway Association".

70 Stat. 667; 85 Stat. 37.

(2) The Chairman of the Association shall transmit annually to the Office of Management and Budget a budget for administrative expenses of the Association. Whenever the Association submits any budget estimate or request to the Office of Management and Budget, it shall concurrently transmit a copy of the estimate or request to the Congress. Within budgetary constraints of the Congress, the maximum feasible and prudent budgetary flexibility shall be provided to the Association to permit effective operations.

Budget transmittal to Office of Management and Budget and Congress.

ACCESS TO INFORMATION

SEC. 203. (a) PLANNING.—Each railroad operating in the region shall provide such relevant information as may be requested by the Secretary, the Office, or the Association in connection with the performance of their respective functions under any provision of this Act. No information may be requested under this subsection after the effective date of the final system plan.

Recordkeeping.

(b) OTHER.—Each railroad or other person or government entity seeking financial assistance from the Association shall maintain and make available such records, make and submit such reports, and provide such data, materials, or other relevant information as may be requested by the Association.

(c) ENFORCEMENT.—Where authorized under subsection (a) or (b) of this section and upon presenting appropriate credentials and a written notice of inspection authority, any officer or employee duly designated by the Secretary, the Office, or the Association may, at reasonable times, inspect records, papers, processes, rolling stock, systems, equipment, or facilities and may, in furtherance of their respective functions under this Act, hold such hearings, sit and act at such times and places, administer such oaths, and require by subpoena or other order the attendance and testimony of such witnesses and the production of such information as is deemed advisable. Subpoenas shall be issued under the signature of the Secretary, the Director of the Office, or the Chairman or President of the Association and may be served by any duly designated individual. In case of contumacy or refusal to obey such a subpoena or order by any person who resides, is found, or transacts business within the jurisdiction of any district court of the United States, such district court shall, upon petition, have jurisdiction to issue to such person an order requiring him to comply forthwith. Failure to obey such an order is punishable by such court as a contempt of court.

(d) CONGRESS.—Nothing in this section shall authorize the withholding of information from any duly authorized committee of the Congress.

REPORT

SEC. 204. (a) PREPARATION.—Within 30 days after the date of enactment of this Act, the Secretary shall prepare a comprehensive report containing his conclusions and recommendations with respect to the geographic zones within the region in and between which rail service should be provided and the criteria upon which such conclusions and recommendations are based. The Secretary may use as a basis for the identification of such geographic zones the standard metropolitan statistical areas, groups of such areas, counties, or groups of counties having similar economic characteristics such as mining, manufacturing, or farming.

(b) SUBMISSION.—The Secretary shall submit the report required by subsection (a) of this section to the Office, the Association, the Governor and public utilities commission of each State studied in the report, local governments, consumer organizations, environmental groups, the public, and the Congress. The Secretary shall further cause a copy of the report to be published in the Federal Register.

Publication in Federal Register.

RAIL SERVICES PLANNING OFFICE

SEC. 205. (a) ESTABLISHMENT.—There is established on the date of enactment of this Act, a new Office in the Commission to be known as the Rail Services Planning Office. The Office shall function continuously pursuant to the provisions of this Act, and shall cease to exist 5 years after the date of enactment of this Act. The Office shall be administered by a director.

(b) DIRECTOR.—The Director of the Office shall be appointed by the Chairman of the Commission with the concurrence of 5 members of the Commission. The Director of the Office shall administer and be responsible for the discharge of the functions and duties of the Office from the date he takes office unless removed for cause by the Commission. He shall be compensated at a rate to be set by the Chairman of the Commission without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, classification, and General Schedule pay rates, but at a rate not in excess of the maximum rate for GS-18 of the General Schedule under section 5332 of such title.

5 USC 5332 note.

(c) POWERS.—The Director of the Office is subject to the direction of, and shall report to, such member of the Commission as the Chairman thereof shall designate. The Chairman may designate himself as that member. Such Director is authorized, with the concurrence of such member or (in case of disagreement) the Chairman of the Commission, to—

(1) appoint, fix the compensation, and assign the duties of employees of the Office without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and to procure temporary and intermittent services to the same extent as is authorized under section 3109 of title 5, United States Code, but at rates not to exceed $250 a day for qualified experts. Each department, agency, and instrumentality of the executive branch of the Federal Government and each independent regulatory agency of the United States is authorized and shall give careful consideration to a request to furnish to the Director of the Office, upon written request, on a reimbursable basis or otherwise, such assistance as the Director deems necessary to carry out the functions and duties of the Office. Such assistance includes transfer of personnel with their consent and without prejudice to their position and rating; and

80 Stat. 416.

87 STAT. 994

Contract authority.

(2) enter into, without regard to section 3709 of the Revised Statutes of the United States (41 U.S.C. 5), such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of the functions and duties of the Office, with any person (including a government entity).

(d) DUTIES.—In addition to its duties, and responsibilities under other provisions of this Act, the Office shall—

(1) study and evaluate the Secretary's report on rail services in the region required under section 204(a) of this Act and submit its report thereon to the Association within 120 days after the date of enactment of this Act. The Office shall also solicit, study, and evaluate the views with respect to present and future rail service needs of the region from Governors of States within the region; mayors and chief executives of political subdivisions within such States; shippers; the Secretary of Defense; manufacturers, wholesalers, and retailers within the region; consumers of goods and products shipped by rail; and all other interested persons. The Office shall conduct public hearings to solicit comments on such report and to receive such views;

Public hearings.

(2) employ and utilize the services of attorneys and such other personnel as may be required in order properly to protect the interests of those communities and users of rail service which, for whatever reason, such as their size or location, might not otherwise be adequately represented in the course of the hearings and evaluations which the Office is required to conduct and perform under other provisions of this Act;

(3) within 180 days after the date of enactment of this Act, determine and publish standards for determining the "revenue attributable to the rail properties", the "avoidable costs of providing service", and "a reasonable return on the value", as those phrases are used in section 304 of this Act, after a proceeding in accordance with the provisions of section 553 of title 5, United States Code; and

80 Stat. 383.

(4) assist States and local and regional transportation agencies in making determinations whether to provide rail service continuation subsidies to maintain in operation particular rail properties by establishing criteria for determining whether particular rail properties are suitable for rail service continuation subsidies. Such criteria should include the following considerations: Rail properties are suitable if the cost of the required subsidy for such properties per year to the taxpayers is less than the cost of termination of rail service over such properties measured by increased fuel consumption and operational costs for alternative modes of transportation; the cost to the gross national product in terms of reduced output of goods and services; the cost of relocating or assisting through unemployment, retraining, and welfare benefits to individuals and firms adversely affected thereby; and the cost to the environment measured by damage caused by increased pollution.

FINAL SYSTEM PLAN

SEC. 206. (a) GOALS.—The final system plan shall be formulated in such a way as to effectuate the following goals:

(1) the creation, through a process of reorganization, of a financially self-sustaining rail service system in the region;

(2) the establishment and maintenance of a rail service system adequate to meet the rail transportation needs and service requirements of the region;

(3) the establishment of improved high-speed rail passenger service, consonant with the recommendations of the Secretary in his report of September 1971, entitled "Recommendations for Northeast Corridor Transportation";

(4) the preservation, to the extent consistent with other goals, of existing patterns of service by railroads (including short-line and terminal railroads), and of existing railroad trackage in areas in which fossil fuel natural resources are located, and the utilization of those modes of transportation in the region which require the smallest amount of scarce energy resources and which can most efficiently transport energy resources;

(5) the retention and promotion of competition in the provision of rail and other transportation services in the region;

(6) the attainment and maintenance of any environmental standards, particularly the applicable national ambient air quality standards and plans established under the Clean Air Act Amendments of 1970, taking into consideration the environmental impact of alternative choices of action; 84 Stat. 1676. 42 USC 1857b note.

(7) the movement of passengers and freight in rail transportation in the region in the most efficient manner consistent with safe operation, including the requirements of commuter and intercity rail passenger service; the extent to which there should be coordination with the National Railroad Passenger Corporation and similar entities; and the identification of all short-to-medium distance corridors in densely populated areas in which the major upgrading of rail lines for high-speed passenger operation would return substantial public benefits; and

(8) the minimization of job losses and associated increases in unemployment and community benefit costs in areas in the region presently served by rail service.

(b) FACTORS.—The final system plan shall be based upon due consideration of all factors relevant to the realization of the goals set forth in subsection (a) of this section. Such factors include the need for and the cost of rehabilitation and modernization of track, equipment, and other facilities; methods of achieving economies in the cost of rail operations in the region; means of achieving rationalization of rail services and the rail service system in the region; marketing studies; the impact on railroad employees; consumer needs; traffic analyses; financial studies; and any other factors identified by the Association under section 202(b) of this title or in the report of the Secretary required under section 204(a) of this title. Ante, p. 990.

(c) DESIGNATIONS.—The final system plan shall designate—

(1) which rail properties of railroads in reorganization in the region or of railroads leased, operated, or controlled by any railroad in reorganization in the region—

(A) shall be transferred to the Corporation;

(B) shall be offered for sale to a profitable railroad operating in the region and, if such offer is accepted, operated by such railroad; the plan shall designate what additions shall be made to the designation under subparagraph (A) of this paragraph in the event such profitable railroad fails to accept such offer;

(C) shall be purchased, leased, or otherwise acquired from the Corporation by the National Railroad Passenger Corporation in accordance with the exercise of its option under section 601(d) of this Act for improvement to achieve the goal set forth in subsection (a)(3) of this section;

(D) may be purchased or leased from the Corporation by a State or a local or regional transportation authority to meet the needs of commuter and intercity rail passenger service; and

(E) if not otherwise required to be operated by the Corporation, a government entity, or a responsible person, are suitable for use for other public purposes, including highways, other forms of transportation, conservation, energy transmission, education or health care facilities, or recreation. In carrying out this subparagraph, the Association shall solicit the views and recommendations of the Secretary, the Secretary of the Interior, the Administrator of the Environmental Protection Agency, and other agencies of the Federal Government and of the States and political subdivisions thereof within the region, and the general public; and

(2) which rail properties of profitable railroads operating in the region may be offered for sale to the Corporation or to other profitable railroads operating in the region subject to paragraphs (3) and (4) of subsection (d) of this section.

(d) TRANSFERS.—All transfers or conveyances pursuant to the final system plan shall be made in accordance with, and subject to, the following principles:

(1) All rail properties to be transferred to the Corporation by a profitable railroad, by trustees of a railroad in reorganization, or by any railroad leased, operated, or controlled by a railroad in reorganization in the region, shall be transferred in exchange for stock and other securities of the Corporation (including obligations of the Association) and the other benefits accruing to such railroad by reason of such transfer.

(2) All rail properties to be conveyed to a profitable railroad operating in the region by trustees of a railroad in reorganization, or by any railroad leased, operated, or controlled by a railroad in reorganization in the region, shall be conveyed in exchange for compensation from the profitable railroad.

(3) Notwithstanding any other provision of this Act, no acquisition under this Act shall be made by any profitable railroad operating in the region without a determination with respect to each such transaction and all such transactions cumulatively (A) by the Association, upon adoption and release of the preliminary system plan, that such acquisition or acquisitions will not materially impair the profitability of any other profitable railroad operating in the region or of the Corporation, and (B) by the Commission, which shall be made within 90 days after adoption and release by the Association of the preliminary system plan, that such acquisition or acquisitions will be in full accord and comply with the provisions and standards of section 5 of part I of the Interstate Commerce Act (49 U.S.C. 5). The determination by the Association shall not be reviewable in any court. The determination by the Commission shall not be reviewable in any court.

62 Stat. 472.

(4) Where the final system plan designates specified rail properties of a railroad in reorganization in the region, or of a railroad leased, operated, or controlled by a railroad in reorganization in the region, to be offered for sale to and operated by a profitable railroad operating in the region, such designation shall terminate 30 days after the effective date of the final system plan unless, prior to such date, such profitable railroad has notified the Association in writing of its acceptance of such offer. Where the final

system plan designates specified rail properties of a profitable railroad operating in the region as authorized to be offered for sale or lease to the Corporation or to other profitable railroads operating in the region, such designation and authorization shall terminate 60 days after the effective date of the final system plan unless, prior to such date, a binding agreement with respect to such properties has been entered into and concluded.

(5) All properties sold by the Corporation pursuant to sections 206(c)(1)(C) and 601(d) of this Act shall be transferred at a value related to the value received for the transfer to the Corporation of such properties.

(e) CORPORATION FEATURES.—The final system plan shall set forth—

(1) pro forma earnings for the Corporation, as reasonably projected and considering the additions or changes in the designation of rail properties to be operated by the Corporation which may be made under subsection (d)(4) of this section;

(2) the capital structure of the Corporation, based on the pro forma earnings of the Corporation as set forth, including such debt capitalization as shall be reasonably deemed to conform to the requirements of the public interest with respect to railroad debt securities, including the adequacy of coverage of fixed charges; and

(3) the manner in which employee stock ownership plans may, to the extent practicable, be utilized for meeting the capitalization requirements of the Corporation, taking into account (A) the relative cost savings compared to conventional methods of corporate finance; (B) the labor cost savings; (C) the potential for minimizing strikes and producing more harmonious relations between labor organizations and railway management; (D) the projected employee dividend incomes; (E) the impact on quality of service and prices to railway users; and (F) the promotion of the objectives of this Act of creating a financially self-sustaining railway system in the region which also meets the service needs of the region and the Nation.

(f) VALUE.—The final system plan shall designate the value of all rail properties to be transferred under the final system plan and the value of the securities and other benefits to be received for transferring those rail properties to the Corporation in accordance with the final system plan.

(g) OTHER PROVISIONS.—The final system plan may recommend arrangements among various railroads for joint use or operation of rail properties on a shared ownership, cooperative, pooled, or condominium-type basis, subject to such terms and conditions as may be specified in the final system plan. The final system plan shall also make such designations as are determined to be necessary in accordance with the provisions of section 402 or 403 of this Act.

(h) OBLIGATIONAL AUTHORITY.—The final system plan shall recommend the amount of obligations of the Association which are necessary to enable it to implement the final system plan.

(i) TERMS AND CONDITIONS FOR SECURITIES.—The final system plan may include terms and conditions for any securities to be issued by the Corporation in exchange for the conveyance of rail properties under the final system plan which in the judgement of the Association will minimize any actual or potential debt burden on the Corporation. Any such terms and conditions for securities of the Corporation which purport to directly obligate the Association shall not become effective without affirmative approval, with or without modification by a joint resolution of the Congress.

ADOPTION OF FINAL SYSTEM PLAN

SEC. 207. (a) PRELIMINARY SYSTEM PLAN.—(1) Within 300 days after the date of enactment of this Act, the Association shall adopt and release a preliminary system plan prepared by it on the basis of reports and other information submitted to it by the Secretary, the Office, and interested persons in accordance with this Act and on the basis of its own investigations, consultations, research, evaluation, and analysis pursuant to this Act. Copies of the preliminary system plan shall be transmitted by the Association to the Secretary, the Office, the Governor and public utility commission of each State in the region, the Congress, each court having jurisdiction over a railroad in reorganization in the region, the special court, and interested persons, and a copy shall be published in the Federal Register. The Association shall invite and afford interested persons an opportunity to submit comments on the preliminary system plan to the Association within 60 days after the date of its release.

Copies, transmittal to Congress.

Publication in Federal Register.

(2) The Office is authorized and directed to hold public hearings on the preliminary system plan and to make available to the Association a summary and analysis of the evidence received in the course of such proceedings, together with its critique and evaluation of the preliminary system plan, not later than 60 days after the date of release of such plan.

Public hearings.

(b) APPROVAL.—Within 120 days after the date of enactment of this Act each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by continuing the present reorganization proceedings than by a reorganization under this Act. Within 60 days after the submission of the report by the Office, under section 205(d)(1) of this title, on the Secretary's report on rail services in the region, each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether or not such railroad shall be reorganized by means of transferring some of its rail properties to the Corporation pursuant to the provisions of this Act. Because of the strong public interest in the continuance of rail transportation in the region pursuant to a system plan devised under the provisions of this Act, each such court shall order that the reorganization be proceeded with pursuant to this Act unless it (1) has found that the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by such a reorganization than by a reorganization under this Act, or (2) finds that this Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization in which case it shall dismiss the reorganization proceeding. If a court does not enter an order or make a finding as required by this subsection, the reorganization shall be proceeded with pursuant to this Act. An appeal from an order made under this section may be made only to the special court. Appeal to the special court shall be taken within 10 days following entry of an order pursuant to this subsection, and the special court shall complete its review and render its decision within 80 days after such appeal is taken. There shall be no review of the decision of the special court.

49 Stat. 911; 76 Stat. 572.

(c) ADOPTION.—Within 420 days after the date of enactment of this Act, the executive committee of the Association shall prepare and submit a final system plan for the approval of the Board of Directors of the Association. A copy of such submission shall be simultaneously

presented to the Commission. The submission shall reflect evaluation of all responses and summaries of responses received, testimony at any public hearings, and the results of additional study and review. Within 30 days thereafter, the Board of Directors of the Association shall by a majority vote of all its members approve a final system plan which meets all of the requirements of section 206 of this title. Ante, p. 994.

(d) REVIEW OF COMMISSION.—Within 30 days following the adoption of the final system plan by the Association under subsection (c) of this section and the submission of such plan to Congress under section 208(a) of this title, the Commission shall submit to the Congress an evaluation of the final system plan delivered to both Houses of Congress. Plan evaluation, submittal to Congress.

REVIEW BY CONGRESS

SEC. 208. (a) GENERAL.—The Board of Directors of the Association shall deliver the final system plan adopted by the Association to both Houses of Congress and to the Committee on Interstate and Foreign Commerce of the House of Representatives and the Committee on Commerce of the Senate. The final system plan shall be deemed approved at the end of the first period of 60 calendar days of continuous session of Congress after such date of transmittal unless either the House of Representatives or the Senate passes a resolution during such period stating that it does not favor the final system plan.

(b) REVISED PLAN.—If either the House or the Senate passes a resolution of disapproval under subsection (a) of this section, the Association, with the cooperation and assistance of the Secretary and the Office, shall prepare, determine, and adopt a revised final system plan. Each such revised plan shall be submitted to Congress for review pursuant to subsection (a) of this section.

(c) COMPUTATION.—For purposes of this section—

(1) continuity of session of Congress is broken only by an adjournment sine die; and

(2) the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the 60-day period.

JUDICIAL REVIEW

SEC. 209. (a) GENERAL.—Notwithstanding any other provision of law, the final system plan which is adopted by the Association and which becomes effective after review by the Congress is not subject to review by any court except in accordance with this section. After the final system plan becomes effective under section 208 of this title, it may be reviewed with respect to matters concerning the value of the rail properties to be conveyed under the plan and the value of the consideration to be received for such properties.

(b) SPECIAL COURT.—Within 30 days after the date of enactment of this Act, the Association shall make application to the judicial panel on multi-district litigation authorized by section 1407 of title 28, United States Code, for the consolidation in a single, three-judge district court of the United States of all judicial proceedings with respect to the final system plan. Within 30 days after such application is received, the panel shall make the consolidation in a district court (cited herein as the "special court") which the panel determines to be convenient to the parties and the one most likely to be able to conduct any proceedings under this section with the least delay and the greatest possible fairness and ability. Such proceedings shall be conducted by the special court which shall be composed of three Federal judges who shall be selected by the panel, except that none of the judges selected 82 Stat. 109.

may be a judge assigned to a proceeding involving any railroad in reorganization in the region under section 77 of the Bankruptcy Act (11 U.S.C. 205). The special court is authorized to exercise the powers of a district judge in any judicial district with respect to such proceedings and such powers shall include those of a reorganization court. The special court shall have the power to order the conveyance of rail properties of railroads leased, operated, or controlled by a railroad in reorganization in the region. The panel may issue rules for the conduct of its functions under this subsection. No determination by the panel under this subsection may be reviewed in any court.

49 Stat. 911; 76 Stat. 572.

(c) DELIVERY OF PLAN TO SPECIAL COURT.—Within 90 days after its effective date, the Association shall deliver a certified copy of the final system plan to the special court and shall certify to the special court—

(1) which rail properties of the respective railroads in reorganization in the region and of any railroad leased, operated, or controlled by such railroads in reorganization are to be transferred to the Corporation, in accordance with the final system plan;

(2) which rail properties of the respective railroads in reorganization in the region or railroads leased, operated, or controlled by such railroads in reorganization are to be conveyed to profitable railroads, in accordance with the final system plan;

(3) the amount, terms, and value of the securities of the Corporation (including any obligations of the Association) to be exchanged for those rail properties to be transferred to the Corporation pursuant to the final system plan, and as indicated in paragraph (1) of this subsection; and

(4) that the transfer of rail properties in exchange for securities of the Corporation (including any obligations of the Association) and other benefits is fair and equitable and in the public interest.

(d) BANKRUPTCY COURTS.—Within 90 days after its effective date, the Association shall deliver a certified copy of the final system plan to each district court of the United States or any other court having jurisdiction over a railroad in reorganization in the region and shall certify to each such court—

(1) which rail properties of that railroad in reorganization are to be transferred to the Corporation under the final system plan; and

(2) which rail properties of that railroad in reorganization, if any, are to be conveyed to profitable railroads operating in the region, under the final system plan.

OBLIGATIONS OF THE ASSOCIATION

SEC. 210. (a) GENERAL.—To carry out the purposes of this Act, the Association is authorized to issue bonds, debentures, trust certificates, securities, or other obligations (herein cited as "obligations") in accordance with this section. Such obligations shall have such maturities and bear such rate or rates of interest as are determined by the Association with the approval of the Secretary of the Treasury. Such obligations shall be redeemable at the option of the Association prior to maturity in the manner stipulated in each such obligation, and may be purchased by the Association in the open market at a price which is reasonable.

(b) MAXIMUM OBLIGATIONAL AUTHORITY.—Except as otherwise provided in the last sentence of this subsection, the aggregate amount of obligations of the Association issued under this section which may be outstanding at any one time shall not exceed $1,500,000,000 of which the aggregate amount issued to the Corporation shall not exceed

$1,000,000,000. Of the aggregate amount of obligations issued to the Corporation by the Association, not less than $500,000,000 shall be available solely for the rehabilitation and modernization of rail properties acquired by the Corporation under this Act and not disposed of by the Corporation pursuant to section 206(c)(1)(C) of this Act. Any modification to the limitations set forth in this subsection shall be made by joint resolution adopted by the Congress.

(c) GUARANTEES.—The Secretary shall guarantee the payment of principal and interest on all obligations issued by the Association in accordance with this Act and which the Association requests be guaranteed.

(d) VALIDITY.—No obligation issued by the Association under this section shall be terminated, canceled, or otherwise revoked, except in accordance with lawful terms and conditions prescribed by the Association. Such an obligation shall be conclusive evidence that it is in compliance with this section, has been approved, and is legal as to principal, interest, and other terms. An obligation of the Association shall be valid and incontestable in the hands of a holder, except as to fraud, duress, mutual mistake of fact, or material misrepresentation by or involving such holder.

(e) THE SECRETARY OF THE TREASURY.—If at any time the moneys available to the Secretary are insufficient to enable him to discharge his responsibilities under subsection (c) of this section, he shall issue notes or other obligations to the Secretary of the Treasury in such forms and denominations, bearing such maturities, and subject to such terms and conditions as may be prescribed by the Secretary of the Treasury. Such obligations shall bear interest at a rate to be determined by the Secretary of the Treasury taking into consideration the current average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the issuance of such obligations. The Secretary of the Treasury is authorized and directed to purchase any such obligations and for such purpose is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under the Second Liberty Bond Act, as amended. The purposes for which securities may be issued under such Act are extended to include any purchase of notes or other obligations issued under this subsection. At any time, the Secretary of the Treasury may sell any such obligations, and all sales, purchases, and redemptions of such obligations by the Secretary of the Treasury shall be treated as public debt transactions of the United States. 40 Stat. 288. 31 USC 774.

(f) AUTHORIZATION FOR APPROPRIATIONS.—There are hereby authorized to be appropriated to the Secretary such amounts as are necessary to discharge the obligations of the United States arising under this section.

(g) LAWFUL INVESTMENTS.—All obligations issued by the Association shall be lawful investments and may be accepted as security for all fiduciary, trust, and public funds, the investment or deposit of which shall be under the authority and control of the United States or any officer or officers thereof. All such obligations issued pursuant to this section shall be exempt securities within the meaning of laws administered by the Securities and Exchange Commission.

LOANS

SEC. 211. (a) GENERAL.—The Association is authorized, in accordance with the provisions of this section and such rules and regulations as it shall prescribe, to make loans to the Corporation, the National Railroad Passenger Corporation, and other railroads (including a

87 STAT. 1002

49 Stat. 911; 76 Stat. 572. 11 USC 205.

railroad in reorganization which has been found to be reorganizable under section 77 of the Bankruptcy Act pursuant to section 207(b) of this title) in the region, for purposes of assisting in the implementation of the final system plan; to a State or local or regional transportation authority pursuant to section 403 of this Act; and to provide assistance in the form of loans to any railroad which (A) connects with a railroad in reorganization, and (B) is in need of financial assistance to avoid reorganization proceedings under section 77 of the Bankruptcy Act (11 U.S.C. 205). No such loan shall be made by the Association to a railroad unless such loans shall, where applicable, be treated as an expense of administration. The rights referred to in the last sentence of section 77(j) of the Bankruptcy Act (11 U.S.C. 205(j)) shall in no way be affected by this Act.

(b) APPLICATIONS.—Each application for such a loan shall be made in writing to the Association in such form and with such content and other submissions as the Association shall prescribe to protect reasonably the interests of the United States. The Association shall publish a notice of the receipt of each such application in the Federal Register and shall afford interested persons an opportunity to comment thereon.

Publication in Federal Register.

(c) TERMS AND CONDITIONS.—Each loan shall be extended in such form, under such terms and conditions, and pursuant to such regulations as the Association deems appropriate. Such loan shall bear interest at a rate not less than the greater of a rate determined by the Secretary of the Treasury taking into consideration (1) the rate prevailing in the private market for similar loans as determined by the Secretary of the Treasury, or (2) the current average yield on outstanding marketable obligations of the Association with remaining periods of maturity comparable to the average maturities of such loans, plus such additional charge, if any, toward covering costs of the Association as the Association may determine to be consistent with the purposes of this Act.

(d) MODIFICATIONS.—The Association is authorized to approve any modification of any provision of a loan under this section, including the rate of interest, time of payment of interest or principal, security, or any other term or condition, upon agreement of the recipient of the loan and upon a finding by the Association that such modification is equitable and necessary or appropriate to achieve the policy declared in subsection (f) of this section.

(e) PREREQUISITES.—The Association shall make a finding in writing, before making a loan to any applicant under this section, that—

(1) the loan is necessary to carry out the final system plan or to prevent insolvency;

(2) it is satisfied that the business affairs of the applicant will be conducted in a reasonable and prudent manner; and

(3) the applicant has offered such security as the Association deems necessary to protect reasonably the interests of the United States.

(f) POLICY.—It is the intent of Congress that loans made under this section shall be made on terms and conditions which furnish reasonable assurance that the Corporation or the railroads to which such loans are granted will be able to repay them within the time fixed and that the goals of the final system plan are reasonably likely to be achieved.

RECORDS, AUDIT, AND EXAMINATION

SEC. 212. (a) RECORDS.—Each recipient of financial assistance under this title, whether in the form of loans, obligations, or other arrangements, shall keep such records as the Association or the Secretary shall prescribe, including records which fully disclose the amount and dis-

position by such recipient of the proceeds of such assistance and such other records as will facilitate an effective audit.

(b) AUDIT AND EXAMINATION.—The Association, the Secretary, and the Comptroller General of the United States, or any of their duly authorized representatives shall, until the expiration of 3 years after the implementation of the final system plan, have access for the purpose of audit and examination to any books, documents, papers, and records of such recipients which in the opinion of the Association, the Secretary, or the Comptroller General may be related or pertinent to the loans, obligations or other arrangements referred to in subsection (a) of this section. The Association or any of its duly authorized representatives shall, until any financial assistance received under this title has been repaid to the Association, have access to any such materials which concern any matter that may bear upon—

(1) the ability of the recipient of such financial assistance to make repayment within the time fixed therefor;

(2) the effectiveness with which the proceeds of such assistance is used; and

(3) the implementation of the final system plan and the realization of the declaration of policy of this Act.

EMERGENCY ASSISTANCE PENDING IMPLEMENTATION

SEC. 213. (a) EMERGENCY ASSISTANCE.—The Secretary is authorized, pending the implementation of the final system plan, to pay to the trustees of railroads in reorganization such sums as are necessary for the continued provision of essential transportation services by such railroads. Such payments shall be made by the Secretary upon such reasonable terms and conditions as the Secretary establishes, except that recipients must agree to maintain and provide service at a level no less than that in effect on the date of enactment of this Act.

(b) AUTHORIZATION FOR APPROPRIATIONS.—There are authorized to be appropriated to the Secretary for carrying out this section such sums as are necessary, not to exceed $85,000,000, to remain available until expended.

AUTHORIZATION FOR APPROPRIATIONS

SEC. 214. (a) SECRETARY.—There are authorized to be appropriated to the Secretary for purposes of preparing the reports and exercising other functions to be performed by him under this Act such sums as are necessary, not to exceed $12,500,000, to remain available until expended.

(b) OFFICE.—There are authorized to be appropriated to the Commission for the use of the Office in carrying out its functions under this Act such sums as are necessary, not to exceed $5,000,000, to remain available until expended. The budget for the Office shall be submitted by the Commission directly to the Congress and shall not be subject to review of any kind by any other agency or official of the United States. Moneys appropriated for the Office shall not be withheld by any agency or official of the United States or used by the Commission for any purpose other than the use of the Office. No part of any other moneys appropriated to the Commission shall be withheld by any other agency or official of the United States to offset any moneys appropriated pursuant to this subsection.

Budget submittal to Congress.

(c) ASSOCIATION.—There are authorized to be appropriated to the Association for purposes of carrying out its administrative expenses under this Act such sums as are necessary, not to exceed $26,000,000, to remain available until expended.

MAINTENANCE AND IMPROVEMENT OF PLANT

SEC. 215. Prior to the date upon which rail properties are conveyed to the Corporation under this Act, the Secretary, with the approval of the Association, is authorized to enter into agreements with railroads in reorganization in the region (or railroads leased, operated, or controlled by railroads in reorganization) for the acquisition, maintenance, or improvement of railroad facilities and equipment necessary to improve property that will be in the final system plan. Agreements entered into pursuant to this section shall specifically identify the type and quality of improvements to be made pursuant to such agreements. Notwithstanding section 210(b) of this title, the Association shall issue obligations under section 210(a) of this title in an amount sufficient to finance such agreements and shall require the Corporation to assume any such obligations. However, the Association may not issue obligations under this section in an aggregate amount in excess of $150,000,000. The Secretary may not enter into any agreements under this section until he issues regulations setting forth procedures and guidelines for the administration of this section. The Corporation shall not be required under title III of this Act to compensate any railroad in reorganization for that portion of the value of rail properties transferred to it under this Act which is attributable to the acquisition, maintenance, or improvement of such properties under this section.

Ante, p. 1000.

TITLE III—CONSOLIDATED RAIL CORPORATION

FORMATION AND STRUCTURE

SEC. 301. (a) ESTABLISHMENT.—There shall be established within 300 days after the date of enactment of this Act, in accordance with the provisions of this section, a corporation to be known as the Consolidated Rail Corporation.

(b) STATUS.—The Corporation shall be a for-profit corporation established under the laws of a State and shall not be an agency or instrumentality of the Federal Government. The Corporation shall be deemed a common carrier by railroad under section 1(3) of the Interstate Commerce Act (49 U.S.C. 1(3)), shall be subject to the provisions of this Act and, to the extent not inconsistent with such Acts, shall be subject to applicable State law. The principal office of the Corporation shall be located in Philadelphia in the Commonwealth of Pennsylvania.

41 Stat. 424.

(c) INCORPORATORS.—The members of the executive committee of the Association shall be the incorporators of the Corporation and shall take whatever steps are necessary to establish the Corporation, including the filing of articles of incorporation. The incorporators shall also serve as the Board of Directors of the Corporation until the stock and other securities of the Corporation are distributed to the estates of the railroads in accordance with section 303(c) of this title and shall adopt the intial bylaws of the Corporation.

(d) BOARD OF DIRECTORS.—The Board of Directors of the Corporation shall consist of 15 individuals selected in accordance with the articles and bylaws of the Corporation: *Provided*, That so long as 50 per centum or more, as determined by the Secretary of the Treasury, of the outstanding indebtedness of the Corporation consists of obligations of the Association or other debts owing to or guaranteed by the United States, three of the members of such board shall be the Secretary, the Chairman and the President of the Association and five of the members of such board shall be individuals appointed as such by the President, by and with the advice and consent of the Senate.

(e) INITIAL CAPITALIZATION.—In order to carry out the final system plan the Corporation is authorized to issue stock and other securities. Common stock shall be issued initially to the estates of railroads in reorganization in the region in exchange for rail properties conveyed to the Corporation pursuant to the final system plan. Nothing in this subsection shall preclude the Corporation from repurchasing the common stock initially issued through payments out of profits in order to establish an employee stock ownership plan; and nothing in this subsection shall preclude the recipients of common stock initially issued from establishing an employee stock ownership plan.

(f) AUDIT AND EXPENDITURES.—So long as 50 per centum or more, as determined by the Secretary of the Treasury, of the outstanding indebtedness of the Corporation consists of obligations of the Association or other debts owing to or guaranteed by the United States, the Corporation shall be subject to the provisions of the Government Corporation Control Act for the purposes of a Federal Government audit. Section 201 of the Government Corporation Control Act (31 U.S.C. 856) is amended by inserting at the end thereof the following: ", and (9) the Consolidated Rail Corporation to the extent provided in the Regional Rail Reorganization Act of 1973.". Ante, p. 992.

(g) ANNUAL REPORT.—The Corporation shall transmit to the Congress and the President, not later than 90 days after the end of each fiscal year, a comprehensive and detailed report on all activities and accomplishments of the Corporation during the preceding fiscal year. Report to Congress and President.

POWERS AND DUTIES OF THE CORPORATION

SEC. 302. The Corporation shall have all of the powers and is subject to all of the duties vested in it under this Act, in addition to the powers conferred upon it under the laws of the State or States in which it is incorporated and the powers of a railroad in any State in which it operates. The Corporation is authorized and directed to—

(a) acquire rail properties designated in the final system plan to be transferred or conveyed to it;

(b) operate rail service over such rail properties except as provided under sections 304(e) and 601(d)(3) of this Act;

(c) rehabilitate, improve, and modernize such rail properties; and

(d) maintain adequate and efficient rail services.

So long as 50 per centum or more, as determined by the Secretary of the Treasury, of the outstanding indebtedness of the Corporation consists of obligations of the Association or other debts owing to or guaranteed by the United States, the Corporation shall not engage in activities which are not related to transportation.

VALUATION AND CONVEYANCE OF RAIL PROPERTIES

SEC. 303. (a) DEPOSIT WITH COURT.—Within 10 days after delivery of a certified copy of a final system plan pursuant to section 209(c) of this Act—

(1) the Corporation, in exchange for the rail properties of the railroads in reorganization in the region and of railroads leased, operated, or controlled by railroads in reorganization in the region to be transferred to the Corporation, shall deposit with the special court all of the stock and other securities of the Corporation and obligations of the Association designated in the final system plan to be exchanged for such rail properties;

(2) each profitable railroad operating in the region purchasing rail properties from a railroad in reorganization in the region, or from a railroad leased, operated, or controlled by a railroad in

reorganization in the region, as provided in the final system plan shall deposit with the special court the compensation to be paid for such rail properties.

(b) CONVEYANCE OF RAIL PROPERTIES.—(1) The special court shall, within 10 days after deposit under subsection (a) of this section of the securities of the Corporation, obligations of the Association, and compensation from the profitable railroads operating in the region, order the trustee or trustees of each railroad in reorganization in the region to convey forthwith to the Corporation and the respective profitable railroads operating in the region, all right, title, and interest in the rail properties of such railroad in reorganization and shall itself order the conveyance of all right, title, and interest in the rail properties of any railroad leased, operated, or controlled by such railroad in reorganization that are to be conveyed to them under the final system plan as certified to such court under section 209(d) of this Act.

(2) All rail properties conveyed to the Corporation and the respective profitable railroads operating in the region under this section shall be conveyed free and clear of any liens or encumbrances, but subject to such leases and agreements as shall have previously burdened such properties or bound the owner or operator thereof in pursuance of an arrangement with any State, or local or regional transportation authority under which financial support from such State, or local or regional transportation authority was being provided at the time of enactment of this Act for the continuance of rail passenger service or any lien or encumbrance of no greater than 5 years' duration which is necessary for the contractual performance by any person of duties related to public health or sanitation. Such conveyances shall not be restrained or enjoined by any court.

(3) Notwithstanding anything to the contrary contained in this Act, if railroad rolling stock is included in the rail properties to be conveyed, such conveyance may only be effected if the profitable railroad operating in the region or the Corporation to whom the conveyance is made assumes all of the obligations under any conditional sale agreement, equipment trust agreement, or lease in respect to such rolling stock and such conveyance is made subject thereto; and the provisions of this Act shall not affect the title and interests of any lessor, equipment trust trustee, or conditional sale vendee or assignee under such conditional sale agreement, equipment trust agreement or lease under section 77(j) of the Bankruptcy Act (11 U.S.C. 205(j)).

49 Stat. 911.

(4) Notwithstanding anything to the contrary contained in this Act, if a railroad in reorganization has leased rail properties from a lessor that is neither a railroad nor controlled by or affiliated with a railroad, and such lease has been approved by the lessee railroad's reorganization court prior to the date of enactment of this Act, conveyance of such lease may only be effected if the Corporation or the profitable railroad to whom the conveyance is made assumes all of the terms and conditions specified in the lease, including the obligation to pay the specified rent to the non-railroad lessor.

(c) FINDINGS AND DISTRIBUTION.—(1) After the rail properties have been conveyed to the Corporation and profitable railroads operating in the region under subsection (b) of this section, the special court, giving due consideration to the findings contained in the final system plan, shall decide—

(A) whether the transfers or conveyances—

(i) of rail properties of each railroad in reorganization, or of each railroad leased, operated, or controlled by a railroad in reorganization, to the Corporation in exchange for the securities and the other benefits accruing to such rail-

road as a result of such exchange, as provided in the final system plan and this Act, and

(ii) of rail properties of each railroad in reorganization, or of each railroad leased, operated, or controlled by a railroad in reorganization, to a profitable railroad operating in the region, in accordance with the final system plan,

are in the public interest and are fair and equitable to the estate of each railroad in reorganization in accordance with the standard of fairness and equity applicable to the approval of a plan of reorganization or a step in such a plan under section 77 of the Bankruptcy Act (11 U.S.C. 205), or fair and equitable to a railroad that is not itself in reorganization but which is leased, operated, or controlled by a railroad in reorganization; and 49 Stat. 911; 76 Stat. 572.

(B) whether the transfers or conveyances are more fair and equitable than is required as a constitutional minimum.

(2) If the special court finds that the terms of one or more exchanges for securities and other benefits are not fair and equitable to an estate of a railroad in reorganization, or to a railroad leased, operated, or controlled by a railroad in reorganization, which has transferred rail properties pursuant to the final system plan, it shall—

(A) enter a judgment reallocating the securities of the Corporation in a fair and equitable manner if it has not been fairly allocated among the railroads transferring rail properties to the Corporation; and

(B) if the lack of fairness and equity cannot be completely cured by a reallocation of the Corporation's securities, order the Corporation to provide for the transfer to the railroad of other securities of the Corporation or obligations of the Association as designated in the final system plan in such nature and amount as would make the exchange or exchanges fair and equitable; and

(C) if the lack of fairness and equity cannot be completely cured by reallocation of the Corporation's securities or by providing for the transfer of other securities of the Corporation or obligations of the Association as designated in the final system plan, enter a judgment against the Corporation.

(3) If the special court finds that the terms of one or more conveyances of rail properties to a profitable railroad operating in the region in accordance with the final system plan are not fair and equitable, it shall enter a judgment against such profitable railroad. If the special court finds that the terms of one or more conveyances or exchanges for securities or other benefits are fairer and more equitable than is required as a constitutional minimum, then it shall order the return of any excess securities, obligations, or compensation to the Corporation or a profitable railroad so as not to exceed the constitutional minimum standard of fairness and equity.

(4) Upon making the findings referred to in this subsection, the special court shall order distribution of the securities, obligations, and compensation deposited with it under subsection (b) of this section to the trustee or trustees of each railroad in reorganization in the region who conveyed right, title, and interest in rail properties to the Corporation and the respective profitable railroads under such subsection.

(d) APPEAL.—A finding or determination entered pursuant to subsection (c) of this section may be appealed directly to the Supreme Court of the United States in the same manner that an injunction order may be appealed under section 1253 of title 28, United States Code: *Provided*, That such appeal is exclusive and shall be filed in the Supreme Court not more than 5 days after such finding or determination is entered by the special court. The Supreme Court shall dismiss 62 Stat. 928.

any such appeal within 7 days after the entry of such an appeal if it determines that such an appeal would not be in the interest of an expeditious conclusion of the proceedings and shall grant the highest priority to the determination of any such appeals which it determines not to dismiss.

TERMINATION OF RAIL SERVICE

SEC. 304. (a) DISCONTINUANCE.—Except as provided in subsections (c) and (f) of this section, (1) rail service on rail properties of a railroad in the region which transfers to the Corporation or to profitable railroads operating in the region all or substantially all of its rail properties designated for such conveyance in the final system plan, and (2) rail service on rail properties of a profitable railroad operating in the region which transfers substantially all of its rail properties to the Corporation or to other railroads pursuant to the final system plan may be discontinued to the extent such discontinuance is not precluded by the terms of the leases and agreements referred to in section 303(b)(2) of this title if—

(A) the final system plan does not designate rail service to be operated over such rail properties; and

(B) not sooner than 30 days following the effective date of the final system plan the trustee or trustees of the applicable railroad in reorganization or a profitable railroad give notice in writing of intent to discontinue such rail service on a date certain which is not less than 60 days after the date of such notice; and

(C) the notice required by paragraph (B) of this subsection is sent by certified mail to the Governor and State transportation agencies of each State and to the government of each political subdivision of each State in which such rail properties are located and to each shipper who has used such rail service during the previous 12 months.

(b) ABANDONMENT.—(1) Rail properties over which rail service has been discontinued under subsection (a) of this section may not be abandoned sooner than 120 days after the effective date of such discontinuance except as provided in subsections (c) and (f) of this section. Thereafter, except as provided in subsection (c) of this section, such rail properties may be abandoned upon 30 days' notice in writing to all those required to receive notice under paragraph (2)(C) of subsection (a) of this section.

(2) In any case in which rail properties proposed to be abandoned under this section are designated by the final system plan as rail properties which are suitable for use for other public purposes (including roads or highways, other forms of mass transportation, conservation, and recreation), such rail properties shall not be sold, leased, exchanged, or otherwise disposed of during the 180-day period beginning on the date of notice of proposed abandonment under this section unless such rail properties have first been offered, upon reasonable terms, for acquisition for public purposes.

(c) LIMITATIONS.—Rail service may be discontinued and rail properties may be abandoned under subsections (a) and (b) of this section notwithstanding any provision of the Interstate Commerce Act (49 U.S.C. 1 et seq.) or the constitution or law of any State or the decision of any court or administrative agency of the United States or of any State. No rail service may be discontinued and no rail properties may be abandoned pursuant to this section— 24 Stat. 379.

(1) after 2 years from the effective date of the final system plan or more than 2 years after the final payment of any rail service continuation subsidy is received, whichever is later; or

(2) if a shipper, a State, the United States, a local or regional transportation authority, or any responsible person offers—

(A) a rail service continuation subsidy which covers the difference between the revenue attributable to such rail properties and the avoidable costs of providing service on such rail properties plus a reasonable return on the value of such rail properties;

(B) a rail service continuation subsidy which is payable pursuant to a lease or agreement with a State, or a local or regional transportation authority, under which financial support was being provided at the time of the enactment of this Act for the continuance of rail passenger service; or

(C) to purchase, pursuant to subsection (d) of this section, such rail properties in order to operate rail service over such properties.

If a rail service continuation subsidy is offered, the government or person offering the subsidy shall enter into an operating agreement with the Corporation or any responsible person (including a government entity) under which the Corporation or such person (including a government entity) will operate rail service over such rail properties and receive the difference between the revenue attributable to such properties and the avoidable costs of providing service on such rail properties and the trustee of any railroad in reorganization shall receive a reasonable rate of return on the value of any rail properties for which a rail service is operated under such subsidy.

(d) PURCHASE.—If an offer to purchase is made under subsection (c)(2)(C) of this section, such offer shall be accompanied by an offer of a rail service continuation subsidy. Such subsidy shall continue until the purchase transaction is completed, unless a railroad assumes operations over such rail properties on its own account pursuant to an order or authorization of the Commission. Whenever a railroad in reorganization in the region or a profitable railroad gives notice of intent to discontinue service pursuant to subsection (a) of this section, such railroad shall, upon the request of anyone apparently qualified to make a purchase offer promptly make available its most recent reports on the physical condition of such property together with such traffic and revenue data as would be required under subpart B of part 1121 of chapter X of title 49 of the Code of Federal Regulations and such other data necessary to ascertain the avoidable costs of providing service over such rail properties.

(e) ABANDONMENT BY CORPORATION.—After the rail system to be operated by the Corporation under the final system plan has been in operation for 2 years, the Commission may authorize the Corporation to abandon any rail properties as to which it determines that rail service over such properties is not required by the public convenience and necessity. The Commission may, at any time after the effective date of the final system plan, authorize additional rail service in the region or authorize the abandonment of rail properties which are not being operated by the Corporation or by any other person. Determinations by the Commission under this subsection shall be made pursuant to applicable provisions of the Interstate Commerce Act (49 U.S.C. 1). 24 Stat. 379.

(f) INTERIM ABANDONMENT.—After the date of enactment of this Act, no railroad in reorganization may discontinue service or abandon any line of railroad other than in accordance with the provisions of this Act, unless it is authorized to do so by the Association and unless no affected State or local or regional transportation authority reasonably opposes such action, notwithstanding any provision of any other Federal law, the constitution or law of any State, or decision or order of, or the pendency of any proceeding before any Federal or State court, agency, or authority.

TITLE IV—LOCAL RAIL SERVICES

FINDINGS AND PURPOSE

SEC. 401. (a) FINDINGS.—The Congress finds and declares that—

(1) The Nation is facing an energy shortage of acute proportions in the next decade.

(2) Railroads are one of the most energy-efficient modes of transportation for the movement of passengers and freight and cause the least amount of pollution.

(3) Abandonment, termination, or substantial reduction of rail service in any locality will adversely affect the Nation's long-term and immediate goals with respect to energy conservation and environmental protection.

(4) Under certain circumstances the cost to the taxpayers of rail service continuation subsidies would be less than the cost of abandonment of rail service in terms of lost jobs, energy shortages, and degradation of the environment.

(b) PURPOSE.—Therefore, it is declared to be the purpose of the Congress to authorize the Secretary to maintain a program of rail service continuation subsidies.

RAIL SERVICE CONTINUATION SUBSIDIES

SEC. 402. (a) GENERAL.—The Secretary shall provide financial assistance in accordance with this section for the purpose of rail service continuation subsidies. For purposes of subsection (b)(1) of this section the Federal share of a rail service continuation subsidy shall be 70 per centum and the State share shall be 30 per centum. For purposes of subsection (b)(2) of this section a State receiving discretionary assistance shall be required to contribute at least 30 per centum of the cost of the program for which the Federal assistance is provided.

(b) ENTITLEMENT.—(1) Each State in the region is entitled to an amount for rail service continuation subsidies from 50 per centum of the sums appropriated each fiscal year for such purpose in the ratio which the total rail mileage in such State, as determined by the Secretary and measured in point-to-point length (excluding yard tracks and sidings), bears to the total rail mileage in all the States in the region, measured in the same manner, except that the entitlement of each State shall be no less than 3 per centum, and the entitlement of no State shall be more than 10 per centum, of 50 per centum of the funds appropriated. In the event that the total amount allocated under this formula, due to the application of the maximum and minimum limitations which it establishes, is greater or less than 50 per centum of the funds appropriated, the excess or deficiency, as the case may be, shall be added to or deducted from the Secretary's discretionary fund provided for in paragraph (2) of this subsection. The entitlement of any State which is withheld in accordance with this section and any sums not used or committed by a State during the preceding fiscal year shall be paid into the discretionary fund provided for in paragraph (2) of this subsection.

(2) The Secretary is authorized to provide discretionary financial assistance to a State or a local or regional transportation authority in the region for the purpose of continuing local rail services, including assistance for the purposes enumerated in section 403 of this title.

(c) ELIGIBILITY.—A State in the region is eligible to receive rail service continuation subsidies pursuant to subsection (b) of this section in any fiscal year if—

(1) the State has established a State plan for rail transportation and local rail services which is administered or coordinated by a designated State agency and such plan provides for the equitable distribution of such subsidies among State, local, and regional transportation authorities;

(2) the State agency has authority and administrative jurisdiction to develop, promote, supervise, and support safe, adequate, and efficient rail services; employs or will employ, directly or indirectly, sufficient trained and qualified personnel; and maintains or will maintain adequate programs of investigation, research, promotion, and development with provision for public participation;

(3) the State provides satisfactory assurance that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid under this title to the State; and

(4) the State complies with the regulations of the Secretary issued under this section.

(d) REGULATIONS.—Within 90 days after the date of enactment of this Act, the Secretary shall issue, and may from time to time amend, regulations with respect to basic and discretionary rail service continuation subsidies.

(e) PAYMENT.—The Secretary shall pay to each State in the region an amount equal to its entitlement under subsection (b)(1) of this section. Any amounts which are not expended or committed by a State pursuant to subsection (b) during the ensuing fiscal year shall be returned by such State to the Secretary, who may use such amounts in accordance with subsection (b)(2) of this section.

(f) TERM.—A rail service continuation subsidy between a State, or a local or regional authority, and the Corporation or other responsible person (including a government entity) may not exceed a term of 2 years.

(g) RECORD, AUDIT, AND EXAMINATION.—(1) Each recipient of financial assistance under this section, whether in the form of grants, subgrants, contracts, subcontracts, or other arrangements, shall keep such records as the Secretary shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance was given or used, the amount of that portion of the cost of the project supplied by other sources, and such other records as will facilitate an effective audit.

(2) The Secretary and the Comptroller General of the United States, or any of their duly authorized representatives shall, until the expiration of 3 years after completion of the project or undertaking referred to in paragraph (1) of this subsection, have access for the purpose of audit and examination to any books, documents, papers, and records of such receipts which in the opinion of the Secretary or the Comptroller General may be related or pertinent to the grants, contracts, or other arrangements referred to in such paragraph. GAO audit.

(h) WITHHOLDING.—If the Secretary, after reasonable notice and opportunity for a hearing to any State agency, finds that a State is not eligible for rail service continuation subsidies under subsections (c) and (d) of this section, payment to such State shall not be made until there is no longer any failure to comply.

(i) AUTHORIZATION FOR APPROPRIATIONS.—(1) There is authorized to be appropriated to carry out the purposes of this section such sums as are necessary, not to exceed $90,000,000 for each of the 2 fiscal years including and following the effective date of the final system plan. Such sums as are appropriated shall remain available until expended.

(2) One-half of the sums appropriated pursuant to the authorization of this subsection shall be reserved for allocation to States in the region under subsection (b)(1) of this section. One-half of the sums appropriated pursuant to the authorization of this subsection shall be reserved for distribution by the Secretary under subsection (b)(2) of this section.

(j) DEFINITION.—As used in this section, "rail service continuation subsidies" means subsidies calculated in accordance with the provisions of section 205(d)(3) of this Act to cover costs of operating adequate and efficient rail service, including where necessary improvement and maintenance of tracks and related facilities.

ACQUISITION AND MODERNIZATION LOANS

SEC. 403. (a) ACQUISITION.—If a State which is eligible for assistance under section 402(c) of this title or a local or regional transportation authority has made an offer to purchase any rail properties of a railroad pursuant to section 304(c)(2)(C) of this Act or other lawful authority, the Secretary is authorized to direct the Association to provide loans to such State or local or regional transportation authority not to exceed 70 per centum of the purchase price: *Provided, however*, That any recipient of such loan is no longer eligible for a rail service continuation subsidy pursuant to section 402 of this title.

(b) MODERNIZATION.—In addition to such acquisition loans, the Secretary is authorized to direct the Association to provide additional assistance not to exceed 70 per centum of the cost of restoring or repairing such rail properties to such condition as will enable safe and efficient rail transportation operations over such rail properties. Such financial assistance may be in the form of a loan or the guarantee of a loan. The Association shall provide such financial assistance as the Secretary may direct under this section and shall adopt regulations describing its procedures for such assistance. With the approval of the Secretary, a State may expend sums received by it under section 402 of this title for acquisition and modernization pursuant to this section.

TITLE V—EMPLOYEE PROTECTION

DEFINITIONS

SEC. 501. As used in this title unless the context otherwise requires—

(1) "acquiring railroad" means a railroad, except the Corporation, which seeks to acquire or has acquired, pursuant to the provisions of this Act, all or a part of the rail properties of one or more of the railroads in reorganization, the Corporation, or a profitable railroad;

(2) "employee of a railroad in reorganization" means a person who, on the effective date of a conveyance of rail properties of a railroad in reorganization to the Corporation or to an acquiring railroad, has an employment relationship with either said railroad in reorganization or any carrier (as defined in parts I and II of the Interstate Commerce Act) which is leased, controlled, or operated by the railroad in reorganization except a president, vice president, treasurer, secretary, comptroller, and any other person who performs functions corresponding to those performed by the foregoing officers;

49 USC 1, 301.

(3) "protected employee" means any employee of an acquiring railroad adversely affected by a transaction and any employee of a railroad in reorganization who on the effective date of this Act have not reached age 65;

(4) "class or craft of employees" means a group of employees, recognized and treated as a unit for purposes of collective bargaining,

which is represented by a labor organization that has been duly authorized or recognized pursuant to the Railway Labor Act as its representative for purposes of collective bargaining; 44 Stat. 577. 45 USC 151.

(5) "representative of a class or craft of employees" means a labor organization which has been duly authorized or recognized as the collective bargaining representative of a class or craft of employees pursuant to the Railway Labor Act;

(6) "deprived of employment" means the inability of a protected employee to obtain a position by the normal exercise of his seniority rights with the Corporation after properly electing to accept employment therewith or, the subsequent loss of a position and inability, by the normal exercise of his seniority rights under the applicable collective bargaining agreements, to obtain another position with the Corporation: *Provided, however*, That provisions in existing collective bargaining agreements of a railroad in reorganization, which do not require a protected employee, in the normal exercise of seniority rights, to make a change in residence, in order to maintain his protection, will be preserved and will also be extended and be applicable to all other protected employees of that same craft or class. It shall not, however, include any deprivation of employment by reason of death, retirement, resignation, dismissal or disciplinary suspension for cause, failure to work due to illness or disability, nor any severance of employment covered by subsections (d) and (e) of section 505 of this title;

(7) "employee adversely affected with respect to his compensation" means a protected employee who suffers a reduction in compensation;

(8) "transaction" means actions taken pursuant to the provisions of this Act or the results thereof; and

(9) "change in residence" means transfer to a work location which is located either (A) outside a radius of 30 miles of the employee's former work location and farther from his residence than was his former work location or (B) is located more than 30 normal highway route miles from his residence and also farther from his residence than was his former work location.

EMPLOYMENT OFFERS

SEC. 502. (a) APPLICABLE LAW.—The Corporation and, where applicable, the Association shall be subject to the provisions of the Railway Labor Act and shall be considered employers for purposes of the Railroad Retirement Act, Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act. The Corporation, in addition, shall, except as otherwise specifically provided by this Act, be subject to all Federal and State laws and regulations applicable to carriers by railroad. 48 Stat. 1283. 26 USC 3201. 45 USC 367.

(b) MANDATORY OFFER.—The Corporation shall offer employment, to be effective as of the date of a conveyance or discontinuance of service under the provisions of this Act, to each employee of a railroad in reorganization who has not already accepted an offer of employment by the Association, where applicable, or an acquiring railroad. Such offers of employment to employees represented by labor organizations will be confined to their same craft or class. The Corporation shall apply to said employees the protective provisions of this title.

(c) ASSOCIATION.—After the transfer of rail properties pursuant to section 303, the Association, in employing any additional employees, shall give priority consideration to employees of a railroad in reorganization and the provisions of this title shall apply to any such employees employed by the Association as if they were employees of the Corporation.

ASSIGNMENT OF WORK

SEC. 503. The Corporation shall have the right to assign, allocate, reassign, reallocate, and consolidate work formerly performed on the rail properties acquired pursuant to the provisions of this Act from a railroad in reorganization to any location, facility, or position on its system provided it does not remove said work from coverage of a collective-bargaining agreement and does not infringe upon the existing classification of work rights of any craft or class of employees at the location or facility to which said work is assigned, allocated, reassigned, reallocated, or consolidated and shall have the right to transfer to an acquiring railroad the work incident to the rail properties or facilities acquired by said acquiring railroad pursuant to this Act, subject, however, to the provisions of section 508 of this title.

COLLECTIVE-BARGAINING AGREEMENTS

SEC. 504. (a) INTERIM APPLICATION.—Until completion of the agreements provided for under subsection (d) of this section, the Corporation shall, as though an original party thereto, assume and apply on the particular lines, properties, or facilities acquired all obligations under existing collective-bargaining agreements covering all crafts and classes employed thereon, except that the Agreement of May 1936, Washington, D.C. and provisions in other existing job stabilization agreements shall not be applicable to transactions effected pursuant to this Act with respect to which the provisions of section 505 of this title shall be superseding and controlling. During this period, employees of a railroad in reorganization who have seniority on the lines, properties, or facilities acquired by the Corporation pursuant to this Act shall have prior seniority roster rights on such acquired lines, properties, or facilities.

(b) SINGLE IMPLEMENTING AGREEMENT.—On or before the date of the adoption of the final system plan by the Board of Directors of the Association as provided in section 207(c) of this Act, the representatives of the various classes or crafts of the employees of a railroad in reorganization involved in a conveyance pursuant to this Act and representatives of the Corporation shall commence negotiation of a single implementing agreement for each class and craft of employees affected providing (1) the identification of the specific employees of the railroad in reorganization to whom the Corporation offers employment; (2) the procedure by which those employees of the railroad in reorganization may elect to accept employment with the Corporation; (3) the procedure for acceptance of such employees into the Corporation's employment and their assignment to positions on the Corporation's system; (4) the procedure for determining the seniority of such employees in their respective crafts or classes on the Corporation's system which shall, to the extent possible, preserve their prior seniority rights; and (5) the procedure for determining equitable adjustment in rates of comparable positions. If no agreement with respect to the matters referred to in this subsection is reached by the end of 30 days after the commencement of negotiations, the parties shall within an additional 10 days select a neutral referee and, in the event they are unable to agree upon the selection of such referee, then the National Mediation Board shall immediately appoint a referee. After a referee has been designated, a hearing on the dispute shall commence as soon as practicable. Not less than 10 days prior to the effective date of any conveyance pursuant to the provisions of

this Act, the referee shall resolve and decide all matters in dispute with respect to the negotiation of said implementing agreement or agreements and shall render a decision which shall be final and binding and shall constitute the implementing agreement or agreements between the parties with respect to the transaction involved. The salary and expenses of the referee shall be paid pursuant to the provisions of the Railway Labor Act.

44 Stat. 577. 45 USC 151.

(c) RELATIONSHIP TO OTHER PROVISIONS.—Notwithstanding failure for any reason to complete implementing agreements provided for in subsection (b) of this section, the Corporation may proceed with a conveyance of properties, facilities, and equipment pursuant to the provisions of this Act and effectuate said transaction: *Provided*, That all protected employees shall be entitled to all of the provisions of such agreements, as finally determined, from the time they are adversely affected as a result of any such conveyance.

(d) NEW COLLECTIVE-BARGAINING AGREEMENTS.—Not later than 60 days after the effective date of any conveyance pursuant to the provisions of this Act, the representatives of the various classes or crafts of the employees of a railroad in reorganization involved in a conveyance and representatives of the Corporation shall commence negotiations of new collective-bargaining agreements for each class and craft of employees covering the rates of pay, rules, and working conditions of employees who are employees of the Corporation, which collective-bargaining agreements shall include appropriate provisions concerning rates of pay, rules, and working conditions but shall not include any provisions for job stabilization resulting from any transaction effected pursuant to this Act which may exceed or conflict with those established or prescribed herein.

EMPLOYEE PROTECTION

SEC. 505. (a) EQUIVALENT POSITION.—A protected employee whose employment is governed by a collective-bargaining agreement will not, except as explicitly provided in this title, during the period in which he is entitled to protection, be placed in a worse position with respect to compensation, fringe benefits, rules, working conditions, and rights and privileges pertaining thereto.

(b) MONTHLY DISPLACEMENT ALLOWANCE.—A protected employee, who has been deprived of employment or adversely affected with respect to his compensation shall be entitled to a monthly displacement allowance computed as follows:

(1) Said allowance shall be determined by computing the total compensation received by the employee, including vacation allowances and monthly compensation guarantees, and his total time paid for during the last 12 months immediately prior to his being adversely affected in which he performed compensated service more than 50 per centum of each of such months, based upon his normal work schedule, and by dividing separately the total compensation and the total time paid for by 12, thereby producing the average monthly compensation and average monthly time paid for; and, if an employee's compensation in his current position is less in any month in which he performs work than the aforesaid average compensation, he shall be paid the difference, less any time lost on account of voluntary absences other than vacations, but said protected employee shall be compensated in addition thereto at the rate of the position filled for any time worked in excess of his average monthly time, *Provided, however*, That—

(A) in determining compensation in his current employment the protected employee shall be treated as occupying the position, producing the highest rate of pay to which his qualifications and seniority entitle him under the applicable collective bargaining agreement and which does not require a change in residence;

(B) the said monthly displacement allowance shall be reduced by the full amount of any unemployment compensation benefits received by the protected employee and shall be reduced by an amount equivalent to any earnings of said protected employee in any employment subject to the Railroad Retirement Act and 50 per centum of any earnings in any employment not subject to the Railroad Retirement Act;

48 Stat. 1283.

(C) a protected employee's average monthly compensation shall be adjusted from time to time thereafter to reflect subsequent general wage increases;

(D) should a protected employee's service total less than 12 months in which he performs more than 50 per centum compensated service based upon his normal work schedule in each of said months, his average monthly compensation shall be determined by dividing separately the total compensation received by the employee and the total time for which he was paid by the number of months in which he performed more than 50 per centum compensated service based upon his normal work schedule; and

(E) the monthly displacement allowance provided by this section shall in no event exceed the sum of $2,500 in any month except that such amount shall be adjusted to reflect subsequent general wage increases.

(2) A protected employee's average monthly compensation under this section shall be based upon the rate of pay applicable to his employment and shall include increases in rates of pay not in fact paid but which were provided for in national railroad labor agreements generally applicable during the period involved.

(3) If a protected employee who is entitled to a monthly displacement allowance served as an agent or a representative of a class or craft of employees on either a full- or part-time basis in the 12 months immediately preceding his being adversely affected, his monthly displacement allowance shall be computed by taking the average of the average monthly compensation and average monthly time paid for of the protected employees immediately above and below him on the same seniority roster or his own monthly displacement allowance, whichever is greater.

(4) An employee and his representative shall be furnished with a protected employee's average monthly compensation and average monthly time paid for, computed in accordance with the terms of this subsection, together with the data upon which such computations are based, within 30 days after the protected employee notifies the Corporation in writing that he has been deprived of employment or adversely affected with respect to his compensation.

(c) DURATION OF DISPLACEMENT ALLOWANCE.—The monthly displacement allowance provided for in subsection (b) of this section shall continue until the attainment of age 65 by a protected employee with 5 or more years of service on the effective date of this Act and, in the case of a protected employee who has less than 5 years service on such date, shall continue for a period equal to his total prior years of service: *Provided*, That such monthly displacement allowance shall termi-

nate upon the protected employee's death, retirement, resignation, or dismissal for cause; and shall be suspended for the period of disciplinary suspension for cause, failure to work due to illness or disability, voluntary furlough, or failure to retain or obtain a position available to him by the exercise of his seniority rights in accordance with the provisions of this section.

(d) TRANSFER.—(1) A protected employee who has been deprived of employment may be required by the Corporation, in inverse seniority order and upon reasonable notice, to transfer to any bona fide vacancy for which he is qualified in his same class or craft of employee on any part of the Corporation's system and shall then be governed by the collective-bargaining agreement applicable on the seniority district to which transferred. If such transfer requires a change in residence, any such protected employee may choose (A) to voluntarily furlough himself at his home location and have his monthly displacement allowance suspended during the period of voluntary furlough, or (B) to be severed from employment upon payment to him of a separation allowance computed as provided in subsections (e) and (f) of this section, which separation allowance shall be in lieu of all other benefits provided by this title.

(2) Such protected employee shall not be required to transfer to a location requiring a change in residence unless there is a bona fide need for his services at such location. Such bona fide need for services contemplates that the transfer be to a position which has not and cannot be filled by employees who are not required to make a change in residence in the seniority district involved and which, in the absence of this section, would have required the employment of a new employee.

(3) Such protected employee who, at the request of the Corporation, has once accepted and made a transfer to a location requiring a change in residence shall not be required again to so transfer for a period of 3 years.

(4) Transfers to vacancies requiring a change in residence shall be subject to the following:

(A) The vacancy shall be first offered to the junior qualified protected employee deprived of employment in the seniority district where the vacancy exists, and each such employee shall have 20 days to elect one of the options set forth in paragraph (1) of this subsection. If that employee elects not to accept the transfer, it will then be offered in inverse seniority order to the remaining qualified, protected employees deprived of employment on the seniority district, who will each have 20 days to elect one of the options set forth in paragraph (1) of this subsection.

(B) If the vacancy is not filled by the procedure in paragraph (4) (A) of this subsection, the vacancy will then be offered in the inverse order of seniority to the qualified protected employees deprived of employment on the system and each of such employees will be afforded 30 days to elect one of the options set forth in paragraph (1) of this subsection.

(C) The provisions of this paragraph shall not prevent the adoption of other procedures pursuant to an agreement made by the Corporation and representative of the class or craft of employees involved.

(e) SEPARATION ALLOWANCE.—A protected employee who is tendered and accepts an offer by the Corporation to resign and sever his employment relationship in consideration of payment to him of a separation allowance, and any protected employee whose employment

relationship is severed in accordance with subsection (d) of this section, shall be entitled to receive a lump-sum separation allowance not to exceed $20,000 in lieu of all other benefits provided by this title. Said lump-sum separation allowance, in the case of a protected employee who had not less than 3 nor more than 5 years of service as of the date of this Act, shall amount to 270 days' pay at the rate of the position last held and, in the case of a protected employee having had 5 or more years' service, shall amount to the number of days' pay indicated below at the rate of the position last held dependent upon the age of the protected employee at the time of such termination of employment:

60 or under	360 days' pay
61	300 days' pay
62	240 days' pay
63	180 days' pay
64	120 days' pay.

(f) TERMINATION ALLOWANCE.—The Corporation may terminate the employment of an employee of a railroad in reorganization, who has less than 3 years' service as of the effective date of this Act: *Provided, however*, That in such event the terminated employee shall be entitled to receive a lump sum separation allowance in an amount determined as follows:

2 to 3 years' service	180 days' pay at the rate of the position last held.
1 to 2 years' service	90 days' pay at the rate of the position last held.
Less than 1 year's service	5 days' pay at the rate of the position last held for each month of service.

(g) MOVING EXPENSE BENEFITS.—Any protected employee who is required to make a change of residence as the result of a transaction shall be entitled to the following benefits—

(1) Reimbursement for all expenses of moving his household and other personal effects, for the traveling expense of himself and members of his family, including living expenses for himself and his family, and for his own actual wage loss, not to exceed 10 working days. *Provided*, That the Corporation or acquiring railroad shall, to the same extent provided above, assume said expenses for any employee furloughed within 3 years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provisions of this section unless such claim is presented to the Corporation or acquiring railroad within 90 days after the date on which the expenses were incurred.

(2)(A)(i) If the protected employee owns, or is under a contract to purchase, his own home in the locality from which he is required to move and elects to sell said home, he shall be reimbursed for any loss suffered in the sale of his home for less than its fair market value. In each case the fair market value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The Corporation or an acquiring railroad shall in each instance be afforded an opportunity to purchase the home at such fair market value before it is sold by the employee to any other person.

(ii) A protected employee may elect to waive the provisions of paragraph (2)(A)(i) of this subsection and to receive, in lieu thereof, an amount equal to his closing costs which are ordinarily paid for and assumed by a seller of real estate in the jurisdiction

in which the residence is located. Such costs shall include a real estate commission paid to a licensed realtor (not to exceed $3,000 or 6 per centum of sale price, whichever is less), and any prepayment penalty required by the institution holding the mortgage; such costs shall not include the payment of any "points" by the seller.

(B) If the protected employee holds an unexpired lease on a dwelling occupied by him as his home, he shall be protected from all loss and cost in securing the cancellation of said lease.

(C) No claim for costs or loss shall be paid under the provisions of this paragraph unless the claim is presented to the Corporation or an acquiring railroad within 90 days after such costs or loss are incurred.

(D) Should a controversy arise with respect to the value of the home, the costs or loss sustained in its sale, the costs or loss under a contract for purchase, loss or cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee, or his representative, and the Corporation or an acquiring railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner: One to be selected by the employee or his representative and one by the Corporation or acquiring railroad and these two, if unable to agree upon a valuation within 30 days, shall endeavor by agreement within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days a third qualified real estate appraiser whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

(h) APPLICATION OF TITLE.—Should a railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving a protected employee of benefits to which he otherwise would have become entitled under this title, the provisions of this title will apply to such employee.

CONTRACTING OUT

SEC. 506. All work in connection with the operation or services provided by the Corporation on the rail lines, properties, equipment, or facilities acquired pursuant to the provisions of this Act and the maintenance, repair, rehabilitation, or modernization of such lines, properties, equipment, or facilities which has been performed by practice or agreement in accordance with provisions of the existing contracts in effect with the representatives of the employees of the classes or crafts involved shall continue to be performed by said Corporation's employees, including employees on furlough. Should the Corporation lack a sufficient number of employees, including employees on furlough, and be unable to hire additional employees, to perform the work required, it shall be permitted to subcontract that part of such

work which cannot be performed by its employees, including those on furlough, except where agreement by the representatives of the employees of the classes or crafts involved is required by applicable collective-bargaining agreements. The term "unable to hire additional employees" as used in this section contemplates establishment and maintenance by the Corporation of an apprenticeship, training, or recruitment program to provide an adequate number of skilled employees to perform the work.

ARBITRATION

SEC. 507. Any dispute or controversy with respect to the interpretation, application, or enforcement of the provisions of this title, except section 504(d) and those disputes or controversies provided for in subsection (g)(2)(D) of section 505 and subsection (b) of section 504 which have not been resolved within 90 days, may be submitted by either party to an Adjustment Board for a final and binding decision thereon as provided in section 3 Second, of the Railway Labor Act, in which event the burden of proof on all issues so presented shall be upon the Corporation or, where applicable, the Association.

44 Stat. 578; 80 Stat. 208. 45 USC 153.

ACQUIRING RAILROADS

SEC. 508. An acquiring railroad shall offer such employment and afford such employment protection to employees of a railroad from which it acquires properties or facilities pursuant to this Act, and shall further protect its own employees who are adversely affected by such acquisition, as shall be agreed upon between the said acquiring railroad and the representatives of such employees prior to said acquisition: *Provided, however*, That the protection and benefits provided for protected employees in such agreements shall be the same as those specified in section 505 of this title: *And provided further, however*, That unless and until such agreements are reached, the acquiring railroad shall not enter into purchase agreements pursuant to section 303 of this Act.

PAYMENTS OF BENEFITS

SEC. 509. The Corporation, the Association (where applicable), and acquiring railroads, as the case may be, shall be responsible for the actual payment of all allowances, expenses, and costs provided protected employees pursuant to the provisions of this title. The Corporation, the Association (where applicable), and acquiring railroads shall then be reimbursed for such actual amounts paid protected employees, not to exceed the aggregate sum of $250,000,000, pursuant to the provisions of this title by the Railroad Retirement Board upon certification to said Board by the Corporation, the Association (where applicable), and acquiring railroads of the amounts paid such employees. Such reimbursement shall be made from a separate account maintained in the Treasury of the United States to be know as the Regional Rail Transportation Protective Account. There is hereby authorized to be appropriated to such protective account annually such sums as may be required to meet the obligations payable hereunder, not to exceed in the aggregate, however, the sum of $250,000,000. There is further authorized to be appropriated to the Railroad Retirement Board annually such sums as may be necessary to provide for additional administrative expenses to be incurred by the Board in the performance of its functions under this section.

Appropriation.

TITLE VI—MISCELLANEOUS PROVISIONS

RELATIONSHIP TO OTHER LAWS

SEC. 601. (a) ANTITRUST.—(1) Except as specifically provided in paragraph (2) of this subsection, no provision of this Act shall be deemed to convey to any railroad or employee or director thereof any immunity from civil or criminal liability, or to create defenses to actions, under the antitrust laws.

(2) The antitrust laws are inapplicable with respect to any action taken to formulate or implement the final system plan where such action was in compliance with the requirements of such plan.

(3) As used in this subsection, "antitrust laws" includes the Act of July 2, 1890 (ch. 647, 26 Stat. 209), as amended; the Act of October 15, 1914 (ch. 323, 38 Stat. 730), as amended; the Federal Trade Commission Act (38 Stat. 717), as amended; sections 73 and 74 of the Act of August 27, 1894 (28 Stat. 570), as amended; the Act of June 19, 1936 (ch. 592, 49 Stat. 1526), as amended; and the antitrust laws of any State or subdivision thereof. 15 USC 2. 15 USC 12. 15 USC 58. 15 USC 8, 9. 15 USC 13.

(b) COMMERCE AND BANKRUPTCY.—The provisions of the Interstate Commerce Act (49 U.S.C. 1 et seq.) and the Bankruptcy Act (11 U.S.C. et seq.) are inapplicable to transactions under this Act to the extent necessary to formulate and implement the final system plan whenever a provision of any such Act is inconsistent with this Act. 24 Stat. 379. 30 Stat. 544.

(c) ENVIRONMENT.—(1) The provisions of section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332 (2)(C)) shall not apply with respect to any action taken under authority of this Act before the effective date of the final system plan. 83 Stat. 853.

(d) NORTHEAST CORRIDOR.—(1) Rail properties designated in accordance with section 206(c)(1)(C) of this Act shall be leased or may (at its option) be purchased or otherwise acquired by the National Railroad Passenger Corporation. The Corporation shall negotiate an appropriate sale or lease agreement with the National Railroad Passenger Corporation as provided in the final system plan.

(2) Properties acquired by purchase, lease, or otherwise pursuant to this subsection shall be improved in order to meet the goal set forth in section 206(a)(3) of this Act, relating to improved high-speed passenger service, by the earliest practicable date after the date of enactment of this Act.

(3) The Secretary shall begin the necessary engineering studies and improvements upon enactment.

(4) The final system plan shall provide for any necessary coordination with freight or commuter services of use of the facilities designated in section 206(c)(1)(C) of this Act. Such coordination may be effectuated through a single operating entity, designated in the final system plan, or as mutually agreed upon by the interested parties.

(5) Construction or improvements made pursuant to this subsection may be made in consultation with the Corps of Engineers.

(e) EMERGENCY SERVICE.—Section 1(16) of the Interstate Commerce Act (49 U.S.C. 1(16)) is amended by inserting "(a)" before the word "Whenever" in the first sentence and adding the following new paragraph: 41 Stat. 477.

"(b) Whenever any carrier by railroad is unable to transport the traffic offered it because—

"(1) its cash position makes its continuing operation impossible;

"(2) it has been ordered to discontinue any service by a court; or

"(3) it has abandoned service without obtaining a certificate from the Commission pursuant to this section;

the Commission may, upon the same procedure as provided in paragraph (15) of this section, make such just and reasonable directions with respect to the handling, routing, and movement of the traffic available to such carrier and its distribution over such carrier's lines, as in the opinion of the Commission will best promote the service in the interest of the public and the commerce of the people subject to the following conditions:

"(A) Such direction shall be effective for no longer than 60 days unless extended by the Commission for cause shown for an additional designated period not to exceed 180 days.

"(B) No such directions shall be issued that would cause a carrier to operate in violation of the Federal Railroad Safety Act of 1970 (45 U.S.C. 421) or that would substantially impair the ability of the carrier so directed to serve adequately its own patrons or to meet its outstanding common carrier obligations.

84 Stat. 971.

"(C) The directed carrier shall not, by reason of such Commission direction, be deemed to have assumed or to become responsible for the debts of the other carrier.

"(D) The directed carrier shall hire employees of the other carrier to the extent such employees had previously performed the directed service for the other carrier, and, as to such employees as shall be so hired, the directed carrier shall be deemed to have assumed all existing employment obligations and practices of the other carrier relating thereto, including, but not limited to, agreements governing rate of pay, rules and working conditions, and all employee protective conditions commencing with and for the duration of the direction.

"(E) Any order of the Commission entered pursuant to this paragraph shall provide that if, for the period of its effectiveness, the cost, as hereinafter defined, of handling, routing, and moving the traffic of another carrier over the other carrier's lines of road shall exceed the direct revenues therefor, then upon request, payment shall be made to the directed carrier, in the manner hereinafter provided and within 90 days after expiration of such order, of a sum equal to the amount by which such cost has exceeded said revenues. The term 'cost' shall mean those expenditures made or incurred in or attributable to the operations as directed, including the rental or lease of necessary equipment, plus an appropriate allocation of common expenses, overheads, and a reasonable profit. Such cost shall be then currently recorded by the carrier or carriers in such manner and on such forms as by general order may be prescribed by the Commission and shall be submitted to and subject to audit by the Commission. The Commission shall certify promptly to the Secretary of the Treasury the amount of payment to be made to said carrier or carriers under the provisions of this paragraph. Payments required to be made to a carrier under the provisions of this paragraph shall be made by the Secretary of the Treasury from funds hereby authorized to be appropriated in such amounts as may be necessary for the purpose of carrying out the provisions hereof.".

"Cost."

ANNUAL EVALUATION BY THE SECRETARY

Report to Congress.

SEC. 602. As part of his annual report each year, the Secretary shall transmit to Congress each year a comprehensive report on the effectiveness of the Association and the Corporation in implementing the purposes of this Act, together with any recommendations for additional legislative or other action.

FREIGHT RATES FOR RECYCLABLES

SEC. 603. The Commission shall, by expedited proceedings, adopt appropriate rules under the Interstate Commerce Act (49 U.S.C. 1 et seq.) which will eliminate discrimination against the shipment of recyclable materials in rate structures and in other Commission practices where such discrimination exists. 24 Stat. 379.

SEPARABILITY

SEC. 604. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of this Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Approved January 2, 1974.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 93-620 (Comm. on Interstate and Foreign Commerce) and No. 93-744 (Comm. of Conference).
CONGRESSIONAL RECORD, Vol. 119 (1973):
Nov. 8, considered and passed House.
Dec. 11, considered and passed Senate, amended.
Dec. 13, Proceedings vacated; reconsidered and passed Senate, amended.
Dec. 20, House agreed to conference report.
Dec. 21, Senate agreed to conference report.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 10, No. 1 (1974):
Jan. 2, Presidential statement.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 74-165

ROBERT W. BLANCHETTE, RICHARD C. BOND and JOHN H. McARTHUR, as Trustees of the Property of Penn Central Transportation Company, Debtor,

Appellants,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, *et al.*,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

CHARLES A. HORSKY

BRICE M. CLAGETT
Covington & Burling
888 - 16th Street, N.W.
Washington, D.C. 20006

PAUL R. DUKE
General Counsel
Penn Central Transportation Company
Six Penn Center Plaza
Philadelphia, Pa. 19107

Attorneys for Appellants Penn Central Trustees

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
STATUTE INVOLVED	3
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	4
THE QUESTIONS ARE SUBSTANTIAL	8
1. The Act Does Not Violate Any Fifth Amendment Rights	8
2. The Issues Are Not Rendered Moot by the Penn Central Reorganization Court's 180-Day Decision	11
3. The Decision Below Holding Invalid Section 207(b) of the Act, Insofar as It Directs Dismissal of the Section 77 Proceeding, Is Separable	12
CONCLUSION	13

TABLE OF CITATIONS

Cases:	Page
Hanover Nat'l Bank v. *Moyses*, 186 U.S. 181 (1902)	12
New Haven Inclusion Cases, 399 U.S. 392 (1970)	12
United States v. *Thirty-seven Photographs*, 402 U.S. 363 (1971)	9
Statutes:	
Bankruptcy Act, Section 77, 11 U.S.C. §205	4, 5, 7, 12
Regional Rail Reorganization Act of 1973, P.L. 93-236, 45 U.S.C. §§701-793	2, 3, 4, 8
Section 102(13)	12
202(a)	9
205(c)(2)	9
206(d)(1)	10
206(d)(3)	9
207(b)	4, 5, 7, 9, 11, 12
208	10
209(a)	9
209(b)	5, 9, 12
209(c)	3, 7
303	3, 7
303(b)	10
303(b)(2)	9
303(c)(2)	10
303(d)	9
304(c)	9
304(f)	3, 7, 9
601(a)(2)	9
601(b)	9
601(c)	9
604	14

Statutes (Continued)	Page
Tucker Act, 28 U.S.C. §1491	9
28 U.S.C. §§1252 and 1253	2
§§2282 and 2284	2
United States Constitution:	
Art. I, Section 8, Clause 4	6, 7, 12, 13
Fifth Amendment	3, 4, 6, 8, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

ROBERT W. BLANCHETTE, RICHARD C. BOND and JOHN H. McARTHUR, as Trustees of the Property of Penn Central Transportation Company, Debtor,

Appellants,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

Appellants Robert W. Blanchette, Richard C. Bond and John H. McArthur, as Trustees of the Property of Penn Central Transportation Company, Debtor, appeal from an order of a three-judge district court sitting in the Eastern District of Pennsylvania, which held unconstitutional certain provisions of the Regional Rail Reorganization Act of 1973, Public Law 93-236, 45 U.S.C. §§ 743-744.

OPINIONS BELOW

The opinion and concurring opinion in the District Court, reprinted in the Joint Appendix[1] at pp. 9-81, have not yet been officially reported.

JURISDICTION

Each of the three actions below was initiated as a suit in the district court for injunctive and declaratory relief against the enforcement of certain provisions of the Regional Rail Reorganization Act of 1973 on constitutional grounds. The actions by Richard Joyce Smith (C.A. No. 74-1107) and by Penn Central Company (C.A. No. 74-1149) were originally brought in the United States District Court for the District of Columbia; the action by Connecticut General *et al.* (C.A. No. 74-189) was brought in the United States District Court for the Eastern District of Pennsylvania. Three-judge courts having been convened pursuant to 28 U.S.C. §§ 2282 and 2284, the actions were consolidated for disposition before the three-judge court in the Eastern District of Pennsylvania. The injunction and declaratory judgment order of that court on cross-motions for summary judgment, which is reprinted in the Joint Appendix at pp. 82-83, was entered on June 25, 1974. On July 2, 1974, appellants George P. Baker,[2] Robert W. Blanchette and Richard C. Bond, Trustees, filed in the district court a notice of appeal to this Court, which is printed in the Joint Appendix at p. 384. Jurisdiction of the appeal is conferred on this Court by 28 U.S.C. §§ 1252 and 1253.

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[1]Copies are today being lodged with the Clerk of a Joint Appendix designed both for this action and for the appeals from the same judgment below taken by the United States and other governmental defendants and by the New Haven Trustee (Joint Appendix, pp. 385-90).

[2]John H. McArthur succeeded George P. Baker as a Trustee on July 22, 1974.

STATUTE INVOLVED

The statute involved in this appeal is the Regional Rail Reorganization Act of 1973, P.L. 93-236, 45 U.S.C. §§ 701-793, which is printed in the Joint Appendix at pp. 391 *et seq.*

QUESTIONS PRESENTED

1. Did the court below properly conclude that appellant Trustees could not maintain an action in the Court of Claims to recover any amount due the estate for fair and just compensation for (a) the rail properties the estate would be required to convey to Consolidated Rail Corporation, and (b) any erosion of the Penn Central estate beyond constitutional limits?

2. Did the court below properly conclude that, because the Act does not provide just compensation for erosion of the Penn Central estate beyond constitutional limits, Section 303 of the Act, relating to the valuation of the Penn Central rail properties; Section 304(f) of the Act, requiring continued rail operation by Penn Central; and Section 209(c), authorizing the certification of the final system plan to the Special Court, offend the Fifth Amendment and are unconstitutional absent a remedy against the United States in the Court of Claims?

3. Did the majority of the court below properly decline to decide whether the Act is unconstitutional because it requires transfer of Penn Central's rail properties to Consolidated Rail Corporation without the assurance of compensation which would satisfy the requirements of the Fifth Amendment?

4. If the court below was in error in declining to reach that question, or if the issue is otherwise now ripe for decision, is there adequate assurance that the consideration specified in the Act to be paid to the Penn Central estate

for such rail properties will satisfy Fifth Amendment requirements?

5. If a Court of Claims remedy exists, does it save the constitutionality of the Act?

STATEMENT OF THE CASE

These actions challenge the constitutional validity of various provisions of the Regional Rail Reorganization Act of 1973 (45 U.S.C. Secs. 701-793) (the Act), which was signed by the President on January 2, 1974.

The Act represents an attempt by the Congress to deal with the problems presented by the fact that a number of major railroads in the Northeast and Midwest are in reorganization pursuant to Section 77 of the Bankruptcy Act. In general, the Act creates a new Government corporation, the United States Railway Association (USRA); charges it with responsibility, subject to Congressional approval, to design a "final system plan" for restructured rail freight service in the Northeast and Midwest regions; creates a new private corporation, Consolidated Rail Corporation (Conrail), to acquire, own and operate the rail properties designated in the final system plan; and, subject to certain preliminary findings required by Section 207(b) of the Act, requires the railroads in reorganization to convey to Conrail such of their rail properties as are designated in the final system plan in return for certain securities and other considerations specified in the statute.

Section 207(b) of the Act requires each reorganization court to determine whether the railroad in reorganization under its jurisdiction will be made subject to the compulsory conveyance provisions of the Act. First, each reorganization court is directed to determine, within 120 days of January 2, 1974 (the 120-day hearing), whether the railroad in reorganization can be reorganized on an income basis within a reasonable time under Section 77 of the

Bankruptcy Act and whether the public interest would be better served by such reorganization than by reorganization under the Act. If both determinations are affirmative, that railroad ceases to be a railroad in reorganization within the meaning of the Act, is no longer subject to the compulsory conveyance and other mandatory provisions of the Act, and continues its reorganization efforts under Section 77.

Second, if the railroad has not been excluded from the Act as a result of the 120-day hearing, each reorganization court is required by Section 207(b) to find, within 180 days of January 2, 1974 (the 180-day hearing), whether the Act provides "a process which would be fair and equitable to the estate of the railroad in reorganization." If it finds that it would not, again the railroad ceases to be a railroad in reorganization within the meaning of the Act and is no longer subject to the compulsory conveyance and other mandatory provisions of the Act. In that event, Section 207(b) directs the reorganization court to dismiss the reorganization proceedings. The decisions of the reorganization courts are reviewable, under Section 207(b), in the "Special Court" — a district court of three judges created pursuant to Section 209(b) of the Act. Section 207(b) provides that there shall be no review of such decisions of the Special Court.

These actions relate to the application of the Act to the estate of Penn Central Transportation Company, Debtor, in reorganization under Section 77 of the Bankruptcy Act (Penn Central). The 120-day hearing held with respect to Penn Central resulted in a finding by the reorganization court on May 2, 1974 that it was not reorganizable on an income basis within a reasonable time. The opinion and order of the reorganization court appear in the Joint Appendix at pp. 84-103.

The 180-day hearing held with respect to Penn Central resulted in a finding by the reorganization court that the

process of the Act was not fair and equitable to the Penn Central estate. The opinion and order of the reorganization court on this issue appear in the Joint Appendix at pp. 124-52. That decision has been appealed by the Government defendants and others to the Special Court.[3]

Shortly after the Act became law, the first of these actions was filed (Joint Appendix p. 161). The complaint alleged, *inter alia*, that the Act worked a permanent taking of the property of the Penn Central estate without assurance that the payment of just compensation required by the Fifth Amendment would be made; that the Act contravened the Fifth Amendment in failing to provide compensation for the erosion of the Debtor's estate during the interval between the enactment of the Act and the ultimate conveyance of rail properties to Conrail, during which period the Act required the railroad to continue operations; and that the Act violated the uniformity requirement of Article I, Section 8, Clause 4 of the Constitution. Similar allegations were made in the other two complaints (Joint Appendix pp. 261, 341). Appellant Trustees intervened as parties defendant in each of the three actions (Joint Appendix, pp. 191, 309, 358).

On June 3, 1974, the cases were submitted to the court below on cross-motions for summary judgment. The defendants, including appellant Trustees, asserted that there could be no deficiencies in just compensation as plaintiffs alleged, because the estates in reorganization would in any event be made whole by way of suit in the Court of Claims,

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[3]Jurisdiction of the reorganization court to make the 120-day and 180-day decisions has been challenged by the Trustee of the New Haven Railroad, a creditor and stockholder of Penn Central. Appeals from both decisions by the New Haven Trustee are now pending before both the Special Court and the Court of Appeals for the Third Circuit.

both for any deficiency in the compensation received from Conrail for rail properties and for any claims they might have if it were determined that an unconstitutional erosion of the estate had taken place or would take place prior to the date of the mandatory conveyance. Defendants also denied that the uniformity requirement of Article I, Section 8, Clause 4 of the Constitution was violated.

On June 25, 1974, the court below filed an opinion and entered an order enjoining and holding null and void three provisions of the Act (Joint Appendix, pp. 9-83). All of the judges agreed that the Act was unconstitutional in failing to provide compensation for interim erosion which would be suffered by the Penn Central estate during the planning period, and that an action against the United States in the Court of Claims was not available to remedy this deficiency. On that basis the court enjoined enforcement of, and declared null and void, Section 304(f) of the Act, which requires continued rail operations during the planning period, and declared Section 303 of the Act null and void insofar as it fails to provide compensation for interim erosion. A majority of the court held Section 207(b) of the Act null and void so far as it precluded a form of liquidation under Section 77 of the Bankrupty Act by a railroad excluded from the mandatory provisions of the Act after the 180-day hearing. Because of these conclusions, the court enjoined USRA from certifying a final system plan to the Special Court pursuant to Section 209(c) (Joint Appendix, p. 82).

The court also concluded that the questions whether the mandatory conveyance of rail properties to Conrail pursuant to the Act would violate Fifth Amendment rights, and whether a suit in the Court of Claims would be available to remedy any deficiency in this respect, were premature, since the 180-day decision as to Penn Central had not yet been made, the final system plan had not yet

been approved by Congress, and the conveyance would have to be ordered by the Special Court (Joint Appendix, pp. 23-25). Judge Fullam, in his concurring opinion, believed that these issues were ripe for decision.

THE QUESTIONS ARE SUBSTANTIAL

These cases present important questions as to the constitutional validity of major provisions of the Regional Rail Reorganization Act of 1973. The order of the court below, finding particular sections to be unconstitutional and on that basis enjoining USRA from certifying a final system plan to the Special Court, will, unless reversed, effectively nullify the entire Act.

1. The Act Does Not Violate Any Fifth Amendment Rights.

No one disputes that the Fifth Amendment guarantees to the Penn Central estate just compensation, both for the value of any rail properties which are required to be conveyed to Conrail from Penn Central by the final system plan, and also for any loss which the estate may suffer from interim erosion resulting from mandatory continued operation of Penn Central beyond the point where that operation constitutes a "taking" of its property. What is in dispute is whether the Act satisfies the Fifth Amendment.

As to Interim Erosion — The court below concluded that the Act was deficient because it provided no basis upon which the estate could be compensated for a taking of its property by reason of the mandatory continued operation of Penn Central at the expense of the Penn Central estate. That issue is ripe for decision because, as the court below found (Joint Appendix, p. 40), "a significant possibility exists that a point of erosion either has been or may soon be reached." The court rejected the argument that the estate

had an assurance of compensation by a suit in the Court of Claims.

We believe that rejection was erroneous. The Act, in many of its sections, expressly repeals or makes inapplicable the provisions of various laws or limits the jurisdiction of the courts,[4] but nowhere suggests or intimates that it intends to exclude or make inapplicable 28 U.S.C. Sec. 1491, conferring jurisdiction on the Court of Claims to give judgment upon any claim against the United States founded either upon the Constitution, an act of Congress, or a contract. The legislative history to which the court refers is, at best ambiguous. While the court below reads it as indicating an intention to exclude a Court of Claims remedy, it is at least equally susceptible of the interpretation that members of Congress did not expect that a "taking" would ever occur. In light of the cardinal principle of constitutional adjudication that a constitutional construction should be accepted if fairly possible (*United States v. Thirty-seven Photographs*, 402 U.S. 363, 369 (1971)), the Act should be interpreted as not excluding an ultimate remedy in the Court of Claims.

As to Final Mandatory Conveyance — The validity of the provisions of the Act requiring conveyance by Penn Central to Conrail of the rail properties designated in the final system plan is an issue of great importance which we believe, contrary to the conclusion of the court below, is ripe for decision. That court cited three bases for its conclusion that consideration of this issue would be premature. The first, that the 180-day decision as to Penn Central had not yet been made, is no longer true (see p. 11, *infra*). The second, that Congress must act before any final system plan can be implemented, is inaccurate; as the concurring opinion below points out, it is not necessary that Congress

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[4]See Sections 202(a), 205(c)(2), 206(d)(3), 207(b), 209(a), 209(b), 303(b)(2), 303(d), 304(c), 304(f), 601(a)(2), 601(b), 601(c).

take any affirmative action, but rather only that the final system plan not be disapproved by either house, with the added provision that USRA continue to submit plans to Congress until one is not so disapproved. See Sec. 208. The third basis cited by the court, that there must be "judicial action" by the Special Court prior to any transfer, is likewise misleading; Section 303(b) does not appear to give that court any discretion in directing the conveyance once it receives the final system plan.

We believe, therefore, that there is before the Court for decision the issue as to the validity of the mandatory conveyance provisions of the Act. We urged in the court below, and will urge in this Court, that the provisions for compensation specified in the Act do not provide assurance that just compensation will be paid. Payment is to be made largely in common stock of Conrail, which may or may not have any value, plus (perhaps) other Conrail securities and a limited amount of USRA government-guaranteed bonds which Conrail can borrow from USRA in return for its own debt securities, plus unnamed "other benefits." Sec. 206(d)(1). After the conveyances have been made, the Special Court (with an appeal to this Court from its decision) will review the determinations in the final system plan as to the value of the property conveyed and the fairness and equity of the consideration tendered for those properties. The court, however, is limited in the relief it can grant. Ultimately, if reallocation of the securities among the several estates is inadequate, it may enter a judgment against Conrail for any deficiency (Sec. 303(c)(2)). As the concurring opinion below points out, "if the value of Conrail's stock is inadequate, a judgment against that same equity would add nothing, and would be essentially circuitous" (Joint Appendix, p. 77).

Nonetheless, as with the interim erosion, we believe that plaintiffs can be made whole for any deficiency which may result from the operation of Section 302(c)(2) of the Act by

way of an action in the Court of Claims. Congress has, in effect, ordered that the rail property of Penn Central designated in the final system plan be taken from the Penn Central estate for public use. This is a classic case of a "taking" within the meaning of the Fifth Amendment, which creates a corresponding constitutional duty to pay just compensation. For the reasons already stated (p. 9, *supra*), we believe that the Act does not preclude a remedy by way of a suit in the Court of Claims.

2. The Issues Are Not Rendered Moot by the Penn Central Reorganization Court's 180-Day Decision.

On July 1, 1974, the Penn Central Reorganization Court, after hearing pursuant to Section 207(b), found that the processes of the Act were not fair and equitable to the Penn Central estate (Joint Appendix, p. 152). Essentially, the decision rested on the same constitutional objections to the adequacy of the compensation provided by the Act which have been noted above, and on the court's further conclusion that no Court of Claims remedy was available. The court's order pursuant to Section 207(b) was that the Penn Central estate should not be reorganized under the Act. However, the court stayed the effectiveness of its order pending its review in the Special Court.

Appeals to the Special Court were filed on July 11, 1974, and under Section 207(b) the decision by that court is to be made within 80 days — by September 29, 1974. Presumably, since the issues before the Special Court are essentially those which are before this Court on these appeals, the Special Court will take appropriate steps to delay any final disposition of the appeals to it until this Court has made its decision, or will provide in its order for modifications thereof depending on what this Court decides. If that expectation proves false, and if the Special

Court enters a final — and under Section 209(b) unappealable — order excluding the Penn Central estate from the mandatory provisions of the Act, we will promptly so advise the Court.

3. The Decision Below Holding Invalid Section 207(b) of the Act, Insofar as It Directs Dismissal of the Section 77 Proceeding, Is Separable.

Section 207(b) of the Act directs that, if a reorganization court finds the process of the Act not to be fair and equitable, "it shall dismiss the reorganization proceeding." This provision would become operative if the Special Court were to affirm the decision of the Penn Central reorganization court, either prior to or following a decision by this Court on the constitutional issues discussed above. A majority of the court below found that this provision of Section 207(b) was in conflict with the constitutional command that Congress establish "uniform laws on the subject of bankruptcies" (Article I, Section 8, Clause 4). See *Hanover National Bank v. Moyses*, 186 U.S. 181 (1902).

We believe the decision below to be correct. This provision of Section 207(b) would effect a partial repeal of Section 77, since it would prevent continued use of that section to effect an appropriate reorganization of a railroad to which it applied. As the concurring opinion below noted, reorganization on an income basis within a reasonable time (which the 120-day decision shows is not available to Penn Central) is by no means the only type of reorganization which can be effected under Section 77. *Cf. New Haven Inclusion Cases*, 399 U.S. 392 (1970). The partial repeal of Section 77, however, applies only to railroads in the northeastern and midwest region defined in Section 102(13) of the Act — a classification of debtors on the basis of geography which appears to be in direct conflict with the

uniformity requirements of Article I, Section 8, Clause 4 of the Constitution.

The invalidity of this section, however, does not affect the validity of the Act as a whole. Indeed, it is difficult to understand why the provision was included, except perhaps for its *in terrorem* effect. In the circumstances, the separability provision of Section 604 of the Act is plainly applicable.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

CHARLES A. HORSKY

BRICE M. CLAGETT
Covington & Burling
888 - 16th Street, N.W.
Washington, D.C. 20006

PAUL R. DUKE
General Counsel
Penn Central Transportation Company
Six Penn Center Plaza
Philadelphia, Pa. 19107

Attorneys for Appellants Penn Central Trustees

CERTIFICATE OF SERVICE

I hereby certify that I have this 23d day of August, 1974, pursuant to Rules 33(1) and 33(3)(b) of the Rules of this Court, served all parties required to be served by causing three copies of the Jurisdictional Statement to be mailed first class, postage prepaid, to the following persons:

The Honorable Robert H. Bork
Solicitor General
Department of Justice
Washington, D.C. 20530

Joseph Auerbach, Esq.
Sullivan & Worcester
225 Franklin Street
Boston, Mass. 02110

David Berger, Esq.
1622 Locust Street
Philadelphia, Pa. 19103

Louis A. Craco, Esq.
Willkie, Farr & Gallagher
1 Chase Manhattan Plaza
New York, N.Y. 10005

Lloyd N. Cutler, Esq.
Wilmer, Cutler & Pickering
1666 K Street, N.W.
Washington, D.C. 20006

Brice M. Clagett

August 23, 1974

Supren

In The
ne Court of the United States

OCTOBER TERM, 1974

RICH
C
NEW YO

No. 74-166

ARD JOYCE SMITH, TRUSTEE
F THE PROPERTY OF THE
RK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY,
UNIT DEBTOR,

CROSS-APPELLANT,

v.

ON CROSS
THE U
ED STATES OF AMERICA, *et al.*,

CROSS-APPELLEES.

EASTE
S-APPEAL FROM THE JUDGMENT OF
JU *NITED STATES DISTRICT COURT*
FOR THE
RN DISTRICT OF PENNSYLVANIA

Of Counsel:
MORRIS RAK
CHARLES W.

SULLIVAN &
225 Fra
Boston, M
02
ER
MORSE, JR.

WORCESTER
klin Street
lassachusetts
10

JURISDICTIONAL STATEMENT OF CROSS-APPELLANT

JOSEPH AUERBACH
225 Franklin Street
Boston, Massachusetts
02110

JAMES WM. MOORE
54 Meadow Street
New Haven, Connecticut
06506

Attorneys for Appellant
Richard Joyce Smith, Trustee
of the Property of The New
York, New Haven and Hartford
Railroad Company, Debtor

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In The
Supreme Court of the United States

OCTOBER TERM, 1974

No. 74–

RICHARD JOYCE SMITH, TRUSTEE
OF THE PROPERTY OF THE
NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY,
DEBTOR,

CROSS-APPELLANT,

v.

UNITED STATES OF AMERICA, *et al.*,

CROSS-APPELLEES.

ON CROSS-APPEAL FROM THE JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT OF CROSS-APPELLANT

This jurisdictional statement is submitted on behalf of cross-appellant, Richard Joyce Smith, Trustee of the property of The New York, New Haven and Hartford Railroad Company, Debtor (the "New Haven Trustee" and the "New Haven," respectively). Since July, 1961, the New Haven has been in reorganization under §77 of the Bankruptcy Act, 11 U.S.C. §205, before the

United States District Court for the District of Connecticut (Circuit Judge Robert P. Anderson sitting by designation). On December 31, 1968, the New Haven Trustee (together with his then co-Trustee) conveyed substantially all of New Haven's assets to Penn Central Transportation Company ("Penn Central") in exchange for a then-to-be judicially determined consideration comprised of cash, mortgage bonds and shares of common stock of Penn Central. See *New Haven Inclusion Cases*, 399 U.S. 392 (1970). The New Haven Trustee's standing in this case is predicated on ownership of $34,025,800 of defaulted mortgage bonds of Penn Central (Stip. Fact ¶¶1 and 2), which has been in reorganization under §77 of the Bankruptcy Act since June 21, 1970, and is also based on his claimed equitable lien, temporarily protected by Order No. 546 of the Penn Central Reorganization Court (Stip. Fact ¶3) to secure the total unpaid portion ($123,809,404) of the purchase price ($174,635,899) approved in *New Haven Inclusion Cases, supra.* In terms of standing, the New Haven Trustee must be deemed to have the rights of a secured creditor to the full extent of his claim, based on the "underwriting" imposed by the New Haven Reorganization Court as to the value of $87.50 per share relative to the 956,000 shares of Penn Central Company[1] common stock which he holds pending adjudication of the New Haven's plan of reorganization, based on this Court's remand, 399 U.S. at 488-89.

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[1]Penn Central Company is the holding company which owns 100% of the stock of Penn Central. The 956,000 shares held by the New Haven Trustee pending final adjudication of New Haven's plan of reorganization represent 4% of the outstanding shares.

THE OPINION BELOW

The New Haven Trustee cross-appeals from so much of an Order, dated June 25, 1974, of a three-judge court convened pursuant to 28 U.S.C. §§2282 and 2284 in the United States District Court for the Eastern District of Pennsylvania (the "court below") as denied the relief sought by cross-appellant.

The Opinion of the court below pursuant to which the Order was entered has not yet been officially reported. Copies of the Opinion and Order are separately bound in the Joint Appendix hereto, at pp. 9-83.[2]

JURISDICTION

This action was brought pursuant to 28 U.S.C. §§1331, 1337, 1651, 2282, 2284 and 2321-2325, to enjoin enforcement of various provisions of the Regional Rail Reorganization Act of 1973, Public Law 93-236, 87 Stat. 985, 45 U.S.C. §§701 *et seq.* (the "RRRA") for repugnance to the Constitution of the United States. In addition, declaratory relief was sought pursuant to 28 U.S.C. §§2201-02.

The principal appellants from the decision of the court below are the United States of America, United States Railway Association ("USRA"), Claude S. Brinegar, Secretary of the United States Department of Transportation and the Interstate Commerce Commission ("ICC") (herein collectively referred to as the "governmental appellants") and Robert W. Blanchette, Richard C. Bond, and John H. McArthur[3], Trustees

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[2]References to documents contained in the Joint Appendix will be identified by the letters "JA" followed by the appropriate page numbers.

[3]Subsequent to commencement of the action, George P. Baker, an original Trustee of Penn Central, resigned and John H. McArthur was appointed in his stead.

of Penn Central, intervening defendants pursuant to Rule 24, Fed. R. Civ. P. (the "Penn Central Trustees").[4]

Since the Order of the court below enjoined certain of the governmental appellants from enforcing certain provisions of the RRRA on grounds of repugnance to the United States Constitution, the governmental appellants and the Penn Central Trustees each have a statutory right of direct appeal to this Court under 28 U.S.C. §1252 and also under 28 U.S.C. §1253.

The New Haven Trustee, as a "party who has received notice of appeal under this section" within the meaning of the penultimate sentence of 28 U.S.C. §1252, is directed by statute to "take any subsequent appeal or cross-appeal to the Supreme Court." 28 U.S.C. §1252.

The New Haven Trustee's notice of appeal was filed with the Clerk of the United States District Court for the Eastern District of Pennsylvania on July 3, 1974, and a copy thereof is printed at JA 385.

The governmental appellants and the Penn Central Trustees support the constitutionality of the RRRA, and therefore are the cross-appellees here. It is understood that the cross-appellees do not challange the jurisdiction of the Court to hear this cross-appeal.

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[4]The governmental appellants filed notices of appeal on July 17, 1974 (USRA), July 22, 1974 (United States), and July 24, 1974 (Brinegar) in *Smith v. United States* (JA 386-88). Defendants Stafford (Chairman of the ICC), Schultz (formerly Secretary of the Treasury) and the ICC, named as party defendants in the *Connecticut General* and/or *Penn Central Co.* cases, filed notices of appeal on July 24, 1974 (JA 389-90). The Penn Central Trustees' notice of appeal was filed on July 1, 1974 (JA 384). The New Haven Trustee's notice of appeal was filed on July 3, 1974 (JA 385).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following provisions of the United States Constitution and Statutes are believed to be involved in the determination of this case:

United States Constitution:

Article I, Section 8, Clauses 3 and 4
Article I, Section 9, Clause 7
Fifth Amendment

Statutes:

Section 77 of the Bankruptcy Act, 11 U.S.C. §205

Regional Rail Reorganization Act of 1973, Public Law 93-239, 87 Stat. 985, 45 U.S.C. §§701 *et seq.*

Extracts of the pertinent constitutional and statutory provisions will be set forth as an Appendix to the New Haven Trustee's Brief. The complete text of the RRRA is printed at JA 391 *et seq.*

QUESTIONS PRESENTED

1. Was the court below in error in refusing to adjudicate whether or not the compulsory conveyance provisions of the RRRA are void on their face as repugnant to the constitutional rights of the New Haven Trustee and other claimants to the Penn Central estate?

2. Did the New Haven Trustee have standing to assert that the enforcement of the compulsory conveyance provisions of the RRRA, if not enjoined, would cause irreparable injury to the New Haven estate?

3. Where a railroad in reorganization under §77 of the Bankruptcy Act is unable to achieve an earnings-based reorganization by reason of large deficits in net railway operating income and the lack of any prospect of earnings, can Congress by enactment deprive claimants to the railroad's estate of their right to insist upon termination of rail operations and the sale of rail properties subject to their mortgage liens for their "highest and best use" value?

4. Considered as an exercise of Congress' Commerce Clause and eminent domain powers, do the compulsory conveyance provisions of the RRRA involve an intentional uncompensated taking, or a taking not compensated in money or its perfect equivalent, of the property of Penn Central, and of claimants to its estate, in violation of the Fifth Amendment to the Constitution?

5. Considered as an exercise of Congress' Bankruptcy Clause powers, do the compulsory conveyance provisions of the RRRA, offend substantive due process rights of claimants to the Penn Central estate by divesting such claimants' liens on valuable rail transportation properties in exchange for common stock and other securities of uncertain value of a governmentally-controlled corporation and an illusory deficiency judgment against such corporation?

6. Do the compulsory provisions of §§303(b)(1) and (2) of the RRRA, requiring conveyance of rail properties and divestment of the liens of claimants to the Penn Central estate, in advance of judicial determinations as to "highest and best use" value of such properties and the equitable equivalent value of the securities and common stock to be exchanged therefor, offend the procedural due process rights of claimants to the Penn Central estate?

7. Are the compulsory conveyance provisions of §§206, 207, 208, 209, 303 and 304 of the RRRA void as a law, purportedly on the subject of bankruptcies, which is not uniform geographically throughout the United States?

STATEMENT OF THE CASE

On January 2, 1974, the RRRA was signed into law by the President.[5] On January 25, 1974, the New Haven Trustee filed a complaint asserting that the RRRA was unconstitutional on its face and as applied to Penn Central, naming as defendants the United States, USRA, and Secretary of Transportation Brinegar. The action was filed in the United States District Court for the District of Columbia. On the same day, other creditors of Penn Central filed a similar complaint in the United States District Court for the Eastern District of Pennsylvania *(Connecticut General v. USRA*, Civil Action No. 74-189). In order to achieve a single expedited proceeding, the New Haven Trustee consented to a motion of the United States and other governmental defendants to transfer *Smith v. United States, et al.* to the Eastern District of Pennsylvania pursuant to 28 U.S.C. §1404(a). A third case, *Penn Central Co. v. Brinegar*, was also transferred, pursuant to §1404(a), from the District of Columbia.

Pursuant to 28 U.S.C. §§2282 and 2284, a three-judge district court, consisting of Circuit Judge Ruggero J. Aldisert and District Judges John P. Fullam and Louis C. Bechtle, was constituted to hear all the cases concerning the constitutionality of the RRRA.

The Penn Central Trustees, who intervened as defendants, answered that the RRRA was constitutional

[5]Public Law 93-236, codified as 45 U.S.C. §§701 *et seq.* Section references are to the Section numbers in Public Law 93-236, and not to the codification in 45 U.S.C.

on the assumption of a "Tucker Act remedy" under 28 U.S.C. §1491 to "underwrite" any constitutional deficiency in the RRRA.

After joinder of issue, the New Haven Trustee on April 29, 1974 filed a motion for summary judgment as to certain of the legal issues raised by his complaint.[6] The United States and the other governmental defendants, and the Penn Central Trustees, each then filed counter-motions for summary judgment. The factual record was then completed by a Stipulation as to the Record in the Penn Central Reorganization Proceedings, a Stipulation as to Factual Matters, a Joint Documentary Submission, and affidavits of two government witnesses.[7] *Smith v. United States* was then consolidated for purposes of oral argument and disposition on the merits with the *Connecticut General* and *Penn Central Company* cases, in which motions for summary judgment had also been filed.

The issue before the court below was whether an injunction should issue restraining the enforcement of various sections of the RRRA on grounds of repugnance to the Constitution. The court below granted, in part, the motion of the New Haven Trustee for summary judgment, and issued an order dated June 25, 1974 ("Order") (JA 82-83) which enjoined defendant USRA from certifying a final system plan to the Special Court pursuant to §209(c) of the RRRA, and enjoined all defendants from taking any

[6]See New Haven Trustee's Memorandum of Points and Authorities in Support of Motion for Summary Judgment (E.D. Pa. C.A. No. 74-1107, Doc. No. 4, May 2, 1974; JA 258), pp. 1-8 for listing of issues included in the Motion for Summary Judgment.

[7]Ten copies of the Joint Documentary Submission have been filed with the Clerk of this Court. One of the government's affidavits is Doc. No. 61 in the Joint Documentary Submission; the other is reprinted at JA 226-55. The Stipulation as to Factual Matters is printed at JA 317-24. The Stipulation as to the Record is identical to that set forth at JA 197-99.

action to enforce the provisions of §304(f) of the RRRA with respect to any abandonment, cessation or reduction of railroad service which may hereafter be determined by a court of competent jurisdiction to be necessary for the preservation of rights guaranteed by the Constitution (Order, ¶¶1, 2; JA 82). In addition, the court below enjoined all parties "from enforcing or taking any action to implement so much of Section 207(b) of the RRRA as purports to require dismissal of pending proceedings for reorganization [of Penn Central] under Section 77 of the Bankruptcy Act" (Order, ¶3; JA 82).[8] Finally, the court below entered a declaratory judgment that §303 of the RRRA is null and void insofar as it fails to provide compensation for interim erosion pending final implementation of the final system plan contemplated by the RRRA and that §304(f) of the RRRA is null and void as violative of the Fifth Amendment of the Constitution to the extent it would require continued operation of rail services at a loss in violation of the constitutional rights of the owners and creditors of Penn Central (Order, ¶¶4a, 4b; JA 82). The court below also declared a portion of the third sentence of §207(b) of the RRRA to be null and void as violative of Article I, Section 8, Clause 4 of the Constitution in that the RRRA is not uniform geographically throughout the United States and, to the extent that the RRRA amends §77 of the Bankruptcy Act, it is a law on the subject of bankruptcies within the meaning of Article I, Section 8, Clause 4 (Order, ¶4c; JA 83).

The court below was not unanimous in every respect. Circuit Judge Aldisert, who wrote the Opinion of the Court, was joined by District Judge Bechtle in

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[8]This portion of the order was entered *sua sponte* as none of the plaintiffs sought this relief.

disposing of "plaintiffs' threshold contention that the possible future conveyance of rail properties to Conrail [Consolidated Rail Corporation] in consideration for Conrail stock and securities constitutes a Fifth Amendment taking without payment of just compensation" (Opinion of the Court; JA 23) by concluding that "we do not meet these Fifth Amendment questions because we are persuaded that these issues are premature" (Opinion of the Court; JA 23). Judge Fullam concurred in the result, but took the view that certain of the constitutional issues presented were ripe for adjudication and should not have been deferred (Concurring opinion of Fullam, J., Part I; JA 55-60). The New Haven Trustee as cross-appellant asserts that the court below was in error in finding that the issue of the facial constitutionality of the compulsory conveyance provisions of the RRRA was not required to be adjudicated on account of alleged prematurity and lack of ripeness.

The court below was also in disagreement as to whether the RRRA was, to the extent it represents a "law on the subject of bankruptcies," void for want of geographical uniformity under Art. I, Sec. 8, Cl. 4 of the Constitution. Judges Fullam and Bechtle so held, but concluded that the only provision in the RRRA that could not be rationalized as being based on Commerce Clause powers was the provision requiring mandatory dismissal of §77 proceedings,[9] which they held to be void for lack of geographical uniformity (Concurring opinion of Fullam, J., Part II; JA 61-65). Judge Aldisert dissented from this conclusion on the ground that the RRRA is uniform in its application to creditors, and that creditor parties lack standing to assert the constitutional defect of the RRRA's non-appli-

[9]RRRA, §207(b), third sentence, Clause (2).

cability to a debtor railroad located outside the region (JA 26-29). The New Haven Trustee, on this appeal, asserts that the RRRA is void for want of geographical uniformity in a number of respects, including (but not limited to) Clause (2) of the third sentence of §207(b), and that, for the reasons set forth in Part II of Judge Fullam's concurring opinion (for the majority of the court), the New Haven Trustee has standing to assert this constitutional defect.

SUBSTANTIALITY OF QUESTIONS PRESENTED

This cross-appeal challenges the constitutional validity of the compulsory conveyance provisions of the RRRA, an issue which the majority of the court below refused to reach on grounds of alleged prematurity. While the RRRA was declared unconstitutional in part by the court below, and the court below enjoined certification of any "final system plan" by USRA to the Special Court, this judgment was based solely on the constitutional defect that the RRRA requires Penn Central to sustain enormous operating deficits, and consequent erosion of the estate available to satisfy Penn Central claimants, during the period January 2, 1974 to the date when the compulsory conveyances mandated by the RRRA may occur, without making provision for payment to the Penn Central estate of just compensation in respect of these operating deficits and consequent erosion. While the decision of the Court below provides an obstacle to the implementation of an unconstitutional taking, the issues which the court below found to be ripe for adjudication represent, in effect, but the tip of the iceberg. The issues which it treated as "premature," which went to the constitutional defects, both facial and as applied to Penn Central, of the compulsory con-

veyance provisions of the RRRA, are inherently important issues which require concurrent resolution. If this Court merely sustains the judgment below without addressing the constitutionality of the compulsory conveyance provisions of the RRRA, a correction by Congress of only the constitutional defects in the RRRA found by the court below, without remedying the more basic constitutional defect asserted in this cross-appeal, would produce seriously adverse consequences to both the Penn Central creditors and the public interest. This cross-appellant under such circumstances would be required to commence still another action to declare such an amended RRRA unconstitutional on the grounds which are urged on this cross-appeal, thereby resulting in still another round of appeals to this Court from either the grant or denial of an injunction in a subsequent §2282 action attacking the RRRA. Broad public and private considerations, as well as objectives of judicial economy, thus favor the adjudication of this cross-appeal at this time.

CONCLUSION

This Court has jurisdiction of this cross-appeal, and substantial questions are presented requiring plenary consideration. If the Court notes probable jurisdiction of the related appeals by the governmental appellants and the Penn Central Trustees, it should similarly note probable jurisdiction of this cross-appeal.

Respectfully submitted,

August 23, 1974

Of Counsel:

MORRIS RAKER
CHARLES W. MORSE, JR.

SULLIVAN & WORCESTER
225 Franklin Street
Boston, Massachusetts
02110

JOSEPH AUERBACH
225 Franklin Street
Boston, Massachusetts
02110

JAMES WM. MOORE
54 Meadow Street
New Haven, Connecticut
06506

Attorneys for Appellant
Richard Joyce Smith, Trustee
of the Property of The New
York, New Haven and Hartford
Railroad Company, Debtor

SUPREME COURT, U. S.
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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-167

UNITED STATES RAILWAY ASSOCIATION,
Appellant,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, *et al.*,
Appellees

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

JURISDICTIONAL STATEMENT

LLOYD N. CUTLER
WILLIAM R. PERLIK
LOUIS R. COHEN

Attorneys for the United States Railway Association

Of Counsel:

BARRY E. CARTER
PAUL C. HUDSON
WILLIAM T. LAKE
J. B. STEPHENS
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

JORDAN JAY HILLMAN
Senior Legal Consultant
United States Railway
Association
2100 Second Street, S.W.
Washington, D.C. 20590

August 23, 1974

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INDEX

	Page
TABLE OF AUTHORITIES	II
OPINIONS BELOW	2
JURISDICTION	2
STATUTE INVOLVED	3
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	5
Summary of the Rail Act	5
Reorganization Court Proceedings	9
Proceedings Below	12
THE QUESTIONS ARE SUBSTANTIAL	16
CONCLUSION	21

TABLE OF AUTHORITIES

CASES: Page

Continental Bank v. *Chicago, Rock Island & P. Ry.*, 294 U.S. 648 (1935) 20
Fleming v. *Rhodes*, 331 U.S. 100 (1947) 3
Hurley v. *Kincaid*, 285 U.S. 95 (1932) 17, 18
In re Litigation under the Regional Rail Reorganization Act of 1973, Docket No. 166 (Judicial Panel on Multidistrict Litigation, Mar. 1, 1974) 17
New Haven Inclusion Cases, 399 U.S. 392 (1970) 21
Reconstruction Finance Corp. v. *Denver & Rio Grande W.R.R.*, 328 U.S. 495 (1946) 20
Shapiro v. *Thompson*, 394 U.S. 618 (1969) 3
United States v. *Raines*, 362 U.S. 17 (1960) 3
Yearsley v. *W.A. Ross Construction Co.*, 309 U.S. 18 (1940) 18

CONSTITUTIONAL PROVISIONS AND STATUTES:

U.S. Constitution:

Art. I, § 8, cl. 3 (Commerce Clause) 20
Art. I, § 8, cl. 4 (Bankruptcy Clause) 16, 20
Amend. V 12, 15, 16, 20

Bankruptcy Act:

Section 77, 11 U.S.C. § 205 ..... 5, 6, 7, 9, 10, 11, 16

Judicial Code:

28 U.S.C. §§ 1331(a) 2
1337 2
2201 2
2202 2
2282 2
2284 2
1407 2
1252 3
1253 ..... 3, 8

TABLE OF AUTHORITIES—Continued

Page

Regional Rail Reorganization Act of 1973:

Pub. L. 93-236, 87 Stat. 985, 45 U.S.C. §§ 701-93 ..... 1, *passim*

Tucker Act:

28 U.S.C. § 1491 ..... 3, 4, 13, 14, 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. ——

UNITED STATES RAILWAY ASSOCIATION,
Appellant,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, *et al.*,
Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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JURISDICTIONAL STATEMENT

This is an appeal from the decision of a three-judge United States District Court sitting in the Eastern District of Pennsylvania, which held unconstitutional certain sections of the Regional Rail Reorganization Act of 1973, Pub. L. 93-236, 87 Stat. 985, 45 U.S.C. §§ 701-93 ("Rail Act" or "Act"). Appellant is the United States Railway Association ("USRA" or "Association"), a "government corporation" formed pursuant to Section 201 of the Rail Act.

OPINIONS BELOW

The opinion and concurring opinion in the district court and its order of June 25, 1974, declaring certain provisions of the Rail Act null and void as violative of provisions of the Constitution and enjoining Appellant from taking certain actions pursuant to the Rail Act, are reprinted in the Joint Appendix ("JA") at JA 9-83. The opinions are not yet officially reported.

JURISDICTION

These cases were brought pursuant to 28 U.S.C. §§ 1331 (a), 1337, 2201, and 2202, seeking a declaratory judgment that the Rail Act is void for repugnance to the United States Constitution and seeking an injunction against the enforcement, operation, and execution of the Rail Act. The actions by Richard Joyce Smith (Civil No. 74-1107) and by Penn Central Company (Civil No. 74-1149) were originally brought in the United States District Court for the District of Columbia; the action by Connecticut General Insurance Corporation (Civil No. 74-189) was brought in the United States District Court for the Eastern District of Pennsylvania. Three-judge courts were convened pursuant to 28 U.S.C. §§ 2282 and 2284. The Judicial Panel on Multidistrict Litigation, in a non-reviewable order, denied a motion of Defendants to consolidate the three actions before the Special Court constituted under Section 209 of the Rail Act, or in the alternative to transfer the actions for pre-trial proceedings under 28 U.S.C. § 1407 to the judges of the Special Court sitting as a Section 2282 three-judge court in the United States District Court for the District of Columbia. By consent of the parties, the *Smith* and *Penn Central Company* actions were then transferred to the Eastern District of Pennsylvania and consolidated with the *Connecticut General* action.

The order appealed from was entered on June 25, 1974 in all three cases. No order has been issued respecting a rehearing. Notice of Appeal to this Court was filed in the United States District Court for the Eastern District of Pennsylvania on July 17, 1974. JA 386. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1252 and 1253. See *Shapiro* v. *Thompson*, 394 U.S. 618, 625 (1969); *United States* v. *Raines*, 362 U.S. 17, 20 (1960); *Fleming* v. *Rhodes*, 331 U.S. 100, 102-04 (1947).

STATUTE INVOLVED

The statute involved in this appeal is the Regional Rail Reorganization Act of 1973, Pub. L. 93-236, 87 Stat. 985, 45 U.S.C. §§ 701-93, which is reprinted at JA 391-431.

QUESTIONS PRESENTED

1. Whether the court below erred in granting injunctive relief on Plaintiffs' claims that the Rail Act may effect a taking of their property without just compensation, when Plaintiffs have adequate remedies at law including a suit in the Court of Claims under the Tucker Act, 28 U.S.C. § 1491.

2. Whether the court below breached its duty to construe statutes so as to save their constitutionality when it construed the Rail Act, despite its silence on the subject, as amending the Tucker Act by implication so as to bar any suit in the Court of Claims to recover any difference between the consideration provided in the Rail Act and the "constitutional minimum" expressly recognized in the Rail Act—a construction of the Rail Act which led the court to declare certain provisions of the Rail Act unconstitutional.

3. Whether the court breached its duty to construe statutes so as to save their constitutionality when, after holding that the Rail Act impliedly amended the Tucker Act to bar a remedy for constitutional claims of rail estates, the court

(a) construed Section 304(f) of the Rail Act to authorize USRA to forbid discontinuance of rail service or abandonment of rail properties even if the "erosion" of the railroad estate should pass the limits beyond which operations can no longer be constitutionally required without compensation—a construction of Section 304(f) which led the court to hold Section 304(f) unconstitutional; and

(b) construed Section 303 of the Rail Act, which expressly requires a "constitutional minimum" consideration for transfers of rail property, to exclude consideration for erosion beyond constitutional limits —a construction of Section 303 which led the court to hold Section 303 unconstitutional.

4. Whether the court below erred in first enjoining all Defendants from taking any action under Section 304(f) to require continuation of rail service that would result in "erosion" beyond constitutional limits and thereafter nullifying other provisions of the Rail Act solely for their failure to provide explicitly for just compensation for the very "erosion" beyond constitutional limits that the court had already enjoined Defendants from causing.

5. Whether, in any event, an injunction unconditionally prohibiting USRA from certifying any Final System Plan for a reorganized rail system to a federal court was an unnecessary and inappropriate remedy to prevent the possibility of erosion beyond constitutional limits that the court had already enjoined USRA and all other Defendants from causing.

STATEMENT OF THE CASE

Eight major railroads operating in the Northeast/Midwest region of the United States are now in reorganization proceedings pursuant to Section 77 of the Bankruptcy Act, 11 U.S.C. § 205. Because of the serious threat this rail crisis presented to the welfare of the region and of the United States, see Section 101(a) of the Rail Act, and because of the inability of the procedures and resources of Section 77 to resolve the underlying problems of railroads in this region, Congress enacted the Regional Rail Reorganization Act of 1973, which became law on January 2, 1974.

Plaintiffs below are creditors and the sole shareholder of the largest of the railroads now in reorganization, Penn Central Transportation Company ("Penn Central"). They brought these actions seeking declaratory judgments that the entire Rail Act is unconstitutional on its face on a large number of grounds, and further seeking injunctions against the implementation of any of its provisions. JA 161-75. The Penn Central Trustees intervened as Defendants. JA 191. Both sides filed Motions for Summary Judgment. JA 221-25. This appeal is taken from a final judgment granting in part Plaintiffs' Motions for Summary Judgment and denying Defendants' Motions. JA 9-83.

Summary of the Rail Act

In broad summary, the Rail Act provides for the following steps, among others, to achieve "the reorganization of railroads in this region into an economically viable system capable of providing adequate and efficient rail service to the region," Section 101(b)(2).

(a) A new government corporation, Appellant USRA, has been formed pursuant to Section 201 of the Rail Act.

Its directors are a Chairman appointed by the President and confirmed by the Senate; the Secretary of Transportation; the Secretary of the Treasury; the Chairman of the Interstate Commerce Commission ("ICC"); and seven other individuals appointed by the President and confirmed by the Senate. Section 201(d).

(b) Each United States district court having jurisdiction of a railroad in the region in reorganization under Section 77 ("Reorganization Court") was required, pursuant to Section 207(b) of the Rail Act, to determine within 180 days of enactment whether its railroad should be reorganized pursuant to the Rail Act. Such determinations (which are described below under the heading "Reorganization Court Proceedings") have been made and are now under review by a Special Court as described below.

(c) USRA is directed, with the assistance of the Secretary of Transportation and the Rail Services Planning Office, a new office within the ICC created by the Rail Act, to prepare a "Final System Plan" for restructuring and reorganizing the railroads in reorganization. Sections 202, 204, 205, and 206. The goals of the Final System Plan are set forth in Section 206(a), and include the creation of a "financially self-sustaining rail service system" in the region. A central feature of the Final System Plan will be the transfer of designated rail properties of railroads in reorganization to a new, for-profit corporation created pursuant to Section 301 of the Rail Act and called Consolidated Rail Corporation ("Conrail"). In exchange for these properties, the Final System Plan will provide for the issuance to the estates of railroads in reorganization of the securities of Conrail, plus up to $500 million of USRA obligations guaranteed by the United States. Sections 206(d)(1), 210.

(d) USRA is required to submit a proposed Final System Plan to Congress within 450 days of enactment (*i.e.*, by March 28, 1975). Sections 207(c), 208(a). The Plan is deemed "approved" and becomes "effective" if neither house of Congress disapproves it within sixty continuous session days after submission. Sections 208, 209(a).

(e) The Final System Plan is then transmitted by USRA, within 90 days after its effective date, to a special United States district court of three judges, created pursuant to Section 209 of the Rail Act and therein given exclusive jurisdiction of all "proceedings with respect to the final system plan." Section 209. This "Special Court" has been formed in the District of Columbia and has the task, in addition to conducting proceedings with respect to the Final System Plan, of reviewing the determinations of the Reorganization Courts described in paragraph (b) above.

(f) Section 303(a) of the Rail Act provides that the Conrail securities and USRA obligations designated in the Final System Plan for transfer to the estates of railroads in reorganization shall be delivered to the Special Court within ten days after the Plan is delivered to that Court. The Special Court is then directed, within a further ten days, to order the trustees of each railroad in reorganization to transfer to Conrail all right, title and interest in the rail properties designated in the Final System Plan. Section 303(b). Thereafter, the Special Court determines whether the exchange of rail properties for Conrail securities, USRA obligations and such other benefits as the Rail Act provides, is fair and equitable to the estate of each railroad in reorganization. Section 303(c). If the Special Court finds that the transfer is not fair and equitable "in accordance with the standard of fairness and equity applicable to the approval of a plan of reorganization or a step in such a plan under Section 77

of the Bankruptcy Act," it is directed to order a reallocation of the Conrail securities, and/or to order the issuance of additional Conrail securities and USRA obligations (subject to an overall $500 million limitation on USRA obligations used for this purpose), and/or to enter a judgment against Conrail. *Id.* Section 303 does not authorize the Special Court to enter a judgment against the United States. Section 303 does, however, recognize that the consideration to be transferred in exchange for rail properties must equal the "constitutional minimum" and directs the Special Court to make necessary adjustments so that this "constitutional minimum" is not exceeded. Section 303(c)(3). The judgment of the Special Court may be appealed directly to this Court "in the same manner that an injunction order may be appealed under Section 1253 of Title 28." Section 303(d).

(g) Section 304 of the Rail Act authorizes the discontinuance of service on, and the abandonment of, rail properties not designated for continuing use in the Final System Plan. Section 304(f) prohibits discontinuance of any rail service by any railroad in reorganization in the region before the implementation of the Final System Plan without the consent of USRA.

(h) The Rail Act provides expedited procedures for the sale to profitable railroads operating in the region of rail properties not going to Conrail and the sale or lease of such rail properties to states and localities and to the National Railroad Passenger Corporation ("Amtrak"). Section 206(c).

(i) The Rail Act also provides new financial assistance of several kinds. Conrail can receive up to $1 billion in USRA obligations guaranteed by the United States, of which $500 million must be used for the "rehabilitation and modernization of rail properties" acquired by Conrail and the remainder may be used for that purpose or

for other purposes including the acquisition of rail properties. Section 210. An additional $500 million of guaranteed USRA obligations is provided to enable Amtrak to purchase or lease from railroads in reorganization rail properties designated in the Final System Plan to be used for passenger service. Sections 206(c)(1)(C), 210(b), 601(d). The Rail Act also provides $250 million in benefits to railroad employees (and thus, indirectly, to the railroads now obligated to employ them) whose employment is terminated or affected by the restructuring of rail services provided by the Final System Plan. Section 509. The Rail Act also provides assistance for the immediate acquisition, maintenance and improvement of property that will be in the Final System Plan, Section 215; funds for emergency needs of railroads in reorganization pending implementation of the Final System Plan, Section 213; and subsidies for continuing non-economic local rail service after the Final System Plan is implemented. Section 402.

Reorganization Court Proceedings

Section 207(b) of the Rail Act required each Reorganization Court to decide, in two stages, whether its railroad should be reorganized in accordance with the Rail Act. The first stage has been referred to as the "120-day" proceeding: each Reorganization Court was to decide, within 120 days of enactment, whether (a) its railroad is reorganizable on an income basis within a reasonable time under Section 77 of the Bankruptcy Act and if so whether (b) the public interest would be better served by continuing the reorganization under Section 77 than by proceedings under the Rail Act. If a Reorganization Court made both affirmative findings, it was authorized to keep its railroad out of subsequent Rail Act proceedings. Railroads not eliminated at the "120-day" stage went through the second stage, or "180-day" pro-

ceeding, in which each Reorganization Court was to order that reorganization proceed under the Rail Act unless it found that the Rail Act "does not provide a process which would be fair and equitable to the estate of the railroad in reorganization."

Section 207(b) also provides that appeals from Reorganization Court orders pursuant to that section shall be made to the Special Court. It further provides that there shall be no appeal from the decisions of the Special Court with respect to "120-day" and "180-day" proceedings.

On the date of enactment, eight major railroads were in reorganization in the region.[1] In addition, fifteen railroad subsidiaries of Penn Central (each of which is a corporation wholly or majority-owned by Penn Central under a long-term lease) were in reorganization in conjunction with Penn Central. These subsidiaries, generally referred to as "Secondary Debtors," were considered separately from Penn Central, in their own proceedings in the Penn Central Reorganization Court. Hence, the major railroads and the Secondary Debtors required nine determinations by Reorganization Courts under Section 207(b).

Each Reorganization Court held an evidentiary hearing and received briefs and oral argument at the "120-day" stage. The result was that on May 1, 1974 two railroads —the Boston and Maine and the Erie Lackawanna— were kept out of the Rail Act procedures on the ground that they are reorganizable on an income basis under

[1] They were and are the only operating railroads in reorganization in the United States, except for a tiny carrier, the Cadillac and Lake City Railroad. The Cadillac and Lake City, which is also in the region, has been excluded from further proceedings under the Act on the ground that it is separately reorganizable on an income basis under Section 77 and the public interest would be better served by continuing under Section 77.

Section 77 and the public interest would be better served by continuing under Section 77. These rulings have not been appealed, and the decisions to eliminate these two railroads from the coverage of the Rail Act are now final.

In the remaining seven cases, the railroads were not taken out of the Rail Act at the "120-day" stage. In all cases except that of the Secondary Debtors, the Reorganization Courts found that the railroads in question were not reorganizable on an income basis under Section 77. In the case of the Secondary Debtors, the Reorganization Court found that certain of these railroads are reorganizable on an income basis under Section 77, but the Court was unable to conclude that the public interest would be better served by reorganization under Section 77 than by proceedings under the Rail Act, so it did not take them out of the Rail Act procedures at that stage.

These seven cases were therefore the subject of subsequent "180-day" proceedings in the respective Reorganization Courts. In each case hearings were held and briefs and arguments were received with respect to the question whether the Rail Act provides a fair and equitable process. These determinations were made on approximately July 1, 1974, six days after the decision of the three-judge Court below in the present case. Two Reorganization Courts, having jurisdiction over Reading Company and The Ann Arbor Railroad Company, ordered that their reorganization be proceeded with pursuant to the Rail Act. In the remaining five proceedings, which dealt with Penn Central, Secondary Debtors, Lehigh Valley Railroad Company, The Central Railroad Company of New Jersey and The Lehigh and Hudson River Railway Company, the Reorganization Courts [1] concluded,

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[1] Three of these five determinations were made by the same court. The Penn Central, Secondary Debtors, and Lehigh Valley

wholly or in substantial part on the basis of the decision below in the present case, that the Rail Act does not provide a fair and equitable process and declined to order reorganization under the Rail Act.

These seven "180-day" determinations are all on appeal to the Special Court, which is required by Section 207 (b) of the Rail Act to render its decision within 80 days after the appeals were taken, a period which expires on September 30, 1974. Appellant and other parties intend to suggest to the Special Court that it render its decision at that time but stay its mandate pending the determination by this Court of the issues on this appeal.

Proceedings Below

Plaintiffs in the present case challenged the constitutionality of the Rail Act on a number of grounds. A primary contention was that the consideration provided in the Final System Plan for required transfers of rail property pursuant to that Plan will or may, despite the statutory requirement of consideration equal to the "constitutional minimum standard of fairness and equity," fall below constitutional requirements so that the transfers will constitute a taking of Plaintiffs' property for less than just compensation in violation of the Fifth Amendment. This contention was rejected by the court below as premature.

Plaintiffs also contended below that a taking of their property without just compensation will result from the allegedly required continuation of rail operations pending implementation of the Final System Plan and the alleged "erosion" beyond constitutional limits of the Penn Central estate during this period. Appellant con-

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reorganizations are all before Judge Fullam in the Eastern District of Pennsylvania. Judge Fullam was also a member of the court below.

tended below (i) that, on any theory of "erosion," the record before the court below did not permit a determination of the amount of erosion suffered by any railroad estate or a determination that any railroad estate has reached or will soon predictably reach the "constitutional limit" beyond which operations cannot be required to continue without an adequate remedy at law for compensation; (ii) that railroad creditors and owners can constitutionally be required to sustain a reasonable burden of interim erosion while efforts are being made to restructure the railroad on a profitable basis; and (iii) that in any event Plaintiffs were not entitled to an injunction or a declaratory judgment of unconstitutionality because, if it should ultimately be determined that the Rail Act had caused an erosion of their interests beyond constitutional limits, Plaintiffs would have an adequate remedy at law in the Court of Claims under the Tucker Act for any claimed shortfall in their compensation.

The court below determined that the present existence of operating losses in the Penn Central system made the erosion issue "ripe for adjudication." The court did not define erosion, nor did it decide whether the Penn Central or any other railroad has yet reached the constitutional limit of erosion, nor did it attempt to define the constitutional limit. The court merely said,

> "we are persuaded that a significant possibility exists that a point of erosion either has been or may soon be reached so that it can be said that plaintiffs' contention of interim unconstitutional taking by continued loss operations is ripe for adjudication." JA 9 at 40.

Resolving the factual issues only to the extent of determining that the erosion question was "ripe," the court below then turned to statutory issues. The court apparently read Section 304(f), which requires a railroad in reorganization to obtain the approval of USRA be-

fore it discontinues or abandons rail service during the planning process, as authorizing USRA to withhold approval even if "erosion" has gone beyond constitutional limits and an adequate remedy at law for compensation is barred by the Rail Act. The court then concluded that the Rail Act did bar an adequate remedy at law. It explicitly rejected the contention of Appellant, of the other Government Parties, and of the Penn Central Trustees that if the constitutional limit of permissible uncompensated erosion should be passed, Plaintiffs would have an adequate remedy at law in the Court of Claims under the Tucker Act for just compensation. The court also apparently decided that the power of the Special Court, pursuant to Section 303, to determine whether transfers of rail properties are fair and equitable to the estate of each railroad in reorganization and to award the "constitutional minimum," does not include the power to remedy erosion of a railroad estate beyond constitutional limits occurring before its rail properties are transferred.

The court below treated the Tucker Act question as one of construing the Rail Act to determine whether Congress intended, when it passed the Rail Act, to provide a remedy under the Tucker Act for claims that property of bankrupt railroads had been taken for public use under the Rail Act for less than constitutionally adequate compensation. Although the Rail Act contains thirteen separate provisions explicitly limiting the application of other statutes but does not mention the Tucker Act, the court below nevertheless concluded that the Tucker Act remedy would not be available because, "[w]e are persuaded that the legislative history supports the conclusion that Congress intended that financial obligations [of the United States] be limited to the express terms of the Act." JA 9 at 50. The court said that to "read a Tucker Act remedy into the [Rail] Act"

would be "judicial legislation on a grand, if not arrogant, scale." JA 9 at 53.

The court below thus struck down part of the statute as unconstitutional by attributing to Congress an intent —nowhere stated in the words of the Rail Act or even in the reports of the responsible Senate and House Committees—to bar rail creditors from invoking the century-old statutory remedy for claims that private property has been taken for public use for less than just compensation. Specifically, the court below partially nullified Section 304(f) and Section 303 of the Rail Act. Section 304 (f) provides that pending determination of the rail service properties to be included in the Final System Plan,

> "no railroad in reorganization may discontinue service or abandon any line of railroad other than in accordance with the provisions of this Act, unless it is authorized to do so by the Association and unless no affected State or local or regional transportation authority reasonably opposes such action . . . ."

The court below held this section,

> "null and void as violative of the Fifth Amendment of the United States Constitution, to the extent that it would require continued operation of rail services at a loss in violation of the constitutional rights of the owners and creditors of a railroad." JA 9 at 82-83.

The court did not define such constitutional rights, but it enjoined all Defendants,

> "from taking any action to enforce the provisions of Section 304(f) . . . with respect to any abandonment, cessation or reduction of service which has been or may hereafter be determined by a court of competent jurisdiction to be necessary for the preservation of rights guaranteed by the United States Constitution." JA 9 at 82.

Technically, this order has effect only if some other court (presumably a Reorganization Court) determines that an abandonment, cessation, or reduction of service is constitutionally required. However, the court below went on to declare that Section 303 of the Rail Act, relating to transfer of rail properties pursuant to the Final System Plan, is

> "null and void as contravening the Fifth Amendment of the United States Constitution insofar as it fails to provide compensation for interim erosion pending final implementation of the Final System Plan . . . ." JA 9 at 82.

In addition, without explanation, the court enjoined USRA, unconditionally, from certifying *any* final system plan to the Special Court pursuant to Section 209(c).

Plaintiffs made a third challenge to the Rail Act on the ground that it is not "uniform" within the meaning of Article I, Section 8, Clause 4, of the Constitution, providing that Congress shall have the power to enact "uniform Laws on the subject of Bankruptcies throughout the United States." The court below rejected this contention except as to one sentence of Section 207(b). That sentence provides that if any Reorganization Court determines, in the "180-day" proceedings, that the Act does not provide a fair and equitable process to assist the reorganization of its debtor and therefore that the debtor shall not be reorganized in accordance with the Act, then the Reorganization Court shall dismiss the Section 77 proceedings. Since the court's ruling nullifying this dismissal requirement does not materially affect the administration of the Rail Act, we do not appeal from this part of the court's order.

THE QUESTIONS ARE SUBSTANTIAL

It is unnecessary to discuss at length either the public importance or the urgency of the constitutional and statu-

tory questions presented by these cases. The Northeast/Midwest rail crisis is a major national problem. The Rail Act represents a comprehensive and "heroic" [1] congressional response. The need for prompt action to resolve the crisis was recognized by Congress in the tight schedules provided in the Rail Act itself and is accepted, we believe, by every party before this Court. If the Rail Act is ultimately held constitutional, it is in the interest of both the creditors and shareholders of the railroads and the public dependent on rail transportation to implement its provisions as rapidly as possible. If the Act violates the Constitution, then another solution to the rail crisis must be sought immediately.

USRA now has a staff of over 130 persons engaged in work that will lead to the preparation of a Final System Plan. Other federal agencies, states, local governments, and railroads in reorganization must make major contributions to this work. The court below has now enjoined USRA from certifying any Final System Plan to the Special Court. Whether that injunction is proper is now an urgent question.

Specifically, this case presents, first, the question whether actions specifically authorized by congressional statute may be enjoined on the ground that they may lead to a taking of private property without just compensation. We are aware of no other instance of such an injunction. In *Hurley* v. *Kincaid*, 285 U.S. 95 (1932), this Court held that the jurisdiction of the Court of Claims to award just compensation after a claimed taking is as broad as the constitutional right and provides an adequate remedy at law barring injunctive relief in advance of the taking. Consequently, the Court held, it was unnecessary and inappropriate for a federal district

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[1] *In re Litigation under the Regional Rail Reorganization Act of 1973*, Docket No. 166, at 3 (Judicial Panel on Multidistrict Litigation, Mar. 1, 1974).

court sitting in equity even to inquire whether a taking would in fact occur. See also *Yearsley* v. *W.A. Ross Construction Co.*, 309 U.S. 18 (1940).

Hurley was a case in which Congress had provided, in a flood control statute, that land in the path of a planned diversion channel should be condemned before construction of floodworks. The statute expressly barred federal liability for flooding itself. When plaintiff alleged that his land in the path of the diversion channel had not been condemned, plaintiff therefore sought an injunction to bar construction. This Court unanimously denied injunctive relief on the ground that construction of the diversion channel had been authorized by Congress and that therefore, if it should result in a taking of plaintiff's land, he would have an adequate remedy in the Court of Claims. In *Hurley*, there were much stronger grounds, in the statute itself, to infer that Congress might have intended to bar such a remedy, but the Court refused to draw such an inference because of its constitutional implications. In these cases, by contrast, the court below inferred a congressional intent to act unconstitutionally and used this inferred intent to strike down several critical statutory provisions.

The court below found a congressional intent to bar a Tucker Act remedy not in the words of the statute, which is silent, nor in the reports of congressional committees, none of which discusses the point. The decision below rests on a few exchanges among individual members on the floor of the Senate and House. Those exchanges, however, show only a congressional intent to restructure rail services in a manner that Congress believed would not result in any transfer of property for less than the "constitutional minimum" consideration that the Act expressly recognizes as due. There is no basis in these exchanges for concluding that Congress intended to bar the normal Tucker Act remedy if, contrary to Congress' expectation, the steps taken pursuant to the

Rail Act should give rise to a claim that the consideration received is less than the "constitutional minimum." Indeed, Congress may never have considered this precise question. Nevertheless, the court below read these fragments of legislative history as showing an affirmative intent to deny the constitutionally required remedy for any transfer on terms that the Special Court (and this Court on appeal) might find to provide less than the "constitutional minimum." In so doing, the court below necessarily found that Congress deliberately intended to act unconstitutionally. Even if the Rail Act were ambiguous on this point, the court ignored its duty to construe statutes in a manner that would save their constitutionality, and thus engaged in the very type of judicial legislation from which it professed to abstain.

The court below also placed an unnecessarily narrow construction on Section 303 of the Rail Act and then struck it down on grounds that appear gratuitous even on the court's construction. Section 303 provides that the Special Court shall determine whether transfers of rail properties "are fair and equitable to the estate of each railroad in reorganization" and requires the Special Court to adjust the consideration given to rail estates in specified ways to meet the "constitutional minimum standard of fairness and equity." Although the court below rejected as premature the principal constitutional challenges to the Section 303 transfer provisions, it apparently read Section 303 as not authorizing the Special Court to take erosion beyond constitutional limits into account in determining how much consideration each railroad estate is constitutionally required to receive. Nothing in Section 303, however, precludes the Special Court from providing consideration for erosion where constitutionally required.

Moreover, even if the court's narrow construction of Section 303 were justified, the result it reached was not. Since the court had already more than adequately dealt

with the erosion problem by enjoining Defendants from requiring erosion beyond constitutional limits, there was no need to strike down Section 303 because of an inferred failure to provide compensation for the very erosion the court itself had barred.

If the Rail Act impliedly bars any remedy for "erosion" beyond constitutional limits, then this appeal presents the further question whether it was appropriate for the court below (a) to decide that the constitutionality of Section 304(f) was ripe for adjudication even though the constitutional limit of erosion had not been found to be reached and might not ever be reached; (b) to interpret Section 304(f) as permitting USRA to refuse to approve discontinuances and abandonments even when such a decision would result in erosion beyond constitutional limits for which (on the court's assumption) there is no adequate remedy at law; (c) to declare Section 304(f), as so construed, unconstitutional as applied to such circumstances; (d) to enjoin USRA, now, from interfering with any discontinuance or abandonment that some other court may hypothetically find constitutionally required; and (e) to declare other portions of the statute unconstitutional, without explanation, because they do not expressly provide a remedy for the very erosion beyond constitutional limits that the court had already done more than necessary to prevent.

Also at issue in these cases is the extent of the power of Congress, under the Commerce and Bankruptcy Clauses of Article I, Section 8 and consistent with the Fifth Amendment, to require creditors and shareholders of a railroad to suffer interim erosion pending efforts to create a "self-sustaining rail service system." This substantial question was apparently not wholly resolved by this Court's decisions in *Continental Bank* v. *Chicago, Rock Island & P. Ry.*, 294 U.S. 648 (1935); *Reconstruction Finance Corp.* v. *Denver & Rio Grande W.*

R.R., 328 U.S. 495 (1946); and *New Haven Inclusion Cases*, 399 U.S. 392 (1970).

The need for full briefing and oral argument in this matter is manifest. The statute involved is singularly long and complex. The constitutional challenges are many and intricate, and the issues presented here are correspondingly difficult.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and set the case for briefing and argument.

Respectfully submitted,

LLOYD N. CUTLER

WILLIAM R. PERLIK

LOUIS R. COHEN

Attorneys for the United States Railway Association

Of Counsel:

BARRY E. CARTER
PAUL C. HUDSON
WILLIAM T. LAKE
J. B. STEPHENS
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

JORDAN JAY HILLMAN
Senior Legal Consultant
United States Railway Association
2100 Second Street, S.W.
Washington, D.C. 20590

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Constitutional provisions and statutes involved	2
Statement	4
The questions are substantial	12
Conclusion	14

CITATIONS

Cases:

Ann Arbor Railroad Co., In the Matter of, E. D. Mich., No. 74–90833, decided July 1, 1974 — 9

Boston & Maine Corp., In the Matter of, D. Mass., No. 70–250M, memorandum opinion, decided May 2, 1974 — 8

Central Railroad Company of New Jersey, In the Matter of, D. N.J., Bky. No. 701–67, decided June 28, 1974 — 9

Continental Bank v. *Chicago, Rock Island & Pacific Ry.*, 294 U.S. 648 — 13

Erie Lackawanna Railway Co., In the Matter of, N.D. Ohio, No. B72–2838, Order No. 234, decided May 2, 1974 — 8

Hurley v. *Kincaid*, 285 U.S. 95 — 13

Lehigh and Hudson River Railway Co., In the Matter of, S.D. N.Y., Bky. No. 72–419, decided July 1, 1974 — 9

Cases—Continued Page

Lehigh Valley Railroad Co., In the Matter of, E.D. Pa., Bky. No. 70–432, Order No. 252, decided July 1, 1974 9

New Haven Inclusion Cases, 399 U.S. 392 13

Penn Central Transportation Co., In the Matter of, 355 F. Supp. 1343 5

Penn Central Transportation Co., In the Matter of, E.D. Pa., Bky. No. 70–347, Order No. 1596, decided July 1, 1974 9

Penn Central Transportation Co., (Secondary Debtors), In the Matter of, E.D. Pa., Bky. Nos. 70–347A to 70–347O, multiple orders, all decided July 1, 1974 9

Reading Co., In the Matter of, E.D. Pa., Bky. No. 71–828, Order No. 650, decided July 1, 1974 9

Reconstruction Finance Corp. v. *Denver & Rio Grande Western R. Co.*, 328 U.S. 495 13

Constitution and statutes:

United States Constitution:

Article I, section 8, clause 3 2

Article I, section 8, clause 4 2

Fifth amendment 2

Bankruptcy Act, section 77, 11 U.S.C. 205 5

Regional Rail Reorganization Act of 1973, Pub. L. 93–236, 87 Stat. 985 ..... passim

Section 202 6

Section 204 6

Section 206(a) 6

Section 206(c) 6

Section 206(d) 6

Section 206(h) 6

Section 206(i) 6

Section 207 7

Constitution and statutes—Continued Page
Section 207(b) 2, 3, 8, 9, 11, 12, 13, 14
Section 208 7
Section 209 7
Section 209(b) 9
Section 209(c) 2, 3, 11
Section 210 6
Section 210(b) 6
Section 213 8
Section 215 8
Section 301 6
Section 302 6
Section 303 7
Section 303(a) 14
Section 303(c)(2) 7
Section 303(c)(3) 7
Section 303(d) 7
Section 304(f) 2, 3, 4, 8, 10, 11, 12, 14
Section 402 8
Miscellaneous:
H. Rep. No. 93–620, 93d Cong., 1st sess 4, 5

In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the three-judge district court (J. App. 9–81)[1] is not yet reported.

JURISDICTION

The order of the three-judge district court (J. App. 82–83) was entered on June 25, 1974. Notices of appeal to this Court (J. App. 387–390) were filed on July 22, 1974, and July 24, 1974.[2] The jurisdiction of this Court is conferred by 28 U.S.C. 1252 and 1253.

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[1] "J. App." refers to the Joint Appendix lodged in this Court.

[2] The opinion and order of the three-judge district court encompassed three separate civil actions (Nos. 74–189, 74–1107, and 74–1149) that had been consolidated for disposition on cross-motions for summary judgment, and we have filed separate notices of appeal with respect to each action. However, we are treating those actions as a single consolidated action for purposes of our jurisdictional statement and brief on the merits.

QUESTIONS PRESENTED

1. Whether Section 304(f) of the Regional Rail Reorganization Act of 1973, which bars a railroad in reorganization from discontinuing service or abandoning any line without the consent of the United States Railway Association, effects a taking of appellees' property in the constitutional sense.

2. Whether the taking, if any, is one for which there is no provision for just compensation.

3. Whether the provision of Section 207(b) of the Act that requires the dismissal of certain reorganization proceedings is invalid as a geographically nonuniform law on the subject of bankruptcies.

4. Whether the district court properly enjoined the Association from certifying a final system plan for judicial review under Section 209(c) of the Act.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, Clauses 3 and 4, of the United States Constitution in pertinent part provide:

> The Congress shall have Power * * *
>
> To regulate Commerce with foreign Nations, and among the several States * * *;
>
> To establish * * * uniform Laws on the subject of Bankruptcies throughout the United States; * * *.

The Fifth Amendment to the Constitution in pertinent part provides:

> * * * [N]or shall private property be taken for public use, without just compensation.

Sections 207(b), 209(c), and 304(f) of the Regional Rail Reorganization Act of 1973, Pub. L. 93–236, 87 Stat. 985, 998, 1000, 1009, in pertinent part provide:[3]

> Section 207(b). Within 120 days after the date of enactment of this Act each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by continuing the present reorganization proceedings than by a reorganization under this Act. * * * Because of the strong public interest in the continuance of rail transportation in the region pursuant to a system plan devised under the provisions of this Act, each such court shall order that the reorganization be proceeded with pursuant to this Act unless it (1) has found that the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by such a reorganization than by a reorganization under this Act, or (2) finds that this Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization in which case it shall dismiss the reorganization proceeding. * * *
>
> Section 209(c). Within 90 days after its effective date, the Association shall deliver a certified copy of the final system plan to the special

[3] The Act in its entirety is set forth at J. App. 393–431.

court and shall certify to the special court—

(1) which rail properties of the respective railroads in reorganization in the region * * * are to be transferred to the Corporation, in accordance with the final system plan;

(2) which rail properties of the respective railroads in reorganization in the region * * * are to be conveyed to profitable railroads, in accordance with the final system plan;

(3) the amount, terms, and value of the securities of the Corporation (including any obligations of the Association) to be exchanged for those rail properties to be transferred to the Corporation pursuant to the final system plan * * *; and

(4) that the transfer of rail properties in exchange for securities of the Corporation (including any obligations of the Association) and other benefits is fair and equitable and in the public interest.

Section 304(f). After the date of enactment of this Act, no railroad in reorganization may discontinue service or abandon any line of railroad other than in accordance with the provisions of this Act, unless it is authorized to do so by the Association and unless no affected State or local or regional transportation authority reasonably opposes such action * * *.

STATEMENT

By 1973, the rail transportation network of the northeastern section of the United States was in grave danger of imminent financial collapse. See generally H. Rep. No. 93–620, 93d Cong., 1st Sess., pp. 25–29.

Seven major railroads[4] operating principally in seventeen northern and eastern States[5] were attempting to reorganize under Section 77 of the Bankruptcy Act, 11 U.S.C. 205, and those proceedings were proving unsuccessful due to the apparently insoluble financial difficulties the railroads faced. See, *e.g., In the Matter of Penn Central Transportation Co.,* 355 F. Supp. 1343 (E.D. Pa.). There was therefore a serious possibility that the rail service provided by some or all of the railroads would be terminated in order to liquidate the bankrupt estates and satisfy their obligations to creditors.

Congress recognized that the threatened wholesale termination of rail service would do incalculable damage to the nation's economy. See H. Rep. No. 93–620, *supra,* pp. 28–29. Accordingly, Congress enacted the Regional Rail Reorganization Act of 1973, Pub. L. 93–236, 87 Stat. 985, as a comprehensive solution to the impending rail crisis. This case involves the constitutionality of significant portions of that Act.

1. The major features of the Act may be briefly summarized. The Act establishes a public, nonprofit corporation, the United States Railway Association,

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[4] The seven railroads are the Penn Central, Reading, Erie Lackawanna, Central of New Jersey, Lehigh Valley, Boston & Maine, and Ann Arbor. In addition, a smaller railroad, the Lehigh & Hudson River, had also entered reorganization.

[5] The railroads operate principally in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, Ohio, Indiana, Michigan, Illinois, and the District of Columbia.

556-471—74——2

and directs the Association to formulate a "final system plan" for the "establishment and maintenance of a [financially self-sustaining] rail service system adequate to meet the rail transportation needs and service requirements of the [northeast] region." Section 206(a) of the Act. See, also, Sections 202 and 204. It is anticipated that the final system plan will provide for the sale of some of the rail properties of the railroads presently in reorganization to profitable railroads, to the National Railroad Passenger Corporation, and to state and local transportation authorities. Section 206 (c) and (d). But the Act contemplates that the centerpiece of the final system plan will be a newly organized for-profit corporation, the Consolidated Rail Corporation, to which the Association will issue up to one billion dollars of the Association's federally-guaranteed obligations. Sections 210, 301, and 302.

The final system plan is expected to provide for the transfer of the bulk of the rail properties of the railroads in reorganization to the Corporation in exchange for stock and securities of the Corporation and up to $500 million of the Association's obligations held by the Corporation.[6] Sections 206(d) and 210(b). The Corporation will be required to use at least $500 million of the Association's obligations for rehabilitation and modernization of the transferred rail properties. Section 210(b).

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[6] Subject to congressional approval, the plan may also provide for additional compensation to the transferor railroads' estates in the form of federally guaranteed obligations of the Corporation. Section 206(i). See, also, Sections 206(h) and 210 Corporation. Section 206(i). See, also, Sections 206(h) and 210(b).

The final system plan is to be submitted to Congress within 450 days after the date of enactment of the Act (January 2, 1974) and will become effective at the end of 60 session days if not disapproved by either house. Sections 207 and 208. Within 90 days thereafter, the plan is to be certified to a special three-judge court appointed by the judicial panel on multi-district litigation. Section 209. The special court is to order the transfer of rail properties from the estates of the railroads in reorganization to the Corporation and other transferees designated in the plan and thereafter to determine the fairness and equity of the compensation payable under the plan to the estates of those railroads. See generally Section 303.

If the special court determines that the consideration payable under the plan exceeds the constitutional minimum standard of fairness and equity, it must order the return of any excess. Section 303(c)(3). If instead the court finds that the terms of the exchange are unfair or inequitable to the estate of any railroad, it must reallocate the total consideration in a fair and equitable manner, and, if necessary, order the Corporation to transfer to that estate additional securities or obligations designated for that purpose in the final system plan, and, if further necessary, enter a judgment in the estate's favor against the Corporation for the additional amount needed to render the exchange fair and equitable. Section 303(c)(2). The judgment of the special court is reviewable by this Court. Section 303 (d).

In order to ensure that rail service throughout the northeastern states remains adequate pending the

transfer of properties to the Corporation under the final system plan, the Act forbids the railroads in reorganization from discontinuing service or abandoning lines without the consent of the Association. Section 304(f). However, the Secretary of Transportation is authorized to provide emergency assistance to the railroads pending implementation of the final system plan and to pay rail service continuation subsidies. Sections 213 and 402. The Secretary is further authorized "to enter into agreements with railroads in reorganization * * * for the acquisition, maintenance, or improvement of railroad facilities and equipment necessary to improve property that will be in the final system plan." Section 215.

The rail properties of a railroad in reorganization are subject to transfer under the final system plan only if the court having jurisdiction over its reorganization so orders. However, Section 207(b) of the Act provides that "[b]ecause of the strong public interest in the continuance of rail transportation in the [northeast] region pursuant to a system plan devised under the provisions of this Act, each such court shall order that the reorganization be proceeded with pursuant to this Act unless it (1) has found that the railroad is reorganizable on an income basis within a reasonable time * * * and that the public interest would be better served by such a reorganization * * *, [7] or (2) finds that this Act

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[7] Two courts have now determined that the railroads under their jurisdiction are reorganizable on an income basis within a reasonable time. *In the Matter of Erie Lackawanna Railway Co.*, N.D. Ohio, No. B72-2838, Order No. 234, decided May 2, 1974; *In the Matter of Boston & Maine Corp.*, D. Mass., No. 70-250M, memorandum opinion, decided May 2, 1974.

does not provide a process which would be fair and equitable to the estate of the railroad in reorganization in which case it shall dismiss the reorganization proceeding."[8]

2. The present action was brought by the sole shareholder and major creditors of Penn Central Transportation Company, one of the railroads in reorganization, seeking declaratory and injunctive relief against enforcement of the Act.[9] They contended, *inter alia,*

[8] Three courts have now found that the Act does not provide a process that is fair and equitable to the estates of the railroads under their jurisdiction. *In the Matter of Penn Central Transportation Co.*, E.D. Pa., Bky. No. 70–347, Order No. 1596, decided July 1, 1974; *In the Matter of Penn Central Transportation Co. (Secondary Debtors)*, E.D. Pa., Bky. Nos. 70–347A to 70–347*O*, multiple orders all decided July 1, 1974; *In the Matter of Lehigh Valley Railroad Co.*, E.D. Pa., Bky. No. 70–432, Order No. 252, decided July 1, 1974; *In the Matter of Central Railroad Company of New Jersey*, D.N.J., Bky. No. 401–67, decided June 28, 1974; *In the Matter of Lehigh and Hudson River Railway Co.*, S.D.N.Y., Bky. No. 72–419, decided July 1, 1974. Two other courts have refused to find that the process under the Act is not fair and equitable. *In the Matter of Reading Co.*, E.D. Pa., Bky. No. 71–828, Order No. 650, decided July 1, 1974; *In the Matter of Ann Arbor Railroad Co.*, E.D. Mich., No. 74–90833, decided July 1, 1974. These cases are all currently on appeal to the special three-judge court established under Section 209(b). The decision of that court on the question of the fairness and equity of the process is made nonreviewable by Section 207(b), which also requires the court to decide the appeals within 90 days (*i.e.*, by September 29, 1974); however, the government has urged the special court to stay its mandate pending disposition of the instant case.

[9] As we have indicated (note 2, *supra*), there were in fact three separate actions before in the district court. The plaintiffs, in No. 74–189, were Connecticut General Insurance Corporation, Connecticut Mutual Life Insurance Company, The Equitable

that the contemplated transfer of rail properties in exchange for stock and securities of the Corporation would effect a taking of their property for public use without just compensation; that enforcement of Section 304(f), which bars railroads from discontinuing service or abandoning lines prior to the transfer without the consent of the Association, would also effect such a taking; and that the entire Act exceeds the power of Congress under the bankruptcy clause of the Constitution.

Life Assurance Society of the United States, Metropolitan Life Insurance Company, and The Prudential Insurance Company of America, and, in their capacities as trustees, The Bank of New York, Bankers Trust Company, The Fidelity Bank, The First Pennsylvania Banking and Trust Company, Girard Trust Bank, National Commercial Bank and Trust Company, United States Trust Company of New York, American National Bank & Trust Co. of Chicago, Mellon Bank N.A., Wilmington Trust Company, and Irving Trust Company. The plaintiff in No. 74–1107 was Richard Joyce Smith, Trustee of the New York, New Haven and Hartford Railroad Company. The plaintiff in No. 74–1149 was Penn Central Company. Claude S. Brinegar, Secretary of Transportation, the United States of America, and the United States Rail Association were named as defendants in all three actions. George M. Stafford, Chairman of the Interstate Commerce Commission, and George P. Schultz, Secretary of Treasury, were additionally named as defendants in Nos. 74–189 and 74–1149. The Interstate Commerce Commission was named as a further defendant in No. 74–1189. George P. Baker, Robert W. Blanchette, and Richard C. Bond, Trustees of the property of Penn Central Transportation Company, intervened as defendants in all three actions. This jurisdictional statement is filed on behalf of the United States of America; Claude S. Brinegar, Secretary of Transportation; George M. Stafford, Chairman of the Interstate Commerce Commission; William E. Simon, Secretary of Treasury; and the Interstate Commerce Commission.

The three-judge court determined first that the question whether the final transfer of rail properties to the Corporation would effect an unconstitutional taking of appellees' property was not yet ripe for adjudication (J. App. 23–25). The court concluded, however, that the problem of "interim erosion" of the bankrupt estates posed by losses resulting from involuntary continuation of service or lines was ripe for adjudication, and the court enjoined the defendants from acting under Section 304(f) to prohibit any "reduction in service which has been or may hereafter be determined by a court of competent jurisdiction to be necessary to [prevent a taking]" (J. App. 82).[10] The court based that ruling upon a determination that the Act impliedly amends the Tucker Act so as to bar suits for damages for any takings resulting from the continued operation of the railroads (J. App. 40–53).

The court further determined that although the Act in principal part is within the general commerce power of Congress, the provision of Section 207(b) that requires dismissal of certain reorganization proceedings is invalid as a geographically nonuniform law on the subject of bankruptcies (J. App. 61–65); enforcement of that provision was therefore enjoined. The court then proceeded, without any further statement of reasons, to enjoin the Association from certifying a final system plan for judicial review under Section 209(c) (J. App. 53).

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[10] The court did not determine whether in fact any such taking had yet occurred. It indicated, however, that a determina-

THE QUESTIONS ARE SUBSTANTIAL

The importance of this case requires little discussion. Certification of a final system plan to the special reviewing court is a critical and necessary step in the procedure established by Congress for the financial restructuring of the rail transportation network of the northeastern States. Enforcement of the final system plan by the special court is the linchpin of the statutory scheme; if no plan is certified to the court, the entire scheme collapses. Thus by barring the Association from certifying a plan to the special court, the court below has completely nullified the congressional solution to the transportation crisis presently facing the nation.

The district court erred in enjoining certification of a plan. The court based that injunction solely upon its determinations that Section 304(f) permits takings, through interim erosion, for which there may be no just compensation and that Section 207(b) establishes a geographically nonuniform rule for the dismissal of railroad reorganization proceedings. Those determinations were in error.

Interim erosion pending implementation of the final system plan will not amount to a taking in the constitutional sense. Appellees, by investing "their capi-

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tion of that kind would require consideration of "both * * * the amount of erosion of the Debtor's estate which can be permitted to occur before impairing liquidation value, and * * * the length of time that is reasonable for assessing the ultimate prospects of achieving sufficient profitability to support a valid recapitalization of the enterprise" (J. App. 41, n. 23).

tal in a public utility that does owe an obligation to the public" (*Reconstruction Finance Corp.* v. *Denver & Rio Grande Western R. Co.*, 328 U.S. 495, 535), subjected themselves to the burden of continuing rail operations for a reasonable time while good faith efforts are being made to restore the northeast rail system to financial viability. See *New Haven Inclusion Cases*, 399 U.S. 392; *Continental Bank v. Chicago, Rock Island & Pacific Ry.*, 294 U.S. 648. The Act represents such an effort.

But even if interim erosion pending the plan's implementation could in some instances be said to constitute a taking, there is ample provision for payment of just compensation. The ownership and creditor interests in the Corporation, and the obligations of the Association, received in exchange by the estates of the transferor railroads should constitute adequate and full consideration. But if that consideration proves to be constitutionally inadequate, a complete remedy is nevertheless available under the Tucker Act. Cf. *Hurley* v. *Kincaid*, 285 U.S. 95.

The provision in Section 207(b) requiring the dismissal of certain railroad reorganization proceedings is not a geographically nonuniform law on the subject of bankruptcies. That provision both by its terms and in fact applied to every railroad reorganization proceeding pending at the time of or within 180 days after enactment of the Act. It has no application to future railroad reorganizations and therefore will never be applied in a geographically discriminatory manner.

But the court erred in enjoining certification of

the final system plan even assuming *arguendo* that Sections 304(f) and 207(b) are constitutionally defective. Certification triggers the transfer of properties pursuant to the plan. See Section 303(a). Certification thus terminates any interim erosion that might otherwise result from enforcement of Section 304(f); and the dismissal provision of Section 207(b) applies only to proceedings in which the reorganization court has determined that the properties of the debtor railroad will not be eligible for transfer under the plan. Thus any constitutional defects in Sections 304(f) and 207(b) would not affect the validity of the certification process. Moreover, the district court dealt with the alleged constitutional defects by enjoining enforcement of Section 304(f) and the dismissal provision of Section 207(b); it was improper for the court additionally to enjoin certification of the plan.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
CARLA A. HILLS,
Assistant Attorney General.
KEITH A. JONES,
Assistant to the Solicitor General.
ROBERT H. KOPP,
DAVID J. ANDERSON,
JAMES F. DAUSCH,
Attorneys.

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IN THE

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OCTOBER TERM, 1974

UNITED STATES OF AMERICA, ET AL., APPELLANTS,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, ET AL., APPELLEES.

UNITED STATES RAILWAY ASSOCIATION, APPELLANT,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, ET AL., APPELLEES.

ROBERT W. BLANCHETTE, RICHARD C. BOND AND JOHN H. MCARTHUR, AS TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR, APPELLANTS,

v.

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RICHARD JOYCE SMITH, AS TRUSTEE OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILWAY COMPANY, DEBTOR, APPELLANT,

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

JOHN F. DONELAN
JOHN K. MASER III
ROGER K. DAVIS
914 Washington Building
Washington, D.C. 20005

Counsel for Amicus Curiae,
The National Industrial Traffic League

Of Counsel:
DONELAN, CLEARY AND CALDWELL
914 Washington Building
Washington, D.C. 20005

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Industrial Traffic League hereby respectfully moves for leave to file the attached brief *amicus curiae* in the four related cases set forth above. The consent of attorneys for the appellees was requested but unanimous consent has been refused.

The interest of the League arises from the fact that it is the largest diversified shipper organization in the United States. The members of the League operate industrial and/or commercial enterprises – large, medium, and small – and are substantial users of the various modes of for-hire transportation, including transportation by railroad. Members of the League have extensively used, and are extensively using, the transportation services of the rail carriers subject to possible reorganization under the Regional Rail Reorganization Act of 1973. Thus, the League and its members have a direct and substantial interest in the disposition of the instant case.

One of the key factors bearing upon the determination of the Fifth Amendment issues in these cases is the *public interest* underlying the challenged Act. Having reviewed the treatment of this subject in the District Court, the League believes that it can provide more complete and helpful argument to the Court on the relevancy of this factor to the ultimate decision. Unless the League is permitted to file a brief as *amicus curiae*, the vitally interested shipping public, as represented by the League, will have no opportunity to express its views on the proper resolution of this issue.

Respectfully submitted,

JOHN F. DONELAN
JOHN K. MASER III
ROGER K. DAVIS
914 Washington Building
Washington, D.C. 20005

Counsel for Amicus Curiae,
The National Industrial Traffic League

Of Counsel:

DONELAN, CLEARY AND CALDWELL
914 Washington Building
Washington, D.C. 20005

August 23, 1974

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	2
ARGUMENT:	
The court below did not give sufficient consideration to the well-established principle that the rights of creditors are limited by the interests of the public, and therefore are not absolute	4
The public interest in rail reorganization clearly justifies interim erosion of the assets of creditors and owners	8
CONCLUSION	12

TABLE OF AUTHORITIES

Cases:

Brooks-Scanlon Company v. Railroad Commission, 251 U.S. 396 (1920)	3
Bullock v. Railroad Commission, 254 U.S. 513 (1921)	3
Continental Illinois Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co., 294 U.S. 648 (1935)	4, 5
Hanover National Bank v. Moyses, 186 U.S. 181 (1902)	4
In Re Litigation Under the Regional Rail Reorganization Act of 1973, Docket No. 166 (J.P.M.L. March 1, 1974)	8
In Re Penn Central Transportation Co., (Bky No. 70-347, E.D. Pa.)	3

Page

New Haven Inclusion Cases,
399 U.S. 392 (1970) 6

Penn Central Merger Cases,
389 U.S. 486 (1968) 6

Railroad Commission v. Eastern Texas R.R.,
264 U.S. 79 (1924) 3

Reconstruction Finance Corporation v. Denver & Rio
Grande Western R.R., 328 U.S. 495 (1946) 5, 6

West Coast Hotel v. Parrish,
300 U.S. 379 (1937) 11

Constitutional Provisions and Statutes:

U.S. Constitution:
Amendment V 4

Bankruptcy Act:
Section 77, 11 U.S.C. § 205 . . . . . 5, 10

Interstate Commerce Act:
Section 1(18), 49 U.S.C. § 1(18) 3

Regional Rail Reorganization Act of 1973:
87 Stat. 985 . . . . . *passim*

Legislative Materials:

S. Rep. No. 601, 93rd Congress, 1st Sess. (1973) 9

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BRIEF AMICUS CURIAE

STATEMENT OF INTEREST

The National Industrial Traffic League (hereinafter referred to as "the League") is the largest organization of shippers in the United States. Its members operate industrial and/or commercial enterprises – large, medium,

and small – and are substantial users of the various modes of for-hire transportation, including transportation by railroad. The League has been in continuous, active existence for more than sixty-five years. Neither carriers nor their representatives are eligible for membership in the League.

The interest of the League in these cases arises from the fact that its members have used, are using, and are planning to use the services of the Penn Central and the seven other railroads in the Northeast and Midwest currently subject to possible reorganization under the Regional Rail Reorganization Act of 1973.[1] The League actively participated in the Congressional hearings which preceded enactment of the latter statute. In providing basic transportation services to the industrial and commercial shippers of the nation, the subject railroads act as originating and delivering carriers and as participating carriers in joint hauls with other railroads.

The Regional Rail Reorganization Act of 1973 (hereinafter referred to as "the Act") was designed to meet the threat of cessation or significant curtailment of essential rail service that developed with the financial decline and entry into bankruptcy proceedings of eight major railroads of the Northeast and Midwest. It appears to the League that a decision sustaining the unconstitutionality of major provisions of the Act will insure the termination of some reorganization proceedings, and the placement of those railroads in equity receivership for the purposes of liquidation. For instance, among others, the Penn Central has been determined to be so financially debilitated that reorganization could only be accomplished under the Act. *In*

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[1] Public Law 93-236, 87 Stat. 985, 45 U.S.C. §§701, *et seq.*, approved January 2, 1974.

Re Penn Central Transportation Company, (E.D. Pa., 1974), Slip Opinion, p. 19. Although the approval of the Interstate Commerce Commission would be required under Section 1(18) of the Interstate Commerce Act, 49 U.S.C. §1-(18), before rail lines and operations could be abandoned, the Commission would likely be constitutionally compelled to authorize large-scale abandonments. *Brooks-Scanlon Company v. Railroad Commission*, 251 U.S. 396 (1920); *Bullock v. Railroad Commission of Florida*, 254 U.S. 513 (1921); *Railroad Commission v. Eastern Texas R.R.*, 264 U.S. 79 (1924).

If such disruption or discontinuation of vital rail services comes about, members of the League will suffer an economic catastrophe of substantial and incalculable proportions. Many of these member companies of the League have developed facilities and planned operations in reliance upon the availability of public rail service. In many cases the very survival of their enterprises will depend upon continued common carrier rail service. In others, substantial curtailment of rail service will result in drastic and adverse alteration of the structure and strength of their businesses.

The fact is that alternate modes of transportation are often non-existent or are simply too uneconomic or impractical. Thus, the industrial and commercial shippers of the nation, represented by the League, have a direct and substantial interest in the revitalization and continued viability of the subject railroads under the Regional Rail Reorganization Act of 1973.

ARGUMENT

It is the League's position that the court below erred in restraining enforcement of certain provisions of the Act and declaring Sections 303 and 304(f) null and void as contravening the Fifth Amendment of the United States Constitution. Section 304(f) was held violative of the Fifth Amendment to the extent that it would require continued operation of rail services at a loss in violation of the constitutional rights of the owners and creditors of a railroad. Section 303 was held unconstitutional insofar as it fails to provide compensation for interim erosion pending final implementation of the Final System Plan pursuant to the statute. The League contends that the Act provides a mechanism for reorganization of railroads that is consistent with the interests of the public and with the constitutional rights of owners and creditors.

A. The Court below did not give sufficient consideration to the well-established principle that the rights of creditors are limited by the interests of the public, and therefore are not absolute.

In the court below too little consideration was given to the long-standing principle that the "property" rights of creditors are subject to the right of the public to make reasonable efforts to reorganize essential common carrier rail operations on a profitable basis. The bankruptcy power directly provides for the *adjustment* of the respective rights of embarrassed debtors and their creditors and it clearly permits *impairment* of the obligation of contracts. *Continental Illinois Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 294 U.S. 648 (1935); *Hanover National Bank v. Moyses*, 186 U.S. 181 (1902). Yet the

Regional Rail Reorganization Act is treated by the Court below as if the rights of creditors are absolute.

It is plainly erroneous to argue that rail creditors may not be forced to accept substantial erosion of their investment during the pendency of reorganization proceedings. In *Continental Bank v. Chicago, Rock Island & Pacific Ry.*, 294 U.S. 648 (1935), this Court held that holders of "collateral notes" of the debtor could constitutionally be compelled to accept a decline in their investment while an effort was made to reorganize the debtor under Section 77 of the Bankruptcy Act, 11 U.S.C. §205.

That this principle relates to substantial as well as minor losses was made even clearer a decade later in *Reconstruction Finance Corp. v. Denver & Rio Grande Western R.R.*, 328 U.S. 495 (1946). In that case this Court upheld a plan of reorganization despite the fact that junior bondholders (1) had lost 90 percent of the value of their claims during the ten years of reorganization and (2) had overwhelmingly voted to reject the plan of reorganization. In unequivocal language this Court declared:

> These respondents cannot be called upon to sacrifice their property so that a depression-proof railroad system might be created. But they invested their capital in a public utility that does owe an obligation to the public. The Insurance Group Committee, with fiduciary responsibility to the myriad holders of policies, and the other investors or speculators in senior bonds as well as the holders of General bonds or other investors or speculators in junior security issues, by their entry into a railroad enterprise assumed the risk that in any depression or any reorganization the interests of the public would be considered as well as theirs. [328 U.S. 535, 536]

In the *Penn Central Merger Cases*, 389 U.S. 486 (1968), and the *New Haven Inclusion Cases*, 399 U.S. 392 (1970), this Court reaffirmed the relevancy of the public interest to consideration of the rights of rail creditors. Confronted in the *Penn Central Merger Cases* with an argument concerning the progressive erosion of bondholders' security, this Court said:

> While the rights of the bondholders are entitled to respect, they do not command Procrustean measures. They certainly do not dictate that rail operations vital to the Nation be jettisoned despite the availability of a feasible alternative. The public interest is not merely a pawn to be sacrificed for the strategic purposes or protection of a class of security holders whose interests may or may not be served by the destructive move. [389 U.S. at 510-511]

More recently, in the *New Haven Inclusion Cases*, this Court responded to the pleas of bondholders by repeating an earlier statement that those who enter into a railroad enterprise assume the special risk that interests of the public will be considered along with those of investors in the event of any depression or reorganization.[2]

Although prior to this Court's review of the New Haven reorganization, the reorganization court had reached the point where it had decided that operations could not continue without immediate inclusion in the Penn Central System, 289 F. Supp. 451, at 459, that reorganization court

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[2] 399 U.S. 392, 492, quoting, *Reconstruction Finance Corp. v. Denver & Rio Grande Western R.R.*, 328 U.S. 495, 535-36.

also squarely acknowledged the inherent public interest limitations on the rights of the bondholders:

> Both the Commission and the courts, however, have reiterated in this and in related proceedings that as bondholders of a railroad their interests are subject to such invasion as may be essential to continue the operation of the railroad for a reasonable period of time to provide an opportunity to work out a permanent plan or means of continuing the operation, if possible, to the extent that it is required by the public interest. [*Id.* at 455]

Clearly, the New Haven reorganization court engaged in the balancing of interests appropriate to such cases. It should be noted that substantial losses were imposed upon New Haven creditors before the court, after seven years of reorganization, concluded that operations would have to cease unless the merger was consummated shortly thereafter. That reorganization court described the necessary process as follows:

> The extent to which the constitutional minimum of value of property rights to which the bondholders are entitled . . . may properly be invaded in the public interest to keep railroad operations going pending a solution of the problem of reorganization, is hardly a matter which can be determined with mathematical precision. It involves a consideration of the amount and nature of the Railroad's obligations, the seriousness of adverse consequences to the public if service were terminated, the rate of losses and the feasibility of possible solutions. [*Id.* at 459]

In the instant cases the court below did not engage in the appropriate balancing of interests. The only discussion of the public interest underlying Congress' action appears in a brief summary of the Act presented "before consideration" of the constitutional claims.[3] Although the amount of erosion and the prospects of ultimate profitability are proper factors in resolving the question of an unconstitutional taking, the public interest should also enter into any determination of the extent to which erosion is permitted. Thus, the court below erred in failing duly to examine the Act in light of both the public interest and the interim financial interests of rail creditors and owners.

B. The public interest in rail reorganizaton clearly justifies interim erosion of the assets of creditors and owners.

The Regional Rail Reorganization Act represents "an heroic attempt"[4] to salvage the rail services of the insolvent railroads of the Midwest and Northeast. It is designed to reorganize the railroads in this region into an economically viable system capable of providing adequate and efficient rail service to the region and the national rail transportation system.

Congress developed this new expression of the bankruptcy power because of the compelling public need for continued rail service. Among the official findings presented in the Act are the following:

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[3] Typed Slip Opinion, p. 5.

[4] *In Re Litigation Under the Regional Rail Reorganization Act of 1973*, Docket No. 166, Opinion and Order dated March 1, 1974, at 3. (Judicial Panel on Multidistrict Litigation).

(3) The public convenience and necessity require adequate and efficient rail service in this region and throughout the Nation to meet the needs of commerce, the national defense, the environment, and the service requirements of passengers, United States mail, shippers, States and their political subdivisions, and consumers.

(4) Continuation and improvement of essential rail service in this region is also necessary to preserve and maintain adequate national rail services and an efficient national rail transportation system.

(5) Rail service and rail transportation offer economic and environmental advantages with respect to land use, air pollution, noise levels, energy efficiency and conservation, resource allocation, safety, and cost per ton-mile of movement to such extent that the preservation and maintenance of adequate and efficient rail service is in the national interest.

(6) These needs cannot be met without substantial action by the Federal Government. [Section 101(a)].

The Senate Commerce Committee's report portrays even more graphically the enormous public interest in the pending reorganizations.[5] The Committee noted that a shutdown of the Penn Central alone could "produce a decrease in the rate of economic activity in the region of 5.2%, a decrease in the entire nation of 4%, and a decrease in the

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[5] Senate Report No. 93-601, December 3, 1973.

GNP for the Nation as a whole of 2.7% after the eighth week of such a shut-down." *Id.* at 7. The Committee also reported that a study by the Indiana Department of Commerce predicted that a shut-down of the Penn Central would produce unemployment in that state of 24% during the first month and that a 60-day shut-down would cause the Indiana industrial economy to suffer a 25% reduction in capacity. *Id.* at 7.

A brief accounting of the role of the insolvent railroads in the national rail system also offers an indication of the economic disaster and chaos which would result if their rail services were discontinued. For instance, the Northeast railroads receive over 300 cars a day from the State of Alabama, over 520 a day from the State of Minnesota, and over 640 cars a day from the State of California. Cars originating in the Northeast arrive in Texas at the rate of 679 cars a day, in North Carolina at a rate above 567 cars a day, and in California at a rate above 810 cars a day. *Id.* at 8.

Thus, recognizing the necessity of continuing the rail service of the insolvent railroads, Congress passed the Regional Rail Reorganization Act of 1973. The Act modifies the procedures and supplements the financial and legal resources normally available in reorganization under Section 77 of the Bankruptcy Act (11 U.S.C. § 205). Among other things, it provides:

(1) expedited procedures for abandoning rail lines and discontinuing rail services (Section 304);

(2) substantial obligational authority for the United States Railway Association with provision for additional amounts upon approval by joint resolution of Congress (Section 210);

(3) funding for emergency rail needs pending implementation of the Final System Plan (Section 213);

(4) subsidies for state and local rail service (Section 402);

(5) benefits for adversely affected employees (Section 509).

The court below failed duly to consider the extent to which these new legal and financial resources serve the interests of both creditors and the public. Congress may not have presented an absolute guarantee of future profitability to creditors but it did provide a reasonable prospect of ultimate profitability that constitutionally justifies substantial interim erosion.

It is appropriate for this Court to give considerable weight to Congress' evaluation of both the public interest in continued rail service and the feasibility of the proposed solution. On matters of public policy Congress is entitled to substantial deference. *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 400 (1937).

The Regional Rail Reorganization Act of 1973 is an entirely reasonable response to a national crisis. In passing this statute Congress set forth a comprehensive and constitutional plan for the protection of the public and the equitable treatment of creditors and owners.

CONCLUSION

The judgment of the district court should be reversed, the constitutionality of the Act sustained and the cause remanded.

Respectfully submitted,

JOHN F. DONELAN
JOHN K. MASER III
ROGER K. DAVIS
914 Washington Building
Washington, D.C. 20005

Counsel for Amicus Curiae,
The National Industrial Traffic League

Of Counsel:
DONELAN, CLEARY AND CALDWELL
914 Washington Building
Washington, D.C. 20005

August 23, 1974.

Nos. 74-165 and

In The

Supreme Court of the United States

October Term, 1974

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v.

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v.

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ROBERT W. BLANCHETTE, RICHARD C. BOND AND JOHN H. McARTHUR, AS TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR, APPELLANTS,

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v.

UNITED STATES OF AMERICA, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR APPELLANTS ROBERT W. BLANCHETTE, RICHARD C. BOND and JOHN H. McARTHUR, TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR

CHARLES A. HORSKY
BRICE M. CLAGETT
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

PAUL R. DUKE
JOHN F. DePODESTA
Penn Central Transportation Company
Six Penn Center Plaza
Philadelphia, Pa. 19107

Attorneys for Appellants Penn

TABLE OF CONTENTS

	Page
JURISDICTION	2
OPINIONS BELOW	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	4
Regional Rail Reorganization Act	4
Penn Central Proceeding	5
Constitutional Litigation	6
SUMMARY OF ARGUMENT	8
ARGUMENT	14
I. THE ACT DOES NOT EXCLUDE A TUCKER ACT REMEDY FOR ANY TAKING OF PROPERTY ACCOMPLISHED PURSUANT TO THE ACT	14
II. IF THE COURT BELOW WAS CORRECT IN CONCLUDING THAT NO COURT OF CLAIMS REMEDY EXISTS, THEN ITS CONCLUSION THAT THE ACT IS UNCONSTITUTIONAL WITH RESPECT TO INTERIM EROSION IS ALSO CORRECT	30
A. Deficit Rail Operations May Not Constitionally Be Required Without, at Least, the Assurance of Successful and Prompt Reorganization	34
B. The Act, While Requiring Continuance of Deficit Rail Operations, Contains No Provisions Compensating the Penn Central Estate for the Erosion Incurred Thereby	41

Page

III. THE CONSTITUTIONAL ADEQUACY OF THE ACT'S PROVISIONS FOR COMPENSATION FOR THE PERMANENT TAKING CONTEMPLATED IS RIPE FOR DECISION 48

(1) The 180-Day Decision 48

(2) Congressional "Approval" 51

(3) The Mandatory Nature of the Conveyance 52

IV. THE ACT'S PROVISIONS REGARDING COMPENSATION FAIL TO ASSURE THAT FIFTH AMENDMENT STANDARDS WILL BE SATISFIED 54

V. THE EXISTENCE OF AN ADEQUATE COURT OF CLAIMS REMEDY SAVES THE CONSTITUTIONALITY OF THE ACT 63

A. An Adequate Court of Claims Remedy Cures the Fifth Amendment Problem 63

B. With the Exception of One Readily Severable Provision, the Act Is Not in Violation of the "Uniformity" Requirement of Article I, Section 8, Clause 4 of the Constitution 68

CONCLUSION 71

APPENDIX: Constitutional and Statutory Provisions 1a

ANNEX A: Letter of John W. Ingram, Federal Railway Administrator, to R.D. Timpany, May 10, 1974 . . 3a

ANNEX B: Letter of Brock Adams, M.C., to John W. Barnum, April 26, 1974 . . . . . 7a

ANNEX C: Extracts from Proposed Amendments to Senate Commerce Committee Working Paper No. 1 (transmitted with Secretary Brinegar's letter of Nov. 14, 1973) 10a

TABLE OF CITATIONS

Page

Cases:

Albert Hanson Lumber Co. v. *United States*, 261 U.S. 581 (1923) 28

Amell v. *United States*, 384 U.S. 158 (1966) 17

Almota Farmers Elev. & Whse Co. v. *United States*, 409 U.S. 470 (1973) 66

American Communications Association v. *Douds*, 339 U.S. 382 (1950) 17

Aris Gloves, Inc. v. *United States*, 420 F.2d 1386 (Ct. Cl. 1970) 14

Baltimore & Ohio R.R. v. *United States*, 298 U.S. 349 (1936) 61

Barnidge v. *United States*, 101 F.2d 295 (8th Cir. 1939) . . . 26

Battaglia v. *General Motors Corp.*, 169 F.2d 254 (2d Cir. 1948) 21

Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U.S. 673 (1930) 21

Brooklyn Eastern District Terminal v. *United States*, 302 F. Supp. 1095 (E.D.N.Y. 1969) 36

Brooks-Scanlon Co. v. *Railroad Comm'n of Louisiana*, 251 U.S. 396 (1920) 32, 34, 36, 55, 56, 62

Bullock v. *Railroad Comm'n of Florida*, 254 U.S. 513 (1921) 34, 55

Campbell v. *Alleghany Corp.*, 75 F.2d 947 (4th Cir. 1934), *cert. denied*, 296 U.S. 581 (1935) 69

Catlin v. *United States*, 324 U.S. 229 (1945) 17, 26

City of New York v. *United States*, 337 F. Supp. 150 (E.D.N.Y. 1972) 36, 55

City of Oakland v. *United States*, 124 F.2d 959 (9th Cir.), *cert. denied*, 316 U.S. 679 (1942) 28

Page

Cases (Cont'd)

Commercial Station Post Office, Inc. v. *United States*, 48 F.2d 183 (8th Cir. 1931) 26, 28

Continental Bank v. *Chicago, R.I. & P. Ry.*, 294 U.S. 648 (1935) 38, 39

Cook v. *United States*, 115 F.2d 463 (5th Cir. 1940) 16

Coombs, Trustee, v. *United States*, 321 U.S. 770 (1944) . . . 28

Cotton Land Co. v. *United States*, 75 F. Supp. 232 (Ct. Cl. 1948) 15

Crozier v. *Krupp*, 224 U.S. 290 (1912) 28

DeSalvo v. *Arkansas Louisiana Gas Co.*, 239 F. Supp. 312 (E.D. Ark. 1965) 15

Eastport Steamship Corp. v. *United States*, 372 F.2d 1002 (Ct. Cl. 1967) 16

Ex parte Cohen, 191 F.2d 390 (9th Cir. 1951), *cert. denied*, 342 U.S. (1952) 17

Eyherabide v. *United States*, 345 F.2d 565 (Ct. Cl. 1965) 14-15

Fawcett v. *C.I.R.*, 149 F.2d 433 (2d Cir. 1945) 17

Federal Sugar Refining Co. v. *United States*, 30 F.2d 254 (2d Cir. 1929) (L. Hand, J.), *aff'd*, *Johnson* v. *United States Shipping Board Emergency Freight Corp.*, 280 U.S. 320 (1930) 16-17

Feldwin Realty Co. v. *United States*, 169 F. Supp. 73 (D.N.J. 1959) 14

Fort Berthold Reservation v. *United States*, 390 F.2d 686 (Ct. Cl. 1968) 15

Foster v. *United States*, 98 F. Supp. 349 (Ct. Cl. 1951) 15

FTC v. *A.P.W. Paper Co.*, 328 U.S. 193 (1946) 17

Georgia v. *Pennsylvania R.R.*, 324 U.S. 439 (1945) 17

Glidden v. *Zdanok*, 370 U.S. 530 (1962) 28

Page

Cases (Cont'd)

Graham & Foster v. *Goodcell*, 282 U.S. 409 (1931) 21

Great Falls Mfg. Co. v. *Attorney General*, 124 U.S. 581 (1888) 28

Hanover National Bank v. *Moyses*, 186 U.S. 181 (1902) 68

Harlem Valley Transportation Ass'n v. *Stafford*, No. 73-2496, 2d Cir. June 18, 1974 46

Hecht Co. v. *Bowles*, 321 U.S. 321 (1944) 52

Hele v. *United States*, 100 Ct. Cl. 289 (1943) 16

Hooe v. *United States*, 218 U.S. 322 (1910) 26

Hurley v. *Kincaid*, 285 U.S. 95 (1932) 15

In re Baltimore & Ohio R.R., 29 F. Supp. 608 (D. Md. 1939), *cert. denied*, 309 U.S. 654 (1940) 69

In re California P. R.R., 4 F. Cas. 1060 (No. 2,315) (D. Cal. 1874) 69

In re Central R.R. of New Jersey, 485 F.2d 208 (3d Cir. 1973). 36, 55

In re New York, N.H. & H. R.R., 304 F. Supp. 793 (D. Conn. 1969) 35, 55, 66

In re New York, N.H. & H. R.R., 281 F. Supp. 65 (D. Conn. 1968) 36, 37

In re New York, N.H. & H. R.R., 289 F. Supp. 451 (D. Conn. 1968) 35, 36, 37, 55

In re New York, N.H. & H. R.R., 16 F. Supp. 504 (D. Conn. 1936) 69

In re Penn Central Transportation Co., 372 F. Supp. 1123 (E.D. Pa. 1974) 55

In re Penn Central Transportation Co. (Columbus Option Appeals), 494 F.2d 270 (3d Cir. 1974), *petition for cert. field*, 42 U.S.L. Week 3633 (U.S. May, 1974), No. 73-1672 30, 36, 55

In re Penn Central Transportation Co., 355 F. Supp. 1343 (1973) 31

Page

Cases (Cont'd)

In re Port Authority Trans-Hudson Corp., 20 N.Y.2d, 457, 285 N.Y. Supp.2d 24, *cert. denied sub nom. Port Authority Trans-Hudson* v. *Hudson Rapid Tubes Corp.*, 390 U.S. 1002 (1968) 56

In re Spier Aircraft Corp., 137 F.2d 736 (3d Cir. 1943), *cert. denied sub nom.* 28

In re Third Ave. Transit Corp., 198 F.2d 703 (2d Cir. 1952) 36

Jacobs v. *United States*, 290 U.S. 13 (1933) 14

Jay Street Connecting R.R. v. *United States*, 174 F. Supp. 609 (E.D.N.Y. 1959) 36, 56

Johnson v. *Emergency Fleet Corp.*, 280 U.S. 320 (1930) . . . 16

Joslin Mfg. Co. v. *City of Providence*, 262 U.S. 668 (1923) 18

Katzenbach v. *McClung*, 379 U.S. 294 (1964) 68

Lee v. *United States*, 58 F.2d 879 (D.C. Cir. 1932) 28

Leidigh Carriage Co. v. *Stengel*, 95 F. 637 (6th Cir. 1899) . . . 69

Louisville Joint Stock Land Bank v. *Radford*, 295 U.S. 555 (1935) 25

Maryland v. *Wirtz*, 392 U.S. 183 (1968) 68

Mercantile Nat'l Bank v. *Longdean*, 371 U.S. 555 (1963) 17

Miller v. *United States*, 57 F.2d 424 (App. D.C. 1932) 18

Monongahela Navigation Co. v. *United States*. 148 U.S. 312 (1893) 61

Nagano v. *McGrath*, 187 F.2d 759 (7th Cir. 1951), *aff'd*, 342 U.S. 916 (1952) 17

New Haven Inclusion Cases, 399 U.S. 392 (1970). 10, 13, 36, 37, 38, 39, 40, 47, 55, 58, 59, 66, 70

New York, N.H. & H. R.R. Bondholders' Committee v. *United States*, 289 F. Supp. 418 (S.D.N.Y. 1968) 35, 55

Cases (Cont'd) **Page**

New York, N.H. & H. R.R. First Mortgage 4% Bondholders' Committee v. *United States*, 305 F. Supp. 1049 (S.D.N.Y. 1969) 35, 55

New York, N.H. & H. R.R. First Mortgage 4% Bondholders' Committee v. *United States*, 289 F. Supp. 418 (S.D.N.Y. 1968) . . . . . .

Olsen v. *United States*, 292 U.S. 246 (1934) 50, 66

Poe v. *Ullman*, 367 U.S. 497 (1961) . . . . . .

Portsmouth Harbor Land & Hotel Co. v. *United States*, 260 U.S. 327 (1922) 15

Potomac Electric Power Co. v. *United States*, 85 F.2d 243 (D.C. Cir.), *cert. denied*, 299 U.S. 565 (1936) 28

Railroad Comm'n of Texas v. *Eastern Texas R.R.*, 264 U.S. 79 (1924) 34, 55

Reconstruction Finance Corp. v. *Denver & R.G.W. R.R.*, 328 U.S. 495 (1946) 38, 39

Richard v. *United States*, 282 F.2d 901 (Ct. Cl. 1960) 15

Rosenberg v. *United States*, 346 U.S. 273 (1953) 17

Silesian-American Corp. v. *Clark*, 332 U.S. 469 (1947) . . . 27, 28

Silesian-American Corp. v. *Markham*, 156 F.2d 793 (2d Cir. 1946) 27

Sioux Tribe of Indians v. *United States*, 315 F.2d 378 (Ct. Cl. 1963) 15

South Puerto Rico Sugar Co. v. *United States*, 334 F.2d 622 (Ct. Cl. 1964), *cert. denied*, 379 U.S. 964 (1965) 16

Stringer v. *United States*, 471 F.2d 381 (5th Cir. 1973) . . . 18

Thomason v. *United States*, 184 F.2d 105 (9th Cir. 1950) . . . 16

United States v. *Causby*, 328 U.S. 256 (1946) 14, 15

United States v. *Congress of Industrial Organizations*, 335 U.S. 106 (1948) 17

Page

Cases (Cont'd)

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United States v. *Dow*, 357 U.S. 17 (1958) 18

United States v. *40.75 Acres of Land*, 76 F. Supp. 239 (N.D. Ill. 1948) 26

United States v. *Klein*, 80 U.S. 128 (1871) 21

United States v. *New River Collieries*, 262 U.S. 341 (1923) 61

United States v. *Pfitsch*, 256 U.S. 547 (1921) 16

United States v. *Reynolds*, 397 U.S. 14 (1970) 66

United States v. *Thirty-seven Photographs*, 402 U.S. 363 (1971) 17

United States Nat'l Bank v. *Pamp*, 83 F.2d 493 (8th Cir. 1936) 69

Vanhorne's Lessee v. *Dorrance*, 2 U.S. (2 Dall.) 304 (1795) 66

Vanston Bondholders Protective Committee v. *Green*, 329 U.S. 156 (1946) 69

Wright v. *Vinton Branch*, 300 U.S. 440 (1937) 69

Yearsley v. *W.A. Ross Construction Co.*, 309 U.S. 18 (1940) 15

Youngstown Sheet and Tube Co. v. *Sawyer*, 343 U.S. 579 (1952) 26

Statutes:

Bankruptcy Act, Section 77, 11 U.S.C. §205 . . . . . 4, 5, 8, 13, 18-19, 31, 37, 39, 45, 52, 62, 69, 70

The Foreign Assistance and Related Programs Appropriation Act of 1974 (P.L. 93-240) 43

Indian Claims Commission Act 15

Statutes (Cont'd) **Page**

Interstate Commerce Act, Section 1(18) 20, 21, 45

National Environmental Policy Act of 1969
42 U.S.C. §4331 . . . . . 21, 46

Rail Services Act of 1973, Report No. 93-601 of the Senate Committee on Commerce 130 (93d Cong., 1st Sess. 1973) 23

Regional Rail Reorganization Act of 1973, 45 U.S.C. §§701-793 . . . . . 2, 3, 4, 15, 71

Section 102(13) 70
202(a) 18
202(a)(10) 18
204(a) 57
205(a)(1) 58
205(c)(2) 18
206(a)(1) 57
206(a)(2) 57
206(a)(5) 57
206(a)(8) 57
206(d)(1) 61
206(d)(3) 18
206(i) 57
207(b) 4, 5, 7, 18, 48, 49, 50, 69, 70, 71
208 . . . . . 25, 41
208(a) 51
208(b) 53
209(a) 18, 19, 20
209(b) 5, 19, 49, 52
209(c) 3, 7
213 . . . . . 42, 43, 44, 45
215 . . . . . 43, 44, 45
303 . . . . . 3, 7, 19, 20
303(b)(1) 52

	Page
Statutes (Cont'd)	
Section 303 (b) (2)	18, 19, 53
303 (c)	41
303 (c) (1) (B)	20, 24, 29, 54, 60
303 (c) (2) (B)	59
303 (c) (2) (C)	20, 60
303 (d)	18, 19, 20
304 (c)	18, 20
304 (f)	3, 7, 18, 44, 45, 46
305 (f)	41
401	58
402	58
402 (f)	58
601	21
601 (a) (2)	18, 20
601 (b)	18, 21
601 (c)	18, 21
604	21, 70
Title V	61
Title VI	21
Section 3709, Revised Statutes, 41 U.S.C. §5	18
Second Supplemental Appropriation Act of 1974 (P.L. 93-305)	43
Tucker Act, 28 U.S.C. §1491	3, 8, 9, 10, 12, 14, 15, 16, 18, 20, 21, 22, 24, 25, 27, 28, 29, 30, 34, 39, 46, 48, 49, 50, 52, 54, 61, 62, 64, 67
28 U.S.C. §§1252 and 1253	2
§§2282 and 2284	2
United States Constitution:	
Art. I, Section 8, Clause 4	3, 7, 13, 68, 71
Fifth Amendment	3, 6, 8, 14, 16, 23, 24, 25, 30, 31, 42, 48, 54, 63, 64, 65

Page

Legislative Materials:

Conference Report, H.R. Rep. No. 93-744, p. 56 (93d Cong., 1st Sess. 1973) 60

Conference Report, H.R. Rep. No. 93-1070 (93d Cong., 2d Sess. 1973) 43

Congressional Record, May 14, 1974, p. S. 7958 45

H.R. Rep. No. 93-260 of the Committee on Interstate and Foreign Commerce, p. 53 (93d Cong., 1st Sess. 1973) 41, 60

Miscellaneous:

Note, The Constitutional Status of the Court of Claims, 68 Harv. L. Rev. 527 (1956) 28

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UNITED STATES OF AMERICA, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR APPELLANTS ROBERT W. BLANCHETTE, RICHARD C. BOND and JOHN H. McARTHUR, TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR

These cases are before the Court on appeal from a judgment of a three-judge district court sitting in the Eastern District of Pennsylvania entered on June 25, 1974.

That court held unconstitutional certain provisions of the Regional Rail Reorganization Act of 1973, Public Law 93-236, 45 U.S.C. §§ 701-793 (the Act).

JURISDICTION

The judgment of the three-judge court in the Eastern District of Pennsylvania, convened pursuant to 28 U.S.C. §§ 2282 and 2284, was entered on June 25, 1974 (Joint Appendix (J.A.), pp. 82-83). On July 2, 1974, the Penn Central Trustees filed in the District Court a notice of appeal to this Court (J.A. p. 384). Timely notices of appeal were also filed by the other appellants (J.A. pp. 385-90). The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1252 and 1253. Probable jurisdiction has not yet been noted; appellants' briefs are being lodged with the clerk prior to the noting of probable jurisdiction pursuant to a motion by all parties to advance causes for argument, filed in this Court on August 23, 1974.

OPINIONS BELOW

The opinion of Circuit Judge Aldisert for the three-judge court is printed at J.A. pp. 9-54, and a separate opinion of District Judge Fullam is printed at J.A. pp. 55-81; the order of the three-judge court is printed at J.A. pp. 82-83. These opinions and order have not yet been reported.

QUESTIONS PRESENTED

1. Did the court below properly conclude that appellant Trustees could not maintain an action in the Court of Claims to recover any amount due the estate for fair and just compensation for (a) the rail properties the estate would be required to convey to Consolidated Rail Cor-

poration, and (b) any erosion of the Penn Central estate beyond constitutional limits?

2. Did the court below properly conclude that, because the Act does not provide just compensation for erosion of the Penn Central estate beyond constitutional limits, Section 303 of the Act, relating to the valuation of the Penn Central rail properties; Section 304(f) of the Act, requiring continued rail operation by Penn Central; and Section 209(c), authorizing the certification of the final system plan to the Special Court, offend the Fifth Amendment and are unconstitutional absent a remedy against the United States in the Court of Claims?

3. Did the majority of the court below properly decline to decide whether the Act is unconstitutional, absent a Court of Claims remedy, in that it requires transfer of Penn Central's rail properties to Consolidated Rail Corporation without the assurance of compensation which would satisfy the requirements of the Fifth Amendment?

4. If the court below was in error in declining to reach that question, or if the issue is otherwise now ripe for decision, is there adequate assurance that the consideration specified in the Act to be paid to the Penn Central estate for such rail properties will satisfy Fifth Amendment requirements?

5. If a Court of Claims remedy exists, does it save the constitutionality of the Act?

STATUTES INVOLVED

Article I, Section 8, Clause 4 of the Constitution, the Fifth Amendment to the Constitution, and the Tucker Act (28 U.S.C. § 1491) are set forth in the Appendix to this brief. The Regional Rail Reorganization Act of 1973, P.L. 93-236, 45 U.S.C. §§ 701-793, is printed at J.A. pp. 391 *et seq.*

STATEMENT

These actions challenge the constitutional validity of various provisions of the Regional Rail Reorganization Act of 1973 (45 U.S.C. §§ 701-793) (the Act), which was signed by the President on January 2, 1974.

Regional Rail Reorganization Act

The Act represents an attempt by the Congress to deal with the problems presented by the fact that a number of major railroads in the Northeast and Midwest are in reorganization pursuant to Section 77 of the Bankruptcy Act. In general, the Act creates a new Government corporation, the United States Railway Association (USRA); charges it with responsibility, subject to Congressional approval, to design a "final system plan" for restructured rail freight service in the Northeast and Midwest regions; creates a new private corporation, Consolidated Rail Corporation (Conrail), to acquire, own and operate the rail properties designated in the final system plan; and, subject to certain preliminary findings required by Section 207(b) of the Act, requires the railroads in reorganization to convey to Conrail such of their rail properties as are designated in the final system plan in return for certain securities and other consideration specified in the statute.

Section 207(b) of the Act requires each reorganization court to make certain decisions which ultimately determine whether the railroad in reorganization under its jurisdiction will be made subject to the compulsory-conveyance provisions of the Act. First, each reorganization court is directed to determine, within 120 days of January 2, 1974 (the 120-day hearing), whether the railroad in reorganization can be reorganized on an income basis within a reasonable time under Section 77 of the Bankrupt-

cy Act and whether the public interest would be better served by such reorganization than by reorganization under the Act. If both determinations are affirmative, that railroad ceases to be a railroad in reorganization within the meaning of the Act, is no longer subject to the compulsory-conveyance and other mandatory provisions of the Act, and continues its reorganization efforts under Section 77.

Second, if the railroad has not been excluded from the Act as a result of the 120-day hearing, each reorganization court is required by Section 207(b) to find, within 180 days of January 2, 1974 (the 180-day hearing), whether the Act provides "a process which would be fair and equitable to the estate of the railroad in reorganization." If the court finds that it would not, again the railroad ceases to be a railroad in reorganization within the meaning of the Act and is no longer subject to the compulsory-conveyance and other mandatory provisions of the Act. In that event, Section 207(b) directs the reorganization court to dismiss the reorganization proceedings. The decisions of the reorganization courts are reviewable, under Section 207(b), in the "Special Court" — a district court of three judges created pursuant to Section 209(b) of the Act. Section 207(b) provides that there shall be no review of such decisions of the Special Court.

Penn Central Proceeding

These actions relate to the application of the Act to the estate of Penn Central Transportation Company, Debtor, in reorganization under Section 77 of the Bankruptcy Act (Penn Central). The 120-day decision by the Reorganization Court on May 2, 1974 found that Penn Central was not reorganizable on an income basis within a reasonable time. The opinion and order of the Reorganization Court appear at J.A. pp. 84-103.

The 180-day hearing held with respect to Penn Central resulted in a finding by the Reorganization Court that the process of the Act was not fair and equitable to the Penn Central estate. The opinion and order of the Reorganization Court on this issue appear at J.A. pp. 124-52. That decision has been appealed by the Government parties and others to the Special Court.[1] The appeals will be argued before the Special Court on August 27 and 28, 1974. Under Section 207(b) of the Act, the Special Court is required to announce its decision by September 29, 1974.

The issues argued before the Reorganization Court, and now before the Special Court, are essentially the same constitutional questions which these actions present to this Court for decision.

Constitutional Litigation

Shortly after the Act became law, the first of these actions was filed (J.A. p. 161). The complaint alleged, *inter alia*, that the Act worked a permanent taking of the property of the Penn Central estate without assurance that the payment of just compensation required by the Fifth Amendment would be made; that the Act contravened the Fifth Amendment in failing to provide compensation for the erosion of the Debtor's estate during the interval between the enactment of the Act and the ultimate conveyance of rail properties to Conrail, during which period the Act required the railroad to continue operations; and that the

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[1]Jurisdiction of the Reorganization Court to make the 120-day and 180-day decisions has been challenged by the Trustee of the New Haven Railroad, a creditor and stockholder of Penn Central. Appeals by the New Haven Trustee from both decisions are now pending before both the Special Court and the Court of Appeals for the Third Circuit.

Act violated the uniformity requirement of Article I, Section 8, Clause 4 of the Constitution. Similar allegations were made in the other two complaints (J.A. pp. 261, 341). Appellant Trustees intervened as parties defendant in each of the three actions (J.A. pp. 191, 309, 358).

On June 3, 1974, the cases were submitted to the court below on cross-motions for summary judgment. The defendants, including appellant Trustees, asserted that there could be no deficiencies in just compensation as plaintiffs alleged, because the estate in reorganization would in any event be made whole by way of suit in the Court of Claims, both for any deficiency in the compensation received from Conrail for rail properties and for any claims they might have if it were determined that an unconstitutional erosion of the estate had taken place or would take place prior to the date of the mandatory conveyance. Defendants also denied that the act violated the uniformity requirement of Article I, Section 8, Clause 4 of the Constitution.

On June 25, 1974, the court below filed an opinion and entered an order enjoining and holding null and void three provisions of the Act (J.A. pp. 9-83). All of the judges agreed that the Act was unconstitutional in failing to provide compensation for interim erosion which would be suffered by the Penn Central estate during the planning period, and that an action against the United States in the Court of Claims was not available to remedy this deficiency. On that basis the court enjoined enforcement of, and declared null and void, Section 304(f) of the Act, which requires continued rail operations during the planning period, and declared Section 303 of the Act null and void insofar as it fails to provide compensation for interim erosion. Because of these conclusions, the court enjoined USRA from certifying a final system plan to the Special Court pursuant to Section 209(c) (J.A. p. 82). A majority of the court also held Section 207(b) of the Act null and void

so far as it mandated dismissal of the Section 77 proceeding if reorganization under the Act is foreclosed.

The court also concluded that the questions whether the mandatory conveyance of rail properties to Conrail pursuant to the Act would violate Fifth Amendment rights, and whether a suit in the Court of Claims would be available to remedy any deficiency in this respect, were premature, since the 180-day decision as to Penn Central had not yet been made, the final system plan had not yet been approved by Congress, and the conveyance would have to be ordered by the Special Court (J.A. pp. 23-25). Judge Fullam, in his concurring opinion, believed that these issues were ripe for decision.

SUMMARY OF ARGUMENT

I.

If the consideration paid pursuant to the Act for the mandatory conveyance of Penn Central's properties proves constitutionally inadequate, or if interim erosion passes the point of constitutional permissibility and therefore involves a taking of property even apart from the ultimate mandatory conveyance, then the Trustees would have a remedy in the Court of Claims for just compensation. The Tucker Act, which provides that remedy, clearly applies. The text of the present Act — although containing thirteen provisions repealing various types of federal-court jurisdiction and excluding application of other federal laws — contains nothing which repealed the Court of Claims' jurisdiction under the Tucker Act for a taking or otherwise precluded a remedy there.

Nor can any implied repeal of the Tucker Act be found in the Act — especially when to find such an implied repeal

would require holding the Act unconstitutional. The Court will, of course, make every effort to construe an act of Congress in a way that makes it constitutional rather than unconstitutional.

The legislative history shows no intent to exclude a Tucker Act remedy in the event that the Act resulted in a taking of property. Congress indeed attempted to structure the Act so that it would be held not to involve any taking, and at least some Congressmen thought that it had succeeded in that attempt. But on that question the intent of Congress is irrelevant: it is for the courts, not Congress, to determine whether or not governmental actions expressly directed by Congress amount to a taking of property for which just compensation is due. Congress specifically recognized that the consideration for Penn Central's properties would be subject to a "constitutional minimum." And the fact that Congress has not yet appropriated funds to pay a Court of Claims judgment is no ground for holding that the Act excluded Tucker Act jurisdiction; the same situation habitually applies with respect to Court of Claims litigation.

II.

The court below was correct in its holding that, absent a Tucker Act remedy, the Act is unconstitutional in requiring continuing erosion of the Penn Central estate, for an indefinite period, without any provision for compensating Penn Central's owners for the taking of property suffered thereby. Such erosion has already been massive — in the hundreds of millions of dollars — and no one can guarantee that, if Penn Central is irrevocably subjected to reorganization under the Act, erosion has not already passed or will pass the point at which it becomes un-

constitutional. Indeed there is a distinct likelihood that that point has already been passed.

The applicable case law, including the recent precedents established in the *New Haven* reorganization, establishes that deficit rail operations may not constitutionally be required without, at least, the assurance of successful and prompt reorganization. Since a decision to make Penn Central subject to the Act is irrevocable, the process of the Act cannot be allowed to go forward without an assurance that, if erosion passes the point of unconstitutionality, the estate will be compensated therefor. The Act itself provides no assurance either of a successful and prompt reorganization or of any compensation for erosion. Hence, if there is no Tucker Act remedy, the Act cannot be sustained.

III.

The majority of the court below erred in its holding that it is premature to decide whether the Act is constitutionally defective, absent a Tucker Act remedy, in failing to assure just compensation for the taking of property caused by a mandatory conveyance of Penn Central property to Conrail pursuant to a final system plan. The majority believed that issue was premature because a mandatory conveyance was subject to three contingencies: (1) a "180-day" decision making Penn Central subject to the process of the Act; (2) Congressional approval of a final system plan; and (3) an order of the Special Court directing the mandatory conveyance. None of these "contingencies" affects the reality that, unless the Act is at this stage found defective, the mandatory conveyance will in fact take place, and there will be no future opportunity to challenge either its constitutionality or its fairness and equity.

(1) The 180-day decision has now been made. While the Reorganization Court refused to subject Penn Central to the process of the Act, it did so essentially by deciding the same constitutional questions now before this Court, holding, *inter alia*, that the Act fails to assure just compensation for the mandatory conveyance of Penn Central property to Conrail. These questions are now before the Special Court, which like the Reorganization Court will doubtless base its holding on essentially constitutional grounds, and which will presumably structure its order to permit modification in the light of what this Court decides. Since there is no appeal from the Special Court's decision, the present cases are the only opportunity for an authoritative decision of these important constitutional questions. All the parties are faced with imminent harm, whichever way the Special Court decides, if that decision should be constitutionally incorrect. And an erroneous exclusion of Penn Central from reorganization under the Act would do violence to the public interest, which plainly dictates such reorganization if the Act is not inconsistent with the preservation of adequate constitutional remedies.

(2) The lower court was in error; the Act contains no requirement that Congress approve the final system plan. The plan becomes effective automatically unless either House of Congress disapproves it within 60 days. And even if Congress should disapprove the first plan, further plans must be submitted until one of them is not disapproved. Since that plan will necessarily provide for a mandatory conveyance of Penn Central property to Conrail there is no possibility, other than through a change in the statute, that the constitutional question before this Court will be mooted or its essential contours altered.

(3) The Special Court "shall" order the conveyance within ten days of the submission of the final system plan to

it. Its order is a ministerial act, and is not subject to appeal. The Act plainly was structured to exclude any exercise of discretion by the Special Court at the mandatory-conveyance stage. Thus the Special Court's order is not a "contingency" which makes decision by this Court premature. Indeed, since the Special Court will then have no choice, this action presents the last opportunity for any court to decide whether a mandatory conveyance can be allowed to go forward, on the basis of a Tucker Act remedy, in spite of the limitations in the Act on the form and amount of the consideration to be paid therefor. The Special Court cannot authoritatively decide that question in the cases presently before it, since a decision by it with respect to Court of Claims jurisdiction would have no binding effect.

IV.

The Act cannot be sustained, absent a Tucker Act remedy, unless it assures that the consideration to be paid for Penn Central's properties is equal to the "constitutional minimum" which the estate must receive. However the constitutional minimum be defined, there can be no assurance that the consideration paid under the Act will equal it. That consideration is required to be, for the most part, securities of Conrail. But at the present time there can be no assurance that Conrail securities will have any value at all, let alone a value equal to the minimum constitutionally required. Nor can there be any assurance that the other consideration permitted by the Act will make up any inadequacy.

V.

If the availability of an adequate Tucker Act remedy is established by this Court's decision, the constitutionality of the Act can be sustained. For the remedy to be adequate, it

must be clear that Penn Central will be entitled to a Court of Claims judgment for any deficiency in the compensation paid for the properties mandatorily conveyed, and also for any loss caused by erosion if such erosion has passed, or passes, the point at which continued loss operations become unconstitutional if for the account of the estate. The Court of Claims judgment need only be for a deficiency — for the amount still owing after taking account of the non-cash consideration paid under the Act — so long as that consideration is valued only at its cash value on the date of its receipt. Otherwise the Act would offend the constitutional requirement that compensation for a taking be paid in cash or cash equivalent. Valuing speculative railroad securities at an "intrinsic" value in excess of their value when received — the device which proved so disastrous in the *New Haven* reorganization — must be excluded.

With one exception, the Act does not violate the "uniform rules of bankruptcy" clause of the Constitution. The Act is, as the Court below held, based on the commerce clause as well as on the bankruptcy clause, and in addition makes a reasonable classification of debtors based on the unique current railroad crisis in the Northeast. The exception is the provision which would deny to Northeastern railroads excluded from the Act, but to no others, the opportunity to reorganize under Section 77 on an other-than-income basis. That is an indefensible geographical discrimination and must be stricken, but it is readily severable.

ARGUMENT

I.

THE ACT DOES NOT EXCLUDE A TUCKER ACT REMEDY FOR ANY TAKING OF PROPERTY ACCOMPLISHED PURSUANT TO THE ACT.

The Tucker Act provides (28 U.S.C. § 1491):

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

An action by the Trustees for just compensation for the properties taken pursuant to the Act would be founded upon the Fifth Amendment to the Constitution. Successful actions pursuant to the Tucker Act based on takings of property are, of course, legion. While in a few early cases the courts took the view that an action for a taking could be maintained only if a contract to pay could be implied in fact, the weight of authority has been, and recent cases have consistently held, that the Fifth Amendment itself creates a right to just compensation for any taking and the Tucker Act provides the necessary waiver of immunity which confers jurisdiction. *See United States v. Causby*, 328 U.S. 256 (1946); *Jacobs v. United States*, 290 U.S. 13 (1933); *Feldwin Realty Co. v. United States*, 169 F. Supp. 73, 76 (D.N.J. 1959); *Aris Gloves, Inc., v. United States*, 420 F.2d 1386, 1391 (Ct. Cl. 1970); *Eyherabide v. United States*, 345 F.2d

565 (Ct. Cl. 1965). It is not a necessary element of an action under the Tucker Act that the Government intended to pay for or even that it intended to take the property involved; so long as a taking in fact occurred the Court of Claims has jurisdiction and the payment of just compensation will be required. *United States v. Causby, supra; Yearsley v. W. A. Ross Construction Co.*, 309 U.S. 18, 21 (1940); *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922); *Sioux Tribe of Indians v. United States*, 315 F.2d 378 (Ct. Cl. 1963); *Richard v. United States*, 282 F.2d 901 (Ct. Cl. 1960); *Foster v. United States*, 98 F. Supp. 349 (Ct. Cl. 1951); *Cotton Land Co. v. United States*, 75 F. Supp. 232 (Ct. Cl. 1948).

The fact that the Rail Act provides a means of securing some consideration for the properties to be taken does not eliminate the Court of Claims' jurisdiction to award a judgment against the United States to fill any gap between the value of the consideration awarded pursuant to the Act and the just compensation required to be paid for the properties taken. Where a statutory provision for determining compensation is constitutionally inadequate, parties are not preduded from availing themselves of other statutory rights such as those under the Tucker Act. *Cf. DeSalvo v. Arkansas Louisiana Gas Co.*, 239 F. Supp. 312 (E.D. Ark. 1965). *Fort Berthold Reservation v. United States*, 390 F.2d 686 (Ct. Cl. 1968), was brought under a provision of the Indian Claims Commission Act creating in the Commission jurisdiction of "claims in law or equity arising under the Constitution" — a provision substantially identical, of course, to the Tucker Act provision at issue here. 390 F.2d at 690, n. 1. The act of Congress authorizing the taking in question had expressly provided for compensation at a stated dollar amount per acre. The Court of Claims had no difficulty in finding that a taking had oc-

curred within the meaning of the Fifth Amendment to the Constitution, and that the jurisdictional provision quoted above authorized an action against the United States to recover the difference between the value of the land thus taken and the amount received by the owners pursuant to the Congressional directive. The case is virtually on all fours with the present situation.

The general jurisdiction conferred upon the Court of Claims by the Tucker Act has been held precluded only in those instances where it has been very clearly withdrawn, such as where another court or agency has expressly been given exclusive jurisdiction to award the same relief as the Court of Claims could otherwise provide. See *Johnson v. Emergency Fleet Corp.*, 280 U.S. 320 (1930); *United States v. Pfitsch*, 256 U.S. 547 (1921); *Thomason v. United States*, 184 F.2d 105 (9th Cir. 1950); *Cook v. United States*, 115 F.2d 463 (5th Cir. 1940); *Eastport Steamship Corp. v. United States*, 372 F.2d 1002, 1007-08 (Ct. Cl. 1967); *South Puerto Rico Sugar Co. v. United States*, 334 F.2d 622, 626 (Ct. Cl. 1964), *cert. denied*, 379 U.S. 964 (1965); *Hele v. United States*, 100 Ct. Cl. 289, 294 (1943).

But all that Congress has provided in the Act is a means for determining the value of the properties taken and the value of the securities to be issued as compensation. The Special Court is not empowered by the Act to render a judgment against the United States should the value of the securities prove inadequate to compensate the railroad estates for the properties taken; thus, the Special Court has not been empowered to determine or to award the just compensation which the Constitution requires. Such a judgment can only be rendered by the Court of Claims.

Repeals by implication of the jurisdiction of federal courts are not lightly to be implied, and will be held to have occurred only on a clear and convincing showing. *Federal*

Sugar Refining Co. v. United States, 30 F.2d 254, 255 (2d Cir. 1929) (L. Hand, J.), *aff'd, Johnson v. United States Shipping Board Emergency Freight Corp.*, 280 U.S. 320 (1930).[2] Especially is this the case where a holding that jurisdiction has been repealed by implication would necessarily result, as the court below correctly held it would result, in a holding that the Act is in whole or in part unconstitutional. See, *e.g., Catlin v. United States*, 324 U.S. 229, 241 (1945). The Court should of course make every effort to construe an act of Congress in a way that makes it constitutional rather than unconstitutional. *E.g., United States v. Thirty-seven Photographs*, 402 U.S. 363, 369 (1971); *American Communications Association v. Douds*, 339 U.S. 382, 407 (1950); *United States v. Congress of Industrial Organizations*, 335 U.S. 106, 120-121 (1948); *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 407-08 (1909).

If Congress in enacting the present Act had withdrawn a Court of Claims remedy, then, as the Court below recognized, the Act would be at least in part unconstitutional, since neither title nor possession to property sought to be taken may be given in the absence of a reasonable, certain and adequate provision for obtained just compensation.

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[2]Repeals of statutes by implication are never favored; the party urging such a repeal has a strong burden of persuasion; a law is not to be held repealed by implication unless no other reasonable construction can be found, and unless the new statute is so repugnant to the old one that they cannot be reconciled. *E.g., Amell v. United States*, 384 U.S. 158 (1966); *Mercantile Nat'l Bank v. Longdean*, 371 U.S. 555 (1963); *Rosenberg v. United States*, 346 U.S. 273 (1953); *FTC v. A.P.W. Paper Co.*, 328 U.S. 193 (1946); *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945); *Ex parte Cohen*, 191 F.2d 300 (9th Cir. 1951), *cert. denied*, 342 U.S. 947 (1952); *Nagano v. McGrath*, 187 F.2d 759 (7th Cir. 1951), *aff'd*, 342 U.S. 916 (1952); *Fawcett v. C.I.R.*, 149 F.2d 433 (2d Cir. 1945).

United States v. Dow, 357 U.S. 17, 21 (1958); *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 677 (1923); *Miller v. United States*, 57 F.2d 424 (App. D.C. 1932); *Stringer v. United States*, 471 F.2d 381, 384 (5th Cir. 1973).

But in the present case, there is no difficulty — no straining of either the text or the legislative history of the Act — involved in holding that it did not unconstitutionally attempt to exclude a Tucker Act remedy for a taking. If Congress had so intended, it would have been easy to exclude such a remedy by a simple and express provision. In fact, as the court below conceded (J.A. p. 45), the Act contains no fewer than *thirteen* provisions repealing or making inapplicable the provision of various laws or excluding the jurisdiction of federal courts on various subjects. Since none of these thirteen provisions excludes a Tucker Act remedy — although Congress was made aware of the possibility of such a remedy — Congress must be deemed to have deliberately rejected the readily available option of including such an exclusionary provision in the Act.

The thirteen repealing or jurisdiction-excluding provisions in the Act are found in Sections 202(a), 205(c)(2), 206(d)(3), 207(b), 209(a), 209(b), 303(b)(2), 303(d), 304(c), 304(f), 601(a)(2), 601(b) and 601(c).

Sections 202(a)(10) and 205(c)(2) exempt United States Railroad Association (USRA) and the Rail Services Planning Office, respectively, from the provisions of Section 3709 of the Revised Statutes, 41 U.S.C. Section 5. Section 206(d)(3) provides that certain determinations by USRA and the ICC shall not be reviewable in any court. Section 207(b) provides that appeals from orders made under that subsection may be taken only to the Special Court, whose decisions are not subject to further review. Section 207(b) also in effect repeals part of the jurisdiction created by Sec-

tion 77 of the Bankrupty Act by requiring dismissal of Section 77 proceedings in certain circumstances.

Section 209(a) provides that the final system plan shall become effective after review by Congress "notwithstanding any other provision of law" and is "not subject to review by any court except in accordance with this section." Here Congress provides that no court may review the contents of the final system plan — the document which establishes what railroad properties shall be taken — and that the plan is to become effective notwithstanding any other provisions of law. Obviously nothing here purports or attempts to exclude a Tucker Act remedy for just compensation for the properties so taken.

Section 209(b) authorizes the Judicial Panel on Multi-District Litigation to create a Special Court and to consolidate therein all judicial proceedings with respect to the final system plan, and to issue rules for the conduct of the Panel's functions. The section goes on to provide that "no determination by the panel [on Multi-District Litigation] under this subsection may be reviewed in any court." Here again Congress demonstrated that it well knew how to exclude jurisdiction of federal courts when it wished to do so.

Section 303(b)(2) provides that mandatory conveyances ordered pursuant to the Act by the Special Court "shall not be restrained or enjoined by any court." Section 303(d) provides that, after the Special Court enters its orders with respect to compensation which are authorized by prior subsections of Section 303, an appeal may be taken to the Supreme Court and "that such appeal is exclusive." This makes a single appeal to the Supreme Court the only means by which interested parties may question whether the Special Court has properly performed the functions allocated to it by Section 303. Since those functions do not include consideration of any question whether the com-

pulsory conveyance pursuant to the Act constitutes a taking of property or the amount of just compensation due therefor,[3] Section 303(d) in no way attempts to exclude a Tucker Act remedy for such a taking. To the contrary, Section 303(d) yet again demonstrates that Congress was fully aware of the necessity of excluding various types of jurisdiction and did so expressly when it wished to do so.

Section 304(c) provides that railroad abandonments permitted under the section may be made "notwithstanding any provision of the Interstate Commerce Act" or of other laws. Section 304(f) provides that the inhibition on interim abandonments imposed by that subsection prevails "notwithstanding any provision of any other Federal law, the constitution or law of any State, or decision or order of, or the pendency of any proceeding before any Federal or State court, agency, or authority."

Section 601(a)(2) provides that "the antitrust laws are inapplicable with respect to any action taken to formulate or implement the final system plan where such action was

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[3]The Special Court is charged by Section 303(c)(2)(C) with entering a judgment against Conrail if a lack of fairness and equity cannot be completely cured by the other means made available to the court. What is conspicuously absent is any authorization for the Special Court to decide whether a judgment against Conrail *does* completely ensure fairness and equity, *i.e.*, whether it meets the "constitutional minimum" standard (Section 303(c)(1)(B)), for just compensation. Since that fundamental question is carefully and deliberately excluded from the Special Court's jurisdiction, the provisions of Section 303(d), creating a single appeal to the Supreme Court from the Special Court's decision of the matters it is authorized to decide, is in no way inconsistent with the preservation of remedies for a taking in the Court of Claims pursuant to the Tucker Act. If the court below meant to intimate otherwise by its observation (J.A. p. 51) that "judicial review is delineated with specificity in Sections 209(a) and 303 with no mention of the Court of Claims," its reasoning is plainly unsound.

in compliance with the requirements of such plan." Section 601(b) similarly makes inapplicable the provisions of the Interstate Commerce Act "whenever a provision of any such act is inconsistent with this Act." And Section 601(c) provides that certain provisions of the National Environmental Policy Act of 1969 "shall not apply with respect to any action taken under authority of this Act before the effective date of the final system plan." These provisions are contained in Title VI of the Act, in a sub-title headed "Relationship to Other Laws." If Congress had wished also to exclude the application of the Tucker Act, it obviously would have added such an exclusion to the very explicit provisions of Section 601 excluding the applicability of various other laws.

Given the absence of any explicit provision excluding the Tucker Act remedy, plus the necessary implication from the provisions discussed above that the Tucker Act was not rendered inapplicable, plus the strong reluctance which the Court must feel in finding a repeal by implication when that would render the Act in whole or in part unconstitutional,[4] the legislative history would, at least, have

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[4]If the Act were construed to repeal Tucker Act jurisdiction without substituting (as of course it does not substitute) a fully equivalent and adequate remedy ensuring just compensation, the repeal of jurisdiction should be held unconstitutional. "[W]hile Congress has the undoubted power to give, withhold and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without . . . just compensation." *Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948); see also *Graham & Foster v. Goodcell*, 282 U.S. 409, 431 (1931); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 682 (1930); *United States v. Klein*, 80 U.S. 128, 144-45 (1871). Thus even if the Court should determine that some provision of the Act repeals Tucker Act jurisdiction, it should strike down that provision alone pursuant to the separability clause of the Act, Section 604.

to show clearly and conclusively that Congress intended to exclude a Tucker Act remedy to warrant this Court in so holding.

The legislative history shows no intent whatever to exclude a Tucker Act remedy in the event that the Act was held to effect a taking of property. Congress did indeed attempt to structure the Act so that no taking would occur. But Congress' intent on that point is wholly irrelevant, since the law is clear that the determination of whether a taking has occurred is a purely judicial function, and that no intent of Congress to effect a taking or to pay therefor is necessary, but only that Congress intend that the acts occur which in law constitute a taking. See cases cited at p. 15, *supra*.

What is entirely absent from the legislative history is any intent to preclude the jurisdiction of the Court of Claims in the event that it should be judicially determined that Congress had been unsuccessful in its desire to avoid a taking. Senator Hartke, one of the managers of the bill, specifically adverted to the possibility of a successful Court of Claims suit if the bill was not structured to avoid a taking. 119 Cong. Rec. S. 23783-84 (1973), quoted in part by the court below, J.A. p. 49. The remarks by Congressman Adams relied on by the court below (J.A. pp. 49-50) amount to, at most, (1) a correct declaration that *the Act itself* contained no provision for a remedy against the United States, and (2) an erroneous legal judgment that Congress had been successful in structuring the Act so that there would be no taking, and hence no *recovery* in a Court of Claims action.

Congress had, in addition, been warned by Claude S. Brinegar, Secretary of Transportation, that the provisions of the Act would not succeed in avoiding a taking and that further amendments were necessary to accomplish that

result. On November 14, 1973 Secretary Brinegar wrote the Senate Committee on Commerce warning that the draft bill then before the committee would be held to effect a compulsory taking of railroad property under the Fifth Amendment to the Constitution. *Rail Services Act of 1973, Report No. 93-601 of the Senate Committee on Commerce,* 130 (93d Cong., 1st Sess. 1973), J.A. pp. 214-20. Secretary Brinegar assumed as axiomatic (and as we have shown his assumptions were correct) that Congress could be held to have effected a taking without intending it, and that if a taking did occur, a remedy for the constitutionally required compensation would be available. The Secretary declared that the only way to avoid a taking would be to provide an option by which a conveyance under the Act could be avoided by the courts; that such an option would have to be one other than an "illusory" option; and that for an option to be other than illusory it would have to be an option to be exercised at a time when all aspects of the final system plan were known and could be assessed, including, in particular, the compensation to be received and the factors bearing on the value thereof.

The Secretary concluded that "in order to avoid condemnation, it is necessary to give the special court the right to turn the final system plan down with respect to each of the railroads in reorganization." *Senate Report, supra,* at 133, J.A. p. 220. Again, "if this is to be deemed a reorganization [as opposed to a condemnation], the court must have the opportunity to say no to the final system plan at a time when all the relevant facts can be presented to it." *Ibid.* Accordingly, the Secretary transmitted amendments which would have provided for a hearing before the special court, after presentation to it of the final system plan, after which the court would determine whether the plan was fair and equitable with respect to each estate and, if not, would remand each case to its reorganization court,

with the result that the compulsory conveyance to Conrail would be avoided. See Proposed Amendments, Annex C hereto, pp. 10a-12a, *infra*.

Congress, placed fully on notice by the Secretary of what would be necessary to avoid a taking, (1) chose not to accept the amendments he proposed, and (2) having been made intensely aware that, if the Secretary were right, a Tucker Act remedy would exist, nonetheless deliberately refrained from adding to the many other repealing and jurisdiction-excluding provisions of the Act any provision making the Tucker Act inapplicable. Thus, while under the relevant case law it is not at all necessary that Congress realize that it is effecting a taking for a taking to be held to have occurred as a result of its actions, in this instance Congress knew exactly what it was doing and must be deemed to have opened the way for the one remedy which would make its action constitutional: *i.e.*, a remedy for just compensation under the Tucker Act.

Congress' attempt to structure the procedures established by the Act as a "reorganization," while doubtless related to its desire to avoid a taking if at all possible consistently with its other objectives, indicates no intent to exclude a Tucker Act remedy. Indeed, by its reference in Section 303(c)(1)(B) to the "constitutional minimum" of compensation required, Congress recognized that there is such a constitutional minimum which must be met; and, of course, it was well aware that the Tucker Act creates jurisdiction of claims against the United States in all actions founded upon the Constitution.

Congress was obviously further aware that the plentiful case law establishing a "constitutional minimum" in railroad reorganization rests upon the doctrine that, if the constitutional minimum is not met, there is a taking of property for which the Fifth Amendment to the Con-

stitution requires that just compensation be paid. See pp. 54-56, *infra*. "The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment." *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589 (1935).

For the above reasons, we think it plain that the Act cannot and should not be construed to repeal the Tucker Act *pro tanto* or to exclude the undoubted jurisdiction of the Court of Claims to entertain actions against the United States, founded upon the Constitution, for takings of property without just compensation. We would in addition point out, however, that if the Court entertains any doubt as to Congress' intention on this score, it will not, by holding in favor of the existence of the Tucker Act remedy, compel the expenditure of any public funds contrary to the desire of Congress. If, after such a holding, Congress believes that its intent has been frustrated or that the price for continuation of rail service in the Northeast is too high if it must meet constitutional standards, Congress will have more than adequate time, prior to any compulsory conveyance under the Act, to repeal the Act or to amend it so as to avoid a taking of property. The earliest time at which compulsory conveyances under the Act could be made is September 1975. This gives Congress ample time to consider whether it still wishes such conveyances to proceed after it is fully on notice of the legal consequences thereof. Moreover, under Section 208 of the Act, Congress must review the final system plan in any event, and will have the opportunity to disapprove or to amend the final system plan, or to amend the Act, if it is unwilling to pay the cost of the taking. There is no risk whatever that unintended or undesired obligations will be incurred.

In this sense the present situation is closely analogous to cases where a condemnation proceeding is instituted either

without a Congressional appropriation of funds or where Congress has imposed limitations on expenditures for the project in question which would or might be exceeded by a judgment in the condemnation action. In such situations the courts have uniformly held that the condemnation proceeding should go forward to judgment, and if Congress proved unwilling to appropriate the necessary funds the condemnation might be abandoned at any time prior to the actual taking. *E.g., Barnidge v. United States,* 101 F.2d 295, 298 (8th Cir. 1939); *Commercial Station Post Office, Inc., v. United States,* 48 F.2d 183, 185 (8th Cir. 1931); *United States v. 40.75 Acres of Land,* 76 F. Supp. 239, 245 (N.D. Ill. 1948). In *Catlin v. United State,* 324 U.S. 229, 241 (1945), the Court went further and, in order to save a "taking" statute from possible unconstitutionality, construed it as giving the Government, upon transfer of title, "only a defeasible title in cases where an issue concerning the validity of the taking arises. . . . The alternative construction, that title passes irrevocably, leaving the owner no opportunity to question the taking's validity . . . , would raise serious question concerning the statute's validity."

Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952), and *Hooe v. United States,* 218 U.S. 322 (1910), furnish no support for the conclusion of the court below. *Youngstown* involved a seizure of property carried out by the President without any Congressional authority; the Court simply held that such a seizure was not a "taking" by the United States for which just compensation would lie, but merely an illegal individual act which could be enjoined. Similarly, in *Hooe,* the Civil Service Commission had occupied the basement of a privately owned building even though Congress had repeatedly refused to appropriate money to pay the rent therefor, and a statute in force provided that " 'hereafter no contract shall be made for the rent of any building . . . until an appropriation therefor

shall have been made in terms by Congress, and that this clause be regarded as notice to all contractors or lessors of any such building or any part of building'." 218 U.S. at 331. The Court naturally held that there had been no taking by the United States, but merely an unauthorized trespass by officials, which could not create a claim against the United States. 218 U.S. at 335-36. "The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the Government." 218 U.S. at 336. Here, to the contrary, there is no dispute that Congress has fully and expressly authorized the acts which in law constitute a taking, and under established and unquestioned doctrine that is enough to constitute a taking by the United States for which just compensation is required. See p. 15, *supra*, and authorities there cited.

Far more similar to the present situation is *Silesian-American Corp. v. Clark*, 332 U.S. 469 (1947), where the "taking" statute at issue (the Trading with the Enemy Act) contained no provision for compensation, but where the Court declined to hold it unconstitutional on that ground, "We must assume that the United States will meet its obligations under the Constitution. Consequently, friendly aliens will be compensated for any property taken . . . ." 332 U.S. at 480. See also the circuit court opinion, *Silesian-American Corp. v. Markham*, 156 F.2d 793, 796-97 (2d Cir. 1946) (L. Hand, J.).

A Tucker Act remedy adequate to save the constitutionality of the Act cannot be excluded on the ground that no appropriation has yet been enacted to pay a judgment of the Court of Claims. The court below may have feared (*cf.* J.A. pp. 50-52) that Congress could either simply ignore such a judgment or that, once this Court has held a

Tucker Act remedy available, Congress could withdraw the jurisdiction of the Court of Claims to hear any claim arising from implementation of the Act. That Congress could constitutionally so legislate is at best highly questionable in view of the authorities cited at p. 21, *supra*, n. 4. Be that as it may, if such possibilities were enough to render takings unconstitutional, then every taking would be invalid and would have to be enjoined except those in which full payment was made, or at least an appropriation voted, prior to the taking itself. That is not the law; the contention that it is has been repeatedly and unanimously rejected by the courts. See cases cited at p. 26, *supra;* see also, *e.g., Glidden v. Zdanok*, 370 U.S. 530, 569-72 (1962); *Silesian-American Corp. v. Clark*, 332 U.S. 469 (1947); *Albert Hanson Lumber Co. v. United States*, 261 U.S. 581, 586-87 (1923); *Crozier v. Krupp*, 224 U.S. 290, 306 (1912); *Great Falls Mfg. Co. v. Attorney General*, 124 U.S. 581 (1888); *In re Spier Aircraft Corp.*, 137 F.2d 736 (3d Cir. 1943), *cert. denied sub nom. Coombs, Trustee, v. United States*, 321 U.S. 770 (1944); *City of Oakland v. United States*, 124 F2d 959 (9th Cir.), *cert. denied*, 316 U.S. 679 (1942); *Potomac Electric Power Co. v. United States*, 85 F.2d 243 (D.C. Cir.), *cert. denied*, 299 U.S. 565 (1936); *Lee v. United States*, 58 F.2d 879 (D.C. Cir. 1932); *Commercial Station Post Office, Inc., v. United States*, 48 F.2d 183, 185 (8th Cir. 1931); Note, The Constitutional Status of the Court of Claims, 68 Harv. L. Rev. 527, 531 & n. 33 (1956).

We fail to understand the court below's characterization of Court of Claims jurisdiction as "an implied remedy" (J.A. p. 41), its apparent belief that the jurisdiction was somehow repealed unless Congress indicated an affirmative intent to preserve it, or its view that simple recognition of a statutory remedy available for over a century would somehow amount to "judicial legislation" (J.A. p. 53). The

cases previously cited demonstrate that it is not necessary that the Act specifically mention a Tucker Act remedy in order for such a remedy to exist. Clearly the remedy does exist absent a Congressional withdrawal of jurisdiction from the Court of Claims. The court below did not find, nor could it have found, that Congress withdrew jurisdiction from the Court of Claims. It based its decision, rather, on the absence of any reference in the Act to the availability of a remedy in that court. But no such reference was required.

Moreover, the court did not give proper weight to Section 303(c)(1)(B) of the Act, which plainly recognizes that the compensation to be received for properties conveyed must satisfy the constitutional minimum. To hold the Act unconstitutional rather than affirming the availability of a Court of Claims action is to conclude that the intention of Congress to provide constitutionally acceptable compensation should be ignored merely because Congress omitted specifically to refer to the only means by which that intention can be carried out: the Tucker Act. That conclusion is erroneous.

Doubtless the court below would never have been led to such a view of the law were it not for its concern that a Court of Claims recovery in this case might be substantial. If the dollar amount possibily involved were less, the Court of Claims' obvious jurisdiction would hardly be a matter of controversy. But to ignore both Congressional enactments and every pertinent legal principle because of such a concern is "judicial legislation" if anything is.

For the reasons stated, the Act does not exclude a Tucker Act remedy for just compensation for any and all takings of property effected by the Act, including both the permanent taking resulting from compulsory conveyances of rail properties to Conrail and any temporary taking resulting from the compelled continuation of losing rail operations

past the point where erosion becomes unconstitutional if for the account of the estate.

II.

IF THE COURT BELOW WAS CORRECT IN CONCLUDING THAT NO COURT OF CLAIMS REMEDY EXISTS, THEN ITS CONCLUSION THAT THE ACT IS UNCONSTITUTIONAL WITH RESPECT TO INTERIM EROSION IS ALSO CORRECT.

The court below held that the failure of the Act to provide any compensation to the Penn Central estate for interim erosion, during the lengthy, indeed unlimited,[5] planning period while continuance of rail operations is required, is unconstitutional as a taking of property without adequate provision for the just compensation required by the Fifth Amendment. We believe that, if the court below was correct in also concluding that the Act precludes any remedy in the Court of Claims under the Tucker Act by which compensation for such erosion could be obtained, its conclusion as to the unconstitutionality of the Act with respect to erosion is plainly correct.

The Penn Central Reorganization Court reached a similar conclusion in its 180-day decision, holding the Act not "fair and equitable" with respect to the Penn Central (J.A. pp. 124-51) because of, *inter alia*, its failure to provide compensation for interim erosion. Similar views have also been suggested by the Court of Appeals for the Third Circuit in *In re Penn Central Transportation Co.* (Columbus Option Appeals), 494 F.2d 270, 283 (1974), *petition for cert. filed*, 42 U.S.L. Week 3633 (U.S. May 8, 1974), No. 73-

[5] See p. 41, *infra*, n. 13.

1672;[6] and were foreshadowed in early 1973 by the Penn Central Reorganization Court. *In re Penn Central Transportation Co.*, 355 F. Supp. 1343, 1344, 1346 (1973).[7]

The court below correctly held that it was not necessary to decide when the point of unconstitutionality had been or would be reached in order to hold that the Act's failure to provide for interim erosion contravenes the Fifth Amendment. Likewise, no findings were necessary as to the amount of erosion which has taken place up to the present time. That it has been massive is indisputable. The Government conceded [8] in the Reorganization Court that since the Section 77 petition was filed in June 1970 the financial erosion alone — new obligations which prime all pre-bankruptcy claims — consists of Trustees' certificates ($100 million), accrued and deferred state and local taxes ($195 million, which will increase by the end of 1975 by another $118 million), and an increase in current liabilities of $185 million — a total of between $457 and $480 million, with $118 million more inevitable. So far as unsecured creditors — and equity holders — are concerned, one must

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[6] The court said: "If, as some of the reports filed by the Trustees suggest, it is already clear that such a reorganization is not feasible, then this reorganization is already at the point where the erosion of the estate in deficit operations must cease and a liquidation alternative must be considered if the secured creditors or other interested parties insist upon such consideration." Since that statement was made, the Penn Central has been found, in the "120-day" decision, to be not reorganizable on an income basis within a reasonable time. J.A. p. 103.

[7] The court said: "Under any view of the matter, it seems clear that the point of unconstitutionality is fast approaching, if it has not already arrived . . . . On the basis of the record to date, it appears highly doubtful that the Debtor could properly be permitted to continue to operate on its present basis beyond October 1, 1973."

[8] Argument of May 6, 1974, on Motion of New Haven Trustee to Dismiss Section 77 Petition, Tr. 12, 284-12, 288.

add as much as $104 million in deferred mortgage and collateral bond interest, subject to the possibility that not all of these obligations are fully secured. And added to all that is the continuing — indeed escalating — physical erosion of the Penn Central rail plant.[9] The court below, after analysis of the evidence before it, concluded that the Penn Central estate between June 21, 1970 and the end of 1973 had sustained ordinary net losses in the amount of $851 million (J.A. p. 36). While there may be some offsets, as, for example, possible increases in Penn Central's net equity in equipment as payments are made on certain equipment obligations, offsets are minor in comparison.

The Government is in error in asserting that an alleged — and unquantified — appreciation in the value of non-rail assets can be considered in the offset category. This Court has made it clear that the public interest cannot compel the continuation of deficit rail operations even though non-carrier operations of the enterprise in question generated a profit that more than offset the carrier losses. *Brooks-Scanlon Co. v. Railroad Comm'n of Louisiana*, 251 U.S. 396 (1920).

Moreover, using possible gains in the value of some assets to offset the erosion from rail losses would be unfair in Penn Central's situation. The numerous classes of claimants to the Penn Central estate hold claims representing quite different interests in different assets. For example, some of the secured creditors have liens primarily on rail assets while others have liens primarily on non-rail assets. Continued railroad losses take the property of claimants primarily entitled to payment from the rail assets

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[9] See Report of Trustees dated April 3, 1974, Item 10, Joint Documentary Submission (J.D.S.). Ten copies of the Joint Documentary Submission, which supplements the Joint Appendix, have been lodged with the Clerk.

while preventing claimants primarily entitled to payment from non-rail assets from collecting their debt. While each class of claimants is affected differently by a required continuance of rail operations, the result is unfair to all claimants.

The Government's arguments based on appreciation of assets, both rail and non-rail, essentially amount to the contention that the creditors can be made to suffer the entire burden of inflation by being endlessly delayed from any satisfaction of their claims while the face amount thereof steadily declines in real value. If the creditors' claims had been satisfied when due, or were satisfied today, they of course would be free to invest the proceeds in short-term or non-fixed-dollar-amount securities so as to avoid inflation losses, and also to obtain the higher rates of interest prevailing in an inflationary period. If the Government is correct that inflationary paper "increases" in asset value can cancel out erosion from income-statement losses (even though, on its theory, there is no way the creditors can realize *any* asset value), then — if inflation is great and rapid enough — there is no erosion at all, and on the Government's theory the creditors can be forced to wait indefinitely, receiving nothing, while the value of their claims is effectively confiscated. We submit that no court could accept so unconscionable a theory.

Finally, all the Government's contentions as to methods computing erosion, which we dispute, are beside the point. The Government has conceded in its brief to the Special Court there has been very substantial erosion, and nowhere denies that it will continue. And the Government stops short of contending that such erosion necessarily fails and will continue to fail to reach constitutional proportions. These concessions require, we submit, that the Court cannot find the Act constitutional unless it holds that, if

erosion has reached or reaches constitutional proportions, a Tucker Act remedy is available. The court below unanimously held that "a significant possibility exists that a point of erosion either has been or may soon be reached so that it can be said that plaintiffs' contention of interim unconstitutional taking by continued loss operations is ripe for adjudication" (J.A. p. 40). That holding is plainly correct and requires that the statute be held unconstitutional unless a remedy for such erosion is provided. Since the Act requires continuation of losing rail operations wholly without regard to whether erosion has passed the point of unconstitutionality, it is necessarily unconstitutional (absent a Court of Claims remedy) whether the point of unconstitutionality has been passed already or whether that point will be reached in the future.

A. Deficit Rail Operations May Not Constitutionally Be Required Without, at Least, the Assurance of Successful and Prompt Reorganization.

The present situation in regard to the Penn Central is unprecedented only in terms of scale and public importance; it is by no means unprecedented in principle. In the words of Mr. Justice Holmes, "[I]f the [railroad] be taken to have granted to the public an interest in the use of the railroad, it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss." *Brooks-Scanlon Co. v. Railroad Comm'n of Louisiana*, 251 U.S. 396, 399 (1920), cited with approval in *Bullock v. Railroad Comm'n of Florida*, 254 U.S. 513 (1921).

In *Railroad Comm'n of Texas v. Eastern Texas R.R.*, 264 U.S. 79 (1924), the Supreme Court again emphasized the right to cease an operation which can only be

conducted at a loss: "And if at any time it develops with reasonable certainty that future operation must be at a loss, the company may discontinue operation and get what it can out of the property by dismantling the road. To compel it to go on at a loss, or to give up the salvage value, would be to take its property without the just compensation which is a part of due process of law." 264 U.S. at 85.

The doctrine of these cases was reaffirmed several times in the New Haven reorganization proceedings, wherein the courts concluded that the Constitution gave the New Haven the right to cease operation and to liquidate. See *New York, N.H. & H.R.R. Bondholders' Committee v. United States*, 289 F. Supp. 418, 440-41 (S.D.N.Y. 1968); *In re New York, N.H. & H.R.R.*, 289 F. Supp. 451, 454, 459-60 (D. Conn. 1968). On remand the Interstate Commerce Commission argued that there was no constitutional right to compel liquidation of a railroad operating at a loss and that the Commission could require continued operation for as long as the public interest demanded. 334 I.C.C. 25 (1968). On further review both the reorganization court and the three-judge court rejected that argument and again recognized the constitutional rights of the New Haven creditors. See *New York, N.H. & H.R.R. First Mortgage 4% Bondholders' Committee v. United States*, 305 F. Supp. 1049, 1055 (S.D.N.Y. 1969); *In re New York, N.H. & H.R.R.*, 304 F. Supp. 793, 801-04 (D. Conn. 1969). Judge Anderson's opinion was particularly emphatic:

> "This Court, therefore, concludes that *Brooks-Scanlon* and subsequent cases, reaffirming the validity of its holding, are still applicable and determinative. The Commission is unable through a groundless construction of statutes, as noted above, to eliminate the constitutional guarantees applicable to this

> case. And it may not arrogate to itself a vast expansion of power through a strained interpretation of Supreme Court decisions." 304 F. Supp. at 804.

This Court affirmed Judge Anderson's conclusions and order. *New Haven Inclusion Cases,* 399 U.S. 392, 489-95 (1970).

Other cases have also acknowledge that *Brooks-Scanlon* set forth the basic constitutional standard. See, *e.g., In re Penn Central Transportation Co.* (Columbus Option Appeals), 494 F.2d 270, 278-82 (3d Cir. 1974), *petition for cert. filed,* 42 U.S.L. Week 3633 (U.S. May 8, 1974), No. 73-1672; *In re Central R.R. of New Jersey,* 485 F.2d 208 (3d Cir. 1973); *City of New York v. United States,* 337 F. Supp. 150, 160 (E.D.N.Y. 1972); *Brooklyn Eastern District Terminal v. United States,* 302 F. Supp. 1095, 1099 (E.D.N.Y. 1969); *Jay Street Connecting R.R. v. United States,* 174 F. Supp. 609, 615 (E.D.N.Y. 1959).

Even when there may be some hope for a reorganization of the railroad which will restore it to viability, the prohibition against the taking of property without payment of just compensation limits the time during which operations at a loss may be required in the public interest. The rights of creditors may be invaded only for a reasonable time, *New Haven Inclusion Cases, supra,* 399 U.S. at 484-93; *In re New York, N.H. & H.R.R., supra,* 289 F. Supp. at 459, and even then only if there is solid prospect that within a reasonable time a reorganization will be effected. *In re Third Ave. Transit Corp.,* 198 F.2d 703 (2d Cir. 1952); *In re New York, N.H. & H.R.R.,* 281 F. Supp. 65 (D. Conn. 1968).

A "reasonable time," in such circumstances, must be determined in light of the particular facts of each

reorganization. See *New Haven Inclusion Cases, supra,* 399 U.S. at 490-93. In this connection, a review of the facts in the New Haven proceeding is instructive. Early in that proceeding, it became clear that the New Haven could not survive as an independent railroad, and that the only alternative to liquidation was its inclusion in a larger rail system. In 1962 the New Haven petitioned for inclusion in the proposed merger of the New York Central and Pennsylvania Railroads. The Trustees' decision to seek inclusion was supported by the New Haven's creditors. The Commission authorized the merger of Penn and Central in 1966, but conditioned its order upon the inclusion of New Haven in the merged system.

Inclusion did not, however, promptly occur. Extensive litigation over the price to be paid for New Haven's assets ensued. In 1967, after the New Haven's petition for inclusion had been approved, two of the several active bondholder groups filed a motion to dismiss the Section 77 proceeding. This motion the reorganization court denied in February, 1968, relying primarily on its hope that final approval and implementation of the first step of the New Haven plan was near at hand. *In re New York, N.H. & H.R.R.*, 281 F. Supp. 65, 69 (D. Conn. 1968). The court's hope, however, was not realized. Both the reorganization court and the three-judge court reviewing the Commission's action approving inclusion found grounds for reversal. The result was that, only six months after it had denied the motion to dismiss, the reorganization court on its own motion ruled that if inclusion were not effected by year's end it would no longer permit the New Haven to continue its operations at a loss and would entertain a motion to dismiss the proceeding. *In re New York N.H. & H.R.R.*, 289 F. Supp. 451 (D. Conn. 1968):

> "[T]his court finds that the continued erosion of the Debtor's estate from operational losses after the end of 1968 will clearly constitute a taking of the Debtor's property and consequently the interests of the bondholders, without just compensation. It is therefore constitutionally impermissible, and obviously no reorganization plan which calls for such a taking can be approved." *Id.* at 459.

The reorganization court thus ruled that it must call a halt even though an ultimate solution was assured. The court's drastic action produced results — the inclusion of New Haven in the Penn Central on December 31, 1968 — and subsequently was specifically approved by the Supreme Court in the *New Haven Inclusion Cases, supra,* 399 U.S. at 415.

The *New Haven* precedent therefore establishes that railroad owners and creditors may be compelled to suffer erosion only if there is a feasible, assured means for reorganizing the railroad, and even then only if that reorganization is effected within a reasonable period. It is plain that the courts would never have tolerated erosion to the extent or for the length of time they did in *New Haven* if the inclusion remedy had not been available, and if the course pursued by the New Haven Trustees in seeking inclusion had not had the consent and support of the New Haven's creditors in the early years of the proceeding.

In the present situation, the Government has relied in the Special Court on such cases as *Continental Bank v. Chicago, R.I. & P. Ry.*, 294 U.S. 648 (1935), and *Reconstruction Finance Corp. v. Denver & R.G.W.R.R.*, 328 U.S. 495 (1946), in arguing that the Act's failure to provide for erosion is constitutional. That reliance is wholly

misplaced.[10] In those cases it was unquestioned that the respective railroads were viable; indeed they had been earning net operating income during the reorganization proceedings, and no one contended that the fair market value [11] of the properties was greater than their going-concern value, nor did anyone propose liquidation as in the best interests of the estate or even of any particular creditor. The problem in those early reorganizations, as is well known, was the scaling down of debt so that the level of fixed charges would be manageable in terms of the level of earnings; none of them presented problems or issues remotely comparable to those involved here.

And, as we have seen, the *New Haven* litigation clearly establishes that, while some erosion is tolerable in certain circumstances, there is a point beyond which continued loss operations become unconstitutional if for the account of the estate. Whether that point has yet been reached with respect to the Penn Central, or when it will be reached, is not necessary to determine in this proceeding. But since no one can deny the possibility of unconstitutional erosion, a determination that any such erosion is not for the account of the estate but is compensable under the Tucker Act is essential to make it possible to hold the Act — which requires continuing erosion — constitutional.

The Government will presumably argue, as it has argued in the Special Court, that the Act provides sufficient

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[10]The issue in *Continental Bank*, which involved the customary Section 77 injunction against sales of collateral, arose at the very outset of the reorganization proceedin, and the injunction could "at any time be dissolved upon application and proper notice and showing," 294 U.S. at 685. In *Denver*, the issue was whether erosion that had already occurred, apparently without objection, should be borne by senior or junior creditors. The Court simply applied the strict-priority rule.

[11]See pp. 54-55, *infra*.

assurance of an ultimately successful reorganization, through the Conrail device, as to justify some continued erosion at the expense of the estate and its creditors. There are at least three answers. First, we think that, once the owners of the railroad's estate squarely raise the issue and seek to exercise their rights, it is highly questionable whether continued loss operations may be required solely in the public interest without some form of compensation for the consequent erosion of their property. See *New Haven Inclusion Cases*, 399 U.S. at 492-93.[12] Second, the Act provides no assurance of any successful reorganization at all, let alone within any definite time limit. (See p. 41, *infra*, n. 13.) Third, an analysis of the provisions and objectives of the Act with respect to Conrail (pp. 57-61, *infra*) makes it dubious in the extreme that Conrail will ever produce income, let alone that it will be sufficiently profitable to pay dividends giving its stockholders — chiefly the present Penn Central creditors — any return remotely comparable to the fair value of the properties they would be forced to surrender. For these reasons, there is no constitutional basis on which loss operations can be required indefinitely at the expense of the estate.

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[12] In *New Haven*, moreover, the estate was guaranteed the value of its properties as of December 31, 1966, a date prior to the first objection by any creditor. *New Haven Inclusion Cases*, 399 U.S. at 492. Thus the estate was wholly protected from any physical erosion caused by deterioration of its properties.

B. The Act, While Requiring Continuance of Deficit Rail Operations, Contains No Provisions Compensating the Penn Central Estate for the Erosion Incurred Thereby.

Absent a remedy in the Court of Claims, the Act fatally infringes the constitutional rules discussed above in requiring continued rail operations for an indefinite time [13] without any provision compensating the estates in reorganization for the resulting erosion.

The Government has argued in the Special Court that nothing in the Act precludes that court, in determining the compensation to be paid the bankrupt estates under Section 303(c) of the Act, from making an allowance for any unconstitutional erosion that may have been suffered. That the Special Court could make such an award is by no means clear from the text of Section 303(c), which is at least equally compatible with the construction that the court may allow only compensation for the value of the properties at the time of their conveyance.[14] But even if the Govern-

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[13]While time limits are specified in the Act for the steps up to and including the mandatory transfer of properties *if* either House of Congress does not disapprove the final system plan, there are no limitations whatever on how many plans Congress may disapprove, and no time limitation on USRA in preparing plans subsequent to disapproval of the first such plan. Section 208. Thus, if either House disapproves any aspect of the first plan submitted, the purportedly tight time schedule established by the Act collapses altogether, and the period for which Section 305(f) requires loss operations to continue is without limit.

[14]The legislative history is clear: "the value of the consideration must equal the fair and equitable value of the rail properties as of the date of the conveyance," and "the court is required to return any excess in the amount of the consideration." Regional Rail Reorganization Act of 1973, H.R. Rep. No. 93-260 of the Committee on Interstate and Foreign Commerce, p. 53 (93d Cong., 1st Sess. 1973).

ment is right, the Special Court would be powerless to grant effective and adequate compensation for erosion, just as it would be powerless to award effective compensation for the value of the properties. As shown at pp. 56-61, *infra*, the Special Court is severely limited in the types and amount of compensation it can award, including, as a last resort, a judgment against Conrail which may well be worthless. Since the Special Court will have no power to enter a judgment against the United States, it is apparent that it will be powerless to award just compensation under the Fifth Amendment for any taking of property that may occur by virtue of the Act, whether with respect to interim erosion or otherwise.

The Act affords no prospect for compensating the estate for the erosion which it has already suffered, and only conjecturally can it mitigate even the continuing physical erosion of those properties inclusion of which in the final system plan can reasonably be anticipated. Section 213 of the Act provides authorization of $85 million to be made available to the Secretary of the Department of Transportation for payment to trustees of railroads in reorganization of "such sums as are necessary for the continued provision of essential transportation services by such railroads." These funds, supplied to the Penn Central Trustees thus far in the amount of $20.6 million (J.D.S. Items 22, 31),[15] represented emergency assistance to keep Penn Central in operation on a day-to-day basis, not to stem erosion.[16] In any event, the amount authorized is obviously

[15]The second grant, approved April 30, 1974 (J.D.S. Item 31), was in effect a "drawing account" for $18 million. The Trustees actually drew down $9.8 million.

[16]The Federal Railroad Administrator, to whom authority to make grants under Section 213 has been delegated by the Secretary of Transportation (39 F.R. 8919), in response to a request for a Section 213

(continued)

inadequate, even if the full amount had been appropriated, which it has not.[17]

Section 215 authorizes the Secretary, with the approval of USRA, to enter into agreements with railroads in reorganization for the acquisition, improvement or maintenance of property which will be included in the final system plan, to be financed by obligations of USRA in a maximum amount of $150 million, which must be assumed by Conrail when it comes into existence. Any values which are created by the use of these funds are to be deducted from the purchase price when the properties are conveyed to Conrail. These funds, depending on how they were used, could possibly arrest some of the physical erosion of the estate. However, they clearly are not available to compensate the estate for the interim financial erosion which has occurred and which is continuing.[18] It should be added that, although the final grant agreement under Section 213

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[16] (continued)
grant from the trustee of the Central Railroad of New Jersey "to protect against further erosion of the estate," advised the trustee on May 10, 1974: "In our opinion, the granting of financial assistance to protect against further erosion of the estate, is not in accordance with the purpose for which funds under Section 213 of the Act have been appropriated." (A copy of the letter is attached to this brief as Annex A.) Also, the conference report on the appropriation under Section 213 (H. Rep. No. 93-1070, 93d Cong., 2d Sess. p. 20) stated: "The purpose of the cash assistance is to keep the bankrupt lines running until the final plan of the new system is drawn up and implemented."

[17]The Foreign Assistance and Related Programs Appropriation Act of 1974 (P.L. 93-240) appropriated $35 million. The Second Supplemental Appropriation Act of 1974 (P.L. 93-305) appropriated an additional $39.8 million, for a total which is $10.2 million less than the amount authorized.

[18]Capital improvements can ultimately affect losses by reducing expenses, but the lead time in making such improvements is such that any benefits would be of little or no immediate significance.

required Penn Central to submit proposals for the use of Section 215 funds by May 15, 1974 (Par. 1(h), Item 15, J.D.S.), which was done, no Section 215 funds have yet been made available (by issuance and sale of USRA obligations), and no proposals under Section 215 for Penn Central properties have been approved.

The Act, moreover, forbids, for all practical purposes, any mitigation of the interim erosion by way of terminating unprofitable operations. Congress made clear its intention in effect to freeze the level of operations existing on January 2, 1974, in order to give USRA the maximum amount of choice as to what would be in the final system plan. When it made grant funds available by Section 213 to keep the bankrupt railroads running during the planning period, it decreed that "recipients must agree to maintain and provide service at a level no less than that in effect on the date of enactment of this Act." Again, in Section 304(f), it provided that after January 2, 1974,

> "no railroad in reorganization may discontinue service or abandon any line of railroad other than in accordance with the provisions of this Act, unless it is authorized to do so by the Association [USRA] and unless no affected State or local or regional transportation authority reasonably opposes such action."

The Association has, thus far at least, not authorized any abandonments, and indeed does not appear to have established any policies to guide disposition of abandonment requests. Items 64 and 65 of the Joint Documentary Submission are, respectively, the requests for approvals of abandonments which the Penn Central Trustees have submitted to USRA, and the USRA response that it was, in effect, not yet ready to deal with them.

There are, moreover, questions of interpretation of the Act which have not yet been resolved. The apparent grant of authority to USRA to authorize abandonments under Section 304(f) may supersede the authority of the Interstate Commerce Commission under Section 1(18) of the Interstate Commerce Act, or it may require that both the Interstate Commerce Act and Section 304(f) be complied with. Since USRA has not acted on any applications, the issue has not yet been litigated, as no doubt it will be.

As is apparent from what has already been said, USRA has given no indication of the standards or policies it will apply in exercising its authority under Section 304(f). State, local and congressional sources have been adamant in the view that USRA should seldom, if ever, authorize any interim abandonments. When the second grant agreement under Section 213 between the Trustees and the Federal Railroad Administrator was shown to contain a provision requiring the Trustees to apply to USRA for permission to abandon a line whenever requested to do so by the Secretary of Transportation, it was vigorously criticized by Congressman Adams, who had been an active sponsor of the Act, as "completely contrary to the intent of Congress in adopting Sections 213, 215 and 304(f) of the Act." He added: ". . . our intention was to preserve the status quo or rail service in the Northeast during this critical time and to allow full public comment on abandonment procedures.[19] A similar criticism of the provision in the grant agreement was made by Public Counsel of the Interstate Commerce Commission (Cong. Rec., May 14, 1974, p. S 7958).

Prior to the Act, but subsequent to the filing of the petition under Section 77, the Penn Central Trustees had actively pursued a program of abandonments of un-

[19]A copy of Mr. Adams' letter is attached to this brief as Annex B.

profitable lines, which they regarded as one of the four essential requisites of a successful reorganization. See *e.g.*, Trustees' Report of July 1, 1972 (J.D.S. Item 6). From June 21, 1970, to the end of 1973, the Interstate Commerce Commission had approved the abandonment of 1,511 miles of line.[20] On January 3, 1974 — the date of enactment of the Act — applications to abandon 2,222 additional miles were pending before the Commission. There has been no action on any application since that date.[21]

The most serious erosion problem created by the Act is not the complete standstill it has imposed, at least so far, on applications for abandonment of particular rail lines whose unprofitability is undoubted. No one contends that Penn Central could be made profitable solely by abandonment of lightly used (in many cases unused) branch lines. The problem of viability is, rather, a problem of the Penn Central system as a whole; and the infirmity of the Act, absent a Tucker Act remedy, is that it requires continuation of that system's operations during a lengthy, indeterminate planning process without any assurance either of ultimate viability or of compensation to the estate for the erosion suffered in the meantime. If such compensation is not assured by a Tucker Act remedy, continuation of rail operations on the present basis cannot be sustained.

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[20]Application to abandon some 90 miles were pending at the Interstate Commerce Commission on June 20, 1970.

[21]It would be inaccurate to attribute the lack of ICC activity during the past seven months entirely to Section 304(f). Since 1973 the Commission has been engaged in litigation concerning the procedures it must follow under the National Environmental Policy Act (42 U.S.C. § 4331). See *Harlem Valley Transportation Ass'n v. Stafford*, No. 73-2496, 2d Cir. June 18, 1974. That problem has recently been resolved, and the Commission must now confront the question of what authority it has in the light of Section 304(f).

The Government will doubtless argue that the Act provides sufficient prospects for a successful reorganization of Penn Central through conveyance of rail properties to Conrail, within a sufficiently short period of time, as to warrant a requirement that the Penn Central estate bear the burden of continuing erosion until the process can be completed. For the reasons already indicated, this argument represents a misinterpretation of the *New Haven* litigation and other applicable law. An additional defect in the argument is that, for the reasons set forth at pp. 57-61, *infra*, it is impossible to conclude at the present time that reorganization through the Conrail device has any reasonable prospects of success or viability. Conrail cannot presently be said to provide any prospect of a successful reorganization even remotely comparable to the assured inclusion in the Penn Central system which was held to warrant, for a time, continued New Haven loss operations. Congress may never permit a Conrail system to come into existence at all; if it does permit it, the system may be hopelessly unviable from the outset; even if it is operationally viable, there is no assurance that the estates will be adequately compensated for the properties they would convey to it. Such shadowy, tentative and amorphous prospects can furnish no justification whatever for an indefinite compelled continuation of Penn Central rail service, which will result in the simple confiscation of the property of Penn Central and its creditors.

III.

THE CONSTITUTIONAL ADEQUACY OF THE ACT'S PROVISIONS FOR COMPENSATION FOR THE PERMANENT TAKING CONTEMPLATED THEREBY IS RIPE FOR DECISION.

The majority of the court below declined, on the ground of prematurity, to decide the question whether the Act infringes the Fifth Amendment on the ground that, absent a Tucker Act remedy, the Act does not assure to the Penn Central estate the just compensation which the Constitution requires for the ultimate mandatory conveyance of its property to Conrail. The majority held that a decision on this issue was premature because three "contingencies" would have to be satisfied before the conveyance could take place: (1) the "180-day" decision with respect to Penn Central; (2) approval of the final system plan by Congress, and (3) an order by the Special Court directing that the conveyance take place (J.A. p. 24). We think it clear, as did Judge Fullam (J.A. pp. 57-60), that none of these "contingencies" makes decision of the issue presently premature.

(1) The 180-Day Decision

The 180-day decision has been made since the decision of the court below was entered. On July 1, 1974, the Penn Central Reorganization Court, after hearing pursuant to Section 207(b), found that the process of the Act was not fair and equitable to the Penn Central estate (J.A. p. 152). Essentially, the decision rested on the same constitutional objections to the adequacy of the compensation provided by the Act which are presented by the present cases before this Court. The issues dealt with in the Reorganization Court's opinion — erosion, assurance that ultimate compensation will be adequate, and the Tucker Act remedy — are all squarely before this Court in the present litigation.

The Reorganization Court's 180-day decision is now on appeal to the Special Court. The same issues are all presented there. The Special Court's decision, which is not appealable (Section 209(b)), will either irrevocably commit Penn Central to reorganizing under the Act or will irrevocably withdraw Penn Central from operation of the Act. For this Court to decline decision of the ultimate-compensation issue would mean that the Special Court's crucial decision as to whether or not Penn Central will reorganize under the Act will necessarily be made without any authoritative decision by this Court of some of the critical constitutional questions which all parties agree must determine the Special Court's disposition.

For example, if the Special Court agrees with the Reorganization Court that the Act fails to provide the assurance of just compensation, and that no Tucker Act remedy is available, then the Penn Central will irrevocably be denied reorganization under the Act, even though the Special Court may be wrong. Unquestionably, there is a vital public interest in Penn Central's reorganizing under the Act if that is constitutionally permissible. The Act itself affirms (Section 207(b)) "the strong public interest in the continuance of rail transportation in the region pursuant to a system plan devised under the provisions of this Act." For this Court now to defer decision would mean that this vital public interest might be wholly frustrated because of an *erroneous* determination by a lower court that a remedy which saves the constitutionality of the Act does not exist.

Conversely, if the Special Court holds that a Tucker Act remedy is available and that it saves the constitutionality of the Act, and therefore irrevocably commits the Penn Central to reorganization under the Act, it is possible that years later the Court of Claims or this Court — which of course would not be bound by a Special Court decision concerning Court of Claims jurisdiction — might determine that the

Special Court was wrong on that point and that no Tucker Act remedy is available. It would then be discovered that the Penn Central estate had been unconstitutionally deprived of its property — but the deed would have been irrevocably done long previously.

Thus there is fully satisfied here the requirement "that federal judicial power is to be exercised to strike down legislation . . . only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action." *Poe v. Ullman,* 367 U.S. 497, 503-04 (1961). The Penn Central Trustees, whose interest is to reorganize under the Act if an adequate Tucker Act remedy exists, are threatened with a Special Court decision irrevocably excluding Penn Central from the Act on a ground which we believe erroneous: *i.e.,* that there is no Tucker Act remedy to assure just compensation for a mandatory conveyance of property under the Act. And both the Trustees and the Penn Central creditor parties are faced with an unconstitutional confiscation of their property if the Special Court erroneously determines that the Act is fair and equitable even without a Tucker Act remedy, or if it holds that a Tucker Act remedy exists and on that basis irrevocably orders Penn Central reorganization under the Act, but it is later authoritatively held in other proceedings that a Tucker Act remedy does *not* exist.

Under Section 207(b) of the Act, the Special Court must announce its decision by September 29, 1974, before these cases can be submitted to this Court. Of course, in the unlikely event that the Special Court were to exclude Penn Central from the Act without regard to the constitutional questions before this Court, or without allowing for adjustments in its decision in the light of this Court's subsequent action, the cases here could be mooted. No party in the Special Court is urging such a course of action. The

Penn Central Trustees are urging the Special Court to affirm the Reorganization Court's 180-day decision, with a condition that if this Court subsequently affirms an adequate Tucker Act remedy it will amend its decision accordingly. It surely is to be expected that, whatever the Special Court decides, its order will leave room for modification in the light of this Court's decision. We shall of course promptly inform this Court of the Special Court's action when that occurs.

(2) **Congressional "Approval"**

The majority below was apparently under the erroneous impression that the Act makes Congressional approval a prerequisite to effectiveness of the final system plan (J.A. pp. 24, 25), and such Congressional approval was one of the three contingencies which the majority held to make consideration of the mandatory-conveyance issue premature. In fact no Congressional approval is required by the Act. As Judge Fullam's opinion pointed out (J.A. p. 57), under Section 208(a) the plan takes effect unless either House of Congress affirmatively acts to express disapproval. If Congress takes no action within 60 days, the plan becomes effective. No case that we know of has ever held that decision of a legal question is premature because that question might be mooted by some subsequent action of Congress.

Moreover, as Judge Fullam also pointed out (J.A. pp. 57-58), even if Congress disapproves a final system plan, USRA is subject to a continuing duty to present revised plans until one becomes effective through the absence of Congressional action to veto it. Thus the clear mandate of the Act is that *a* final system plan will become effective; and, since no one disputes that *any* final system plan under the Act must provide for the mandatory conveyance of Penn Central properties to Conrail, the adequacy-of-

compensation issue is not premature, regardless of whether it is the first plan or a subsequent one which becomes effective.

The majority below might have had a point if the constitutional issue here presented depended in some way on the *content* of the final system plan which eventually becomes effective. But there is no such dependence. Because of the provisions of the Act limiting compensation, *any* final system plan must necessarily fail to provide the assurance of just compensation which is essential, absent a Tucker Act remedy, to make the Act constitutional.

(3) The Mandatory Nature of the Conveyance

The third "contingency" offered by the majority below to avoid decision is the order of the Special Court under Section 303(b)(1) requiring conveyance of Penn Central property to Conrail. The majority may have believed, though it nowhere stated, that the Special Court would have discretion to refuse to order the conveyance if it believed there was some problem with the adequacy of the consideration. We think it quite clear, as did Judge Fullam (J.A. p. 58), that the Special Court's action under Section 303(b)(1) is mandatory and ministerial, and thus cannot be regarded as a contingency.

While the Special Court is granted, by Section 209(b), the powers of a district judge in Section 77 proceedings — including those of a reorganization court, which would appear to afford it general equity powers — the Act expressly states that "the special court shall . . . order" the transfer. Although such words are not always given a mandatory meaning when adressed to a court of equity, *Hecht Co. v. Bowles,* 321 U.S. 321 (1944), there are other strong indications in the Act that Congress intended that the Special

Court would be performing, at that stage, no more than a ministerial act. The Act sets up specific, tight time schedules obviously designed to bring Conrail to operating status as quickly as possible. This purpose is emphasized by the last sentence of Section 303(b)(2): "Such conveyance [by the Special Court] shall not be restrained or enjoined by any court." A decision by the Special Court to accomplish what all other courts are forbidden to do by refusing to order the transfer, once the "process" of the Act had reached that point, would not only cause delay, but would leave the whole process up in the air. There is no provision in the Act for appellate review, by this Court or a Court of Appeals, of such a decision of the Special Court; this strongly indicates that ordering the transfer was intended as a ministerial act, since all other initial decisions by the Special Court were made subject to judicial review. Nor is there any provision in the Act by which to revise the final system plan at that stage, as there is if it is initially rejected by Congress (Section 208(b)). Moreover, because the time is so short (10 days), the Special Court would have to act on its own motion or have, at most, a summary proceeding prior to taking any such action.

(If the Special Court could refuse to order the transfer, the erosion problem would become even more aggravated, since the erosion would be incurred without any assurance of "light at the end of the tunnel" in the form of a mandatory transfer for which at least some compensation would be due.)

Even if the Special Court had some discretion in ordering the conveyance — which under the Act it plainly does not have — it is undisputed that its action is not subject to review in this or any other court. If, therefore, the Special Court is to have any guidance from this Court on the constitutional issues which would be before it in the highly unlikely event it determined that it had discretion, that

guidance must come in a decision of the present cases. If that guidance is not given, the same dilemma, desired by no one, would exist as will exist if the Special Court must act now in the absence of a decision here: it would have to include Penn Central under the Act, or alternatively to exclude it, on constitutional grounds on which its opinion might well be wrong, with no opportunity for anyone to find out whether it was wrong or not. Such a result would irretrievably injure the parties, and would do violence to the public interest as well.

IV.

THE ACT'S PROVISIONS REGARDING COMPENSATION FAIL TO ASSURE THAT FIFTH AMENDMENT STANDARDS WILL BE SATISFIED.

The provisions of the Act dealing with the consideration which would be received by the Penn Central estate — absent a Tucker Act remedy — for the rail properties it would be required to transfer to Conrail must be assessed against the body of law which establishes that when properties of a railroad in reorganization are transferred by Government decree to a new owner, free and clear of liens and claims of the former owner, the Fifth Amendment fixes a minimum to the amount of consideration the owners must receive. Indeed, Section 303(c)(1)(B) recognizes that the Constitution sets a minimum in such circumstances. No one denies that a constitutional minimum exists, though there are disagreements as to its definition. But however the constitutional minimum is defined (with one exception, see p. 60, *infra*), it is clear that the Act fails to assure that it will be met.

We believe that the constitutional minimum is the fair market value[22] of the properties in question, free of any

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[22]This term is more satisfactory than the often-used "liquidation value," because the latter is sometimes improperly read as recognizing

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obligation of continued railroad use. See *New Haven Inclusion Cases*, 399 U.S. 392, 489-495 (1970); *In re Penn Central Transportation Co.*, 372 F. Supp. 1123 (E.D. Pa. 1974); *New York, N.H. & H.R.R. First Mortgage 4% Bondholders' Committee v. United States*, 305 F. Supp. 1049 (S.D.N.Y. 1969); *In re New York, N.H. & H.R.R.*, 304 F. Supp. 793, 798-804 (D. Conn. 1969); *In re New York, N.H. & H.R.R.*, 289 F. Supp. 451, 454-455, 459-460 (D. Conn. 1968); *New York, N.H. & H.R.R. First Mortgage 4% Bondholders' Committee v. United States*, 289 F. Supp. 418, 440-441 (S.D.N.Y. 1968).

Fair market value is the constitutional minimum because, as these and other cases have established, if a railroad has neither earnings nor the reasonable prospect of earnings, its owners have a constitutional right to withdraw their property from operation by them as a railroad and to realize the value obtainable from its sale. See also *Railroad Comm'n of Texas v. Eastern Texas R.R.*, 264 U.S. 79 (1924); *Bullock v. Railroad Comm'n of Florida*, 254 U.S. 513 (1921); *Brooks-Scanlon Co. v. Railroad Comm'n of Louisiana*, 251 U.S. 396 (1920); *In re Penn Central Transportation Co.* (Columbus Option Appeals), 494 F.2d 270 (3d Cir. 1974), *petition for cert. filed*, 42 U.S.L. Week 3633 (U.S. May 8, 1974), No. 73-1672; *In re Central R.R. of New Jersey*, 485 F.2d 208 (3d Cir. 1973); *City of New York, v.*

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[22] (continued)
only values for non-rail uses. To the extent that the highest and best values of particular rail properties of the estate may be for continued rail use in the hands of others, the estate is plainly entitled to those values in the event of a per-parcel sale ("liquidation") or a constitutional substitute therefor. This is true whether the value is created by prospective profitability of those properties in the hands of others or by a demand for reasons other than profitability, such as a public-interest need determining offers by public bodies.

United States, 337 F. Supp. 150, 160 (E.D.N.Y. 1972); *Jay Street Connecting R.R. v. United States*, 174 F. Supp. 609, 615 (E.D.N.Y. 1959); *In re Port Authority Trans-Hudson Corp.*, 20 N.Y.2d 457, 285 N.Y. Supp. 2d 24, *cert. denied sub nom. Port Authority Trans-Hudson v. Hudson Rapid Tubes Corp.*, 390 U.S. 1002 (1968)

The provisions of the Act fail to assure that the owners of the Penn Central estate will receive the constitutional minimum value of the rail properties which it would be required to convey to Conrail.[23] The Penn Central estate would receive stock and perhaps other securities of Conrail and possibly, if the final system plan so provided, some share of the $500 million of Government-guaranteed obligations of USRA which Conrail can acquire, presumably by mortgaging its properties as security. (It is possible, however, that little or none of the $500 million may be available, since it may be allocated towards compensating non-bankrupt lesssor railroads which are not subject to the Act and whose property may concededly not

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[23]Such tentative information as to the value of the Penn Central estate as is presently available is referred to in Items 4 (pp. 11-13), 40 and 58, Joint Documentary Submission (J.D.S.). The studies there treated are in the process of further analysis and refinement. No estimate of the value of the estate is relevant to disposition of the present litigation, because (1) no one knows how much of that estate would be taken by Conrail; (2) no one knows the amount, nature or value of the consideration that will be made available; therefore there is nothing against which to measure the value of whatever properties would be taken. Neither is any such estimate relevant to the erosion question: even if the value of the estate should be found to exceed the sum of all claims against it, the stockholders' equity would be suffering erosion, and their rights with respect to erosion are no less than those of creditors. See, *e.g.*, *Brooks-Scanlon Co. v. Railroad Comm'n of Louisiana*, *supra*.

be taken pursuant to the eminent-domain power without payment in cash or cash equivalent.[24]

It is a fair inference that the Act contemplates, and that the final system plan will provide, that most of the consideration is to be in the form of Conrail common stock. Section 206(i) instructs USRA to "minimize any actual or potential debt burden" on Conrail. But there can be no assurance that any substantial value can be ascribed to Conrail common. Its worth will depend entirely on the earning power prospects of Conrail, which will, in turn, depend on a wide variety of factors, including the many decisions which must be made by USRA in constructing the final system plan and the extent to which those decisions will be acceptable to Congress.

Indeed, the goals which are to be achieved in the final system plan are not easily made compatible. By Section 206(a)(1) the system is to be "financially self-sustaining," yet by Section 206(a)(2) it is also to be "adequate to meet the rail transportation needs and service requirements of the region." By Section 206(a)(5) it is to provide for "retention and promotion of competition in the provision of rail and other transportation services in the region," and by Section 206(a)(8) it is to minimize "job losses and associated increases in unemployment and community benefit costs in areas of the region presently served by rail service." The inherent conflict between the goal of financial self-sufficiency and the other goals is well illustrated by the divergent approaches taken by the Department of Transportation in its Report pursuant to Section 204(a) (J.D.S.

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[24] At a pre-trial hearing in the Special Court, counsel for the Government conceded that, in requiring conveyances from non-bankrupt lessor railroads to Conrail, the Government would be exercising eminent domain power.

Item 62) and by the ICC's Rail Services Planning Office in its Report pursuant to Section 205(a)(1) (J.D.S. Item 63). The latter reflects the same public pressure for retention of even unprofitable rail services that will be felt in Congress when that body considers a USRA plan.

In any event, given these disparate criteria, the political bodies which must make the final decisions on Conrail may design a rail system with some prospects for viability — though predictions as to earning power of a to-be-created system are fraught with difficulty [25] — or they may go far in the direction of rendering the system unviable as a profit-making entity in order to meet the demands of communities and industries for continued rail service.[26] Depending on the totality of the choices made by political bodies influenced by non-financial considerations, the equity securities of Conrail may be worth little or nothing.

No one knows, or can even make a responsible guess, as to the size or configuration of the final system which Conrail will acquire. No one knows the extent to which USRA will be required, by the pressures which are so evident in the hearings held by the Rail Planning Office of the ICC,[27] to enlarge the system to a point where its viability will be precarious and its common stock virtually or entirely

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[25] When the Pennsylvania and New York Central railroads were merged in 1968, the courts believed that the merger would produce benefits of more than $80,000,000 annually. *New Haven Inclusion Cases*, 399 U.S. at 400. A little over two years later, Penn Central was in bankruptcy.

[26] That some unprofitable branch lines may be continued by way of the subsidy provisions of Sections 401 and 402 will reduce only slightly the pressure to include them in the Conrail system. The subsidies require local funds, and the Federal support is assured for only two years. Section 402(f).

[27] See the Report of the Office (J.D.S. Item 63), *passim*.

worthless. While there are strong indications that Conrail will not be viable, the assumptions as to the size and configuration of the final system on which that estimate rests may or may not be accurate; no one can tell. Moreover, as the Reorganization Court pointed out (J.A. pp. 137-39), no one knows what standard of valuation will be applied to the rail properties to be acquired by Conrail, which may be decided by the Supreme Court sometime in the future to have been so wide of the mark as (because of the resulting judgment against Conrail) to destroy the assumed viability of Conrail entirely.[28] Similarly, no one knows how USRA will value Conrail's stock, and other securities, or indeed what securities it will authorize. USRA's decision as to what Conrail and USRA securities should be authorized is apparently not subject to any judicial review, since Section 303(c)(2)(B) provides that the Special Court is limited, in its allocation of such securities among the estates in reorganization, to securities "designated in the final system plan."

The Reorganization Court's opinion points up another major uncertainty as to the value of Conrail stock. Both the legislative history of the Act and arguments before that court by Government counsel suggest that USRA may proceed on the assumption that the value of the Conrail common stock — *i.e.*, the capitalized value of its prospective earnings — necessarily and automatically establishes the value of the rail assets conveyed to Conrail. If that is in error, as we believe it is,[29] and this Court ultimately so

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[28] "The heart of . . . a determination [of the validity of a plan of reorganization] is a finding of fact . . . as to the value of the debtor's property." *New Haven Inclusion Cases*, 399 U.S. 392, 428 (1970).

[29] If this position were right, the Special Court would be obliged to award the estate only common stock even if the final system plan had

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holds, the capital structure and viability prospects assumed in the USRA plan would be no longer appropriate. This view that the constitutional minimum is *automatically* satisfied by Conrail stock is the only basis on which it can be argued that the Act assures satisfaction of the constitutional minimum. For the reasons stated at pp. 34-40 and pp. 54-56, *supra*, we think that view is plainly in error.

Nor is there assurance of adequate consideration to the Penn Central estate in the only remedy available to the Special Court in the event Conrail common stock is substantially or wholly worthless — a judgment against Conrail under Section 303(c)(2)(C). There is no basis upon which to conclude that Conrail could pay the judgment, or even service the debt which it would create. As the Reorganization Court observed (J.A. p. 137): "... obviously, such a judgment would be relatively pointless, serving merely as a further reduction in the value of the common stock."

Similarly an "underwriting plan" to guarantee the value of Conrail stock would add no value whatever to the consideration so long as Conrail itself was the guarantor. No provision of the Act permits a guarantee by USRA or by the credit of the United States, and such a device is explicitly ruled out by the legislative history: "the arrangements ... shall not include any form of Federal guarantee of the value of the [Conrail] stock."[30]

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[29] (continued)

provided for other consideration as well. The Special Court is required by Section 303(c)(1)(B) to make sure that no estate receives more than the constitutional minimum, and it "is required to return any excess in the amount of the consideration." Regional Rail Reorganization Act of 1973, H.R. Report No. 93-620 of the Committee on Interstate and Foreign Commerce, p. 53 (93d Cong. 1st Sess. 1973).

[30] Regional Rail Reorganization Act of 1973, Conference Report, H.R. Rep. No. 93-744, p. 56 (93d Cong. 1st Sess. 1973).

For all these reasons, the conclusion is inescapable that there is nothing within the four corners of the Act which assures the Penn Central estate of the just compensation required by the Constitution for the taking of its properties. If no Tucker Act remedy is available, the Act must fall.

A word is appropriate as to the provision in Section 206(d)(1) that the consideration to be received for the rail properties transferred to Conrail shall also include "the other benefits accruing to such railroad by reason of such transfer." The words "other benefits" must, of course, be construed to be consistent with the rules which determine the extent to which, in a condemnation action, the condemnee may constitutionally be charged with benefits or enhancement of values accruing to him as a direct result of the taking in question. If the words were not so construed, the deduction of "other benefits" from the consideration to be received would violate the principle that it is the courts, not the Congress, which in all cases must determine the measure of just compensation for the taking of property. *Baltimore & Ohio R.R. v. United States*, 298 U.S. 349, 364-369 (1936); *United States v. New River Collieries*, 262 U.S. 341, 344 (1923); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893).[31]

[31] The Trustees by no means concede that, as the Government parties have heretofore assumed, the payment to labor provided by Title V of the Act will be an "other benefit." That question, of course, need not be decided now. Suffice it that the uncertainty of what "other benefits" may be, and the lack of any record on which a court could estimate either their dollar equivalent or the extent to which they would affect the amount or value of Conrail stock which the Penn Central estate would receive, only add to the uncertainty — the lack of assurance — with which the Courts is confronted.

The Government has contended in the Special Court that the Act is similar to Section 77 in requiring railroad creditors to accept securities, not necessarily of the same type and priority as their previous interests, in an ongoing railroad enterprise, and that such Section 77 plans have frequently been upheld by the courts. But all of the prior cases involved judicial approval of fully worked-out plans for the reorganization of railroads that the record showed were viable, in the sense that they produced and would continue to produce net operating income. None of them involved the courts in irrevocably approving reorganization pursuant to a plan not yet devised and offering no demonstrable prospects, let alone assurance, of viability. Thus in none of the cases on which the Government relies was the *Brooks-Scanlon* doctrine mentioned; it had no application to those situations. Here, by contrast, it is controlling. The Government itself has conceded in its brief to the Special Court (p. 32): "Of course, since the amount of rail property [to be] conveyed cannot be foreseen at this time, it is impossible to make any final judgment as to the adequacy of consideration for that property." In these circumstances, the Court must, before allowing the irrevocable process of the statute to proceed, confront the distinct possibility that the consideration will in fact prove inadequate. And there is nothing in the Act that would cure such an inadequacy if it develops; only a Tucker Act remedy in the Court of Claims can do that.

V.

THE EXISTENCE OF AN ADEQUATE COURT OF CLAIMS REMEDY SAVES THE CONSTITUTIONALITY OF THE ACT.

A. An Adequate Court of Claims Remedy Cures the Fifth Amendment Problem.

We believe that the constitutionality of the Act can be sustained (and its fairness and equity to the Penn Central estate sustained by the Special Court) if the decision of this Court establishes:

> (a) If the market value of the consideration provided under the Act, determined as of the date of payment of that consideration, falls below the just compensation to which the Penn Central estate is constitutionally entitled, the Court of Claims will have jurisdiction over an action for a taking, and must enter a judgment against the United States for any remaining amount owing; the only defense open to the United States in that court will be that the value of the consideration paid under the Act is sufficient in amount to constitute the full just compensation necessary to satisfy the Fifth Amendment; and
>
> (b) If it is determined that, by reason of the Act, Penn Central loss operations for the account of the estate were prolonged past the point of unconstitutionality, the Court of Claims will have jurisdiction to award just compensation to the estate for the taking of property occasioned thereby; the only defense open to the United States in that court

> will be that the erosion caused by Penn Central loss operations did not become unconstitutional in amount before the date of conveyance, or that the Special Court has taken account of such erosion and awarded consideration to the estate of sufficient value to satisfy the Fifth Amendment.

In other words, a bare holding that the jurisdiction of the Court of Claims was not repealed by the Act would be insufficient if the United States were to retain defenses which, if successful, could frustrate a Tucker Act remedy as ensuring just compensation to the estate. Merely as one example, we think it clear that the Government must be precluded from arguing in a Court of Claims action th erosion is not compensable on the ground that the Trustees or the Reorganization Court somehow consented to the continuation of rail operations for the account of the estate, and that no taking occurred for that reason. Surely the estate may not thus be penalized because its custodians are making every reasonable effort to accommodate themselves to the statute rather than, for example, seeking immediate liquidation.

Since it would be hazardous, if not impossible, to try to imagine every conceivable defense to a Court of Claims action which ingenious Government counsel might formulate, the only way to ensure that the estate will receive just compensation is to preclude all defenses other than those outlined above. The following remarks by counsel for all the Government parties to the court below (J.D.S. Item 64, pp. 143-44) indicate that the Government agrees with this position:

> "Now, Mr. Horsky [counsel for the Penn Central Trustees] also said, I think, that he felt that as to a permanent taking or any

taking he thought the only question that should be before the Court of Claims is whether the values that had been paid over were constitutionally inadequate and that if they were, it was simply a matter of money to be awarded then.

"We would agree to that as to the permanent taking, but as to any claim for an interim taking, we would say the court would then have two problems before it, the first of which would be whether the time all the creditors and stockholders were required to wait exceeded the permissible limits of erosion, whether there was any taking at all, in other words, and in the New Haven case when Judge Anderson finally set an erosion limit, the only one I think we are familiar with to date, it was as of a date seven years after the New Haven reorganization had begun, and this reorganization I think is just becoming — Judge Fullam will know exactly — four years old.

"So there would be two questions for the Court of Claims to decide there. First, has the interim erosion passed the point of impermissibility under the Constitution at all, and, second, if so, what was the amount?"

If a fully adequate Court of Claims remedy is thus established, the question remains whether the Act nonetheless infringes the Fifth Amendment because the partial consideration there provided for is to be paid in forms (*e.g.*, Conrail securites) other than cash. Even if a Court of Claims remedy is available for the deficiency, which of

course will be owed in cash, arguably the form of compensation specified in the Act is constitutionally inadequate because of the rule that when property is taken for a public purpose the Constitution requires payment in cash or cash equivalent. *E.g., Almota Farmers Elev. & Whse. Co. v. United States,* 409 U.S. 470 (1973); *United States v. Reynolds,* 397 U.S. 14 (1970); *Olsen v. United States,* 292 U.S. 246 (1934); *Vanhorne's Lessee v. Dorrance,* 2 U.S. (2 Dall.) 304 (1795). This problem concerned the Reorganization Court (J.S. pp. 146-47).

We think that concern would be fully justified if the Conrail securities and other consideration tendered under the Act were valued on the basis of some alleged "intrinsic" value unrelated to their market value on the date of their receipt by the estates in reorganization. The estates would then be receiving, as partial compensation for a taking of property, nothing resembling cash or cash equivalent, but merely speculative securities the alleged value of which could be realized only after many years and only if the Special Court's prognosis of the viability of Conrail proved accurate. It was a similar problem in the New Haven reorganization which led Judge Anderson to devise an "underwriting plan" to ensure that the New Haven estate in fact received the cash equivalent of the "intrinsic" value attributed to the Penn Central stock it was acquiring. *In re New York, N.H. & H.R.R.,* 304 F. Supp. 793, 808-10, 304 F. Supp. 1136 (D. Conn. 1969). That device was specifically approved by this Court, but for the unforeseen Penn Central bankruptcy, in *New Haven Inclusion Cases,* 399 U.S. 392, 483-89 (1970): and the Court rejected the lower court's findings as to "intrinsic value," since "the fairness and equity that are the essence of a § 77 proceeding forbid our approval of a payment for the transferred New Haven properties that may be worth only a fraction of its purported value." 399 U.S. at 488.

No effective underwriting plan is permissible under the 1973 Act as presently written.[32] We believe it follows that, pursuant to the constitutional rule with respect to cash or cash equivalent, the Special Court will be obliged to ignore any alleged "intrinsic" value and, instead, to value the securities tendered to the estates in reorganization at no more than their cash market value on the date they are received by those estates.

Even if the Act were held to preclude such a method of valuation by the Special Court — and we know of no reason why that should be held — then a Tucker Act remedy is adequate if the Court of Claims will be able to ensure constitutionally adequate treatment to the Penn Central estate. We believe it will be so able. If and when the Court of Claims is asked to award a deficiency judgment against the United States, on the ground that the maximum consideration which the Special Court could award was constitutionally inadequate, the Court of Claims could and must, consistently with the Constitution, enter judgment for that amount which remains constitutionally owing. We think that this Court can meet the argument that the Act is unconstitutional because it fails to ensure the cash or cash equivalent which the Constitution requires only by holding that the partial consideration to be received under the Act must be valued at no more than its cash value on the date of its receipt.

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[32] See p. 60, *supra*.

B. With the Exception of One Readily Severable Provision, the Act Is Not in Violation of the "Uniformity" Requirement of Article I, Section 8, Clause 4 of the Constitution.

The court below correctly held that, with one exception, the provisions of the Act do not infringe the constitutional requirement that laws on bankruptcy must be uniform throughout the United States. Article I, Section 8, Clause 4.

The argument to the contrary rests on the statement in *Hanover National Bank v. Moyses*, 186 U.S. 181, 188 (1902) that the uniformity requirement "is geographic and not personal." There are two answers.

One is the answer given by the majority of the court below (J.A. 27, 61-64): that since the principal provisions of the Act which depend on the bankruptcy power for their validity are repetitive of similar provisions in existing, valid laws — albeit that some of those powers are to be exercised by the Special Court rather than the Reorganization Court — the Act as a whole can be upheld as an exercise of the broad powers of Congress under the Commerce Clause. See, *e.g.*, *Katzenbach v. McClung*, 379 U.S. 294, 303-304 (1964); *Maryland v. Wirtz*, 392 U.S. 183, 190 (1968). That the legislation emerged from the Commerce committees in both the House and the Senate reflects the fact that the underlying concern of the Act, as reflected in its title, is the regulation of interstate commerce.

The second answer is that the Act, even viewed as no more than an exercise of the bankruptcy power, is a legitimate classification of debtors. No decision by this Court has ever held that an act of Congress violated the

uniformity requirement,[33] and many attacks made upon earlier bankruptcy laws have been rejected in circumstances similar to those here involved. See, *e.g.*, *In re Baltimore & Ohio R.R.*, 29 F. Supp. 608 (D. Md. 1939), *cert. denied*, 309 U.S. 654 (1940); *Campbell v. Alleghany Corp.*, 75 F.2d 947, 951 (4th Cir. 1934), *cert. denied*, 296 U.S. 581 (1935); *Leidigh Carriage Co. v. Stengel*, 95 F. 637, 646-48 (6th Cir. 1899); *In re New York, N.H. & H.R.R.*, 16 F. Supp. 504, 512-13 (D. Conn. 1936); *In re California P. R.R.*, 4 F. Cas. 1060 (No. 2,315) (D. Cal. 1874). Indeed, as Justice Frankfurter stated in his concurring opinion in *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 172 (1946), the uniformity requirement is satisfied "when existing obligations of a debtor are treated alike by the bankruptcy administration throughout the country, regardless of the state in which the bankruptcy court sits." No one asserts here that that standard is not met by the Act.

While these answers suffice to dispose of the general non-uniformity challenge, there is one provision of the Act which was properly held invalid on this ground by the court below (J.A. pp. 27, 64-65) — the requirement of Section 207(b) that, if the process of the Act is found to be not fair and equitable, the reorganization court "shall dismiss the reorganization proceeding."

This provision is in no sense an exercise of the commerce power. It effects a partial repeal of Section 77, since it would prevent continued use of that section to effect an appropriate reorganization of a railroad to which it applied. The issue is not rendered moot because Penn Central is not

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[33] The only such decision in a lower court — *United States Nat'l Bank v. Pamp*, 83 F.2d 493 (8th Cir. 1936) — was expressly rejected in *Wright v. Vinton Branch*, 300 U.S. 440, 463 and n. 7 (1937).

reorganizable on an income basis within a reasonable time, as determined in the 120-day decision. Reorganization on an income basis is by no means the only type of reorganization which can be effected under Section 77. *Cf. New Haven Inclusion Cases,* 399 U.S. 392 (1970). The partial repeal of Section 77, however, applies only to railroads in one part of the United States, defined in Section 102(13) of the Act.

Nor can this provision be sustained on the ground suggested by Judge Aldisert (J.A. 27-29) for rejection of the "uniformity" attack on the statute generally: that the plaintiffs in these actions are Penn Central creditors, and that the Act "is geographically uniform with respect to creditors' claims." The dismissal of the Section 77 proceeding required by Section 207(b) would substantially affect all Penn Central creditors by making their rights and remedies quite different from those of creditors of railroads identically situated except for their geographic location. In any event, Judge Aldisert recognizes that a railroad inside or outside the region would have standing to challenge this provision; and the Penn Central Trustees — representing the railroad and all interests in its estate — do challenge it.

The invalidity of this section, however, does not effect the validity of the Act as a whole. Indeed, it is difficult to understand why the provision was included, except perhaps for an *in terrorem* effect. The separability provision of the Act (Section 604) applies.

CONCLUSION

For the reasons stated, the judgment of the court below should be reversed and the Regional Rail Reorganization Act held constitutional in all respects except for the last nine words of the third sentence of Section 207(b), which should be held void as repugnant to Article I, Section 8, Clause 4 of the Constitution.

CHARLES A. HORSKY

BRICE M. CLAGETT
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

PAUL R. DUKE

JOHN F. DePODESTA
Penn Central Transportation Company
Six Penn Center Plaza
Philadelphia, Pa. 19107

Attorneys for Appellants Penn Central Trustees

August 23, 1974

APPENDIX

Constitutional and Statutory Provisions

Constitution of the United States, Article I, Section 8, Clause 4:

> "The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States;".

Constitution of the United States, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Tucker Act, 28 U.S.C. § 1491 (1970):

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for

liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

"Nothing herein shall be construed to give the Court of Claims jurisdiction in suits against, or founded on actions of, the Tennessee Valley Authority, nor to amend or modify the provisions of the Tennessee Valley Authority Act of 1933, as amended, with respect to suits by or against the Authority."

ANNEX A

(Seal) **DEPARTMENT OF TRANSPORTATION**
FEDERAL RAILROAD ADMINISTRATION
WASHINGTON, D.C. 20590

OFFICE OF
THE ADMINISTRATOR

May 10, 1974

Mr. R.D. Timpany
Trustee, The Central Railroad
Company of New Jersey
1100 Raymond Boulevard
Newark, New Jersey 07102

Dear Mr. Timpany:

This is in response to your application dated April 18, 1974, for emergency assistance pursuant to Section 213 of the Regional Rail Reorganization Act of 1973 and Part 253 of Title 49 of the Code of Federal Regulations.

You have requested $10,357,000 in assistance, to be made available as follows:

April 30, 1974	$1,778,000
July 1, 1974	1,659,000
October 1, 1974	1,759,000
January 1, 1975	2,730,000
April 1, 1975	2,431,000
	$10,357,000

You contend that the amount requested in your application is necessary to protect against further erosion of the estate and is intended on this basis to cover estimated net income losses for the period April 1974 - June 1975. In your letter of April 30, 1974, you further advise that as a result of your continuing review of operations, the previously forecast net income loss of $1,778,000 for the second quarter of 1974

should be increased to $1,981,000 to reflect an updating of cost and revenue components. You also advise in that letter that previously forecast month-end cash balances should be reduced, in part due to a change in practice by the State of New Jersey, resulting in slower payment of monthly supplemental subsidy bills rendered to the State.

Based on our review of your application, and pursuant to the purposes and intent of the Act, I am prepared to enter into a definitive agreement for a total of $2.0 million in emergency assistance in accordance with the draft grant agreement and terms and conditions which are attached.

As the draft agreement and terms and conditions more explicitly provide, the assistance would be furnished to meet specific payments for (a) wages and salaries, (b) fuel costs, and (c) utilities expenses which are necessary for the continued provision of essential services by the Central Railroad Company of New Jersey. Funds to meet such payments would be deposited in a separate account from time to time, based on a certification by you that grant funds in a specified amount are essential to avoid an imminent risk of termination of rail services.

The draft terms and conditions also include a provision for a program of assistance under Section 215. Based on the preliminary discussions we have had with respect to a program for the rehabilitation of the terminal area under Section 215, it would appear that the chances of realizing an acceptable return on investment in the terminal area, plus some possible early cash generation, would be favorable. It would thus be useful to have your specific proposal for the rehabilitation of the terminal area for review as soon as possible.

In reviewing your application and subsequent revision, we have taken three major exceptions:

1. In our opinion, the granting of financial assistance to protect against further erosion of the estate, is not in accordance with the purpose for which the funds under § 213 of the Act have been appropriated. Accordingly, your application for assistance specifically on this basis is denied. However, the information supplied in your application indicates that you will imminently require emergency cash assistance to keep essential services going, and it is on this basis that the assistance is being made available pursuant to the Act.

2. Further, it is our opinion that in the absence of a Court order, the payment of retroactive wages, or the payment of any retroactive debt, would not be a proper item to be covered by assistance under Section 213. Therefore, we will not include in any assistance provided, amounts to cover retroactive payment, as you propose, of the 4 percent wage increase which became effective nationally on January 1, 1974. It is our understanding that you have made no commitment, nor entered into any agreement to make these retroactive payments.

3. With respect to the payment of supplemental subsidy bills by the State, we have advised the Office of the Commissioner of Transportation that, in our opinion, Section 213 does not contemplate the granting of emergency assistance to cover slowed payment of such bills by the State. Indeed, in the formulation and adoption of emergency assistance provisions, it was assumed that then-existing financial assistance would be maintained. We trust that a way will be found by the State and yourself to promptly settle this issue. In any event, we suggest that the negotiations with the responsible State authorities proceed on the basis that the appropriations under the Act to assure continuation of essential services did not contemplate the underwriting

of such portions of cash shortfalls as result from slowed payments of amounts owed under otherwise binding agreements.

It is our understanding that your cash situation may be extremely critical as early as May 22, 1974. We are prepared to proceed expeditiously to execute a definitive agreement upon receipt of advice from you with respect to this offer.

Sincerely,

/s/ John W. Ingram
JOHN W. INGRAM
Administrator

APPENDIX B

Rec'd. April 30, 1974

April 26, 1974

Honorable John W. Barnum
Under Secretary
Department of Transportation
Washington, D.C. 20590

Dear John:

I was very concerned to read in the *Washington Star* of April 25th an article which indicated that both you and John Ingram would condition operating grants to the Penn Central on a requirement that applications be made to the United States Railway Association (USRA) for abandonment of lines which you deemed to be "hopelessly uneconomic."

The purpose of this letter is to emphasize to you that such an endeavor by DOT and the Trustees of the Penn Central would be completely contrary to the intent of Congress in adopting sections 213, 215 and sections 304(f) of the Regional Rail Reorganization Act.

In an earlier letter to you dated March 15, 1974, regarding the proposed abandonment by the Erie-Lackawanna of a commuter service to Cleveland, I outlined my understanding of Congressional intent regarding abandonments of rail lines or services during the planning period created by the Regional Rail Reorganization Act.

In summary, what I said then, and repeat to you now, is that our intention was to preserve the status quo of rail service in the Northeast during that critical time and to allow full public comment on abandonment proposals. The purpose of this procedure was twofold: first, to allow careful study of the structure of rail service in the Northeast and,

secondarily, to allay public fears regarding wholesale abandonments of rail service. It seems to me that piecemeal abandonments of rail service, such as the *Star* article suggests that you wish, will only arouse public concern. More significantly, they will undermine the very careful process of study and public review of rail service which the Congress created in the Regional Rail Reorganization Act.

The carrying out of the purpose of the Rail Reorganization Act will require the closest cooperation between the Executive and the Legislative branches of government. Ultimately, both House of Congress must approve the final system plan for rail service designed by USRA. In the interim, the Congress must approve the appropriations necessary to carry out the purposes of the Act. Therefore, it seems to me that DOT should give the strictest adherence to Congressional intent in administering the first stages of the lengthy planning process which the Act sets forth. To encourage USRA to allow a series of rail abandonments during the planning period would be both harmful to cooperation between Congress and the DOT, and contrary to the intention of the Act.

I would appreciate receiving from the Department a prompt answer, in writing, as to how you intend to administer the operating grant provisions of section 213 of the Act and how you intend to advise USRA on its policy towards abandonment applications, which it may permit under section 304(f).

Yours very truly,

BROCK ADAMS, M.C.

BA:we

cc: Honorable Warren Magnuson
Honorable Harley O. Staggers
Honorable Richard Shoup
Honorable Dan Kuykendall
Edward Jordan, President
USRA
Mr. Robert Blanchette, Trustee
Penn Central

ANNEX C

Extracts from Proposed Amendments To Senate Commerce Committee Working Paper No. 1.

(transmitted with Secretary Brinegar's letter of Nov. 14, 1973)

P. 46, delete everything on line 12 down through the end of line 10 on p. 50 and substitute the following:

"PROCEEDINGS BEFORE THE SPECIAL COURT

"SEC. 303. (a) APPROVAL OF TRANSFERS UNDER PLAN — As soon as is possible after submission of the final system plan to it, the special court, after hearings, shall decide whether or not to approve the transfers of rail properties and the compensation therefor provided for in the final system plan. In making that decision with respect to each railroad in reorganization, the court shall consider—

(1) whether the transfers are fair and equitable to the debtor's estate; and

(2) the interest of the public in the continuation of rail service over the rail properties proposed for transfer under the final system plan.

If the court finds that it cannot approve any of the transfers provided for in the final system plan because the common stock of the Corporation has not been fairly allocated among the railroads in reorganization transferring rail properties to the Corporation, it shall reallocate the stock in a manner which is fair and equitable. If the court finds that a transfer of rail properties of a railroad in reorganization for common stock of the Corporation would not be fair and equitable to the estate of a railroad in reorganization even

with the stock fairly allocated, it shall amend the final system plan to provide for the transfer to that railroad in reorganization, in addition to its allocated amount of the common stock of the Corporation, obligations of the Association in an amount which, together with the stock, make the transaction fair and equitable to the estate of that railroad. If the court finds that a transfer of rail properties of a railroad in reorganization to a profitable railroad would not be fair and equitable compensation, it shall determine what fair and equitable compensation would be and order that such compensation be paid. If there is no way that the court can make a finding that the proposed transfers of rail properties from a railroad in reorganization to the Corporation are fair and equitable to the estate of a railroad in reorganization, then the court shall disapprove the final system plan with respect to that railroad and remand the case to its reorganization court for further proceedings under section 77 of the Bankruptcy Act. If the court approves the final system plan with respect to a railroad in reorganization, it shall order the parties to make the conveyances as provided for in the final system plan, as it may have been amended by the court. Proceedings under this section shall take precedence over all other matters assigned to the judges of the special court, shall be assigned for hearings at the earliest practicable date and shall be expedited in every way possible.

"(b) APPEALS— a finding or determination entered pursuant to subsection (a) of this section may be appealed directly to the Supreme Court of the United States in the same manner that an injunction order may be appealed under section 1253 of title 28, United States Code: *Provided*, that such appeal is exclusive and shall be filed in the Supreme Court not more than 5 days after such finding or determination is entered by the special court. The Supreme Court shall grant the highest priority to the determination

of any such appeals. Notwithstanding the filing of an appeal under this subsection, the special court may refuse to stay the execution of its orders issued under subsection (a) of this section.

"(c) COURT REVIEW OF ACTIONS— Except as provided in section 209(a) of this Act and in this section, action or inaction under this Act of the Secretary, the Commission, the Association or any director, member, officer, committee, or subordinate unit of any of them, shall not be reviewable in any court."

CERTIFICATE OF SERVICE

I hereby certify that I have this 23d day of August, 1974, caused three (3) copies of the foregoing Brief to be mailed first-class, postage prepaid to:

The Honorable Robert H. Bork
Solicitor General
Department of Justice
Washington, D.C. 20530

Joseph Auerbach, Esquire
Sullivan & Worcester
225 Franklin Street
Boston, Mass. 02110

Lloyd N. Cutler, Esquire
Wilmer, Cutler & Pickering
1666 K Street, N.W.
Washington, D.C. 20006

David Berger, Esquire
1622 Locust Street
Philadelphia, Pa. 10103

Louis A. Craco, Esquire
Willkie, Farr & Gallagher
1 Chase Manhattan Plaza
New York, N.Y. 10005

Brice M. Clagett

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1651

UNITED STATES RAILWAY ASSOCIATION,

Appellant,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF CERTAIN UNITED STATES REPRESENTATIVES

BROCK ADAMS
United States Representative
436 Cannon House Office Bldg.
Washington, D.C. 20515

Attorney for Amici Curiae

August, 1974

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

	Page
MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF CERTAIN UNITED STATES REPRESENTATIVES	iv
INTEREST OF AMICUS CURIAE	1
OPINION BELOW	3
JURISDICTION	4
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4
QUESTIONS PRESENTED	5
STATEMENT	5
SUMMARY OF ARGUMENT	8
ARGUMENT:	
THE REORGANIZATION PROCESS PROVIDED IN THE RAIL ACT IS A CONSTITUTIONAL EXERCISE OF THE COMMERCE AND BANKRUPTCY POWERS OF THE CONGRESS	9
THERE IS NO UNCONSTITUTIONAL EROSION OF CREDITORS' RIGHTS DURING THE PERIOD REQUIRED TO COMPLETE THE REORGANIZATION PROCESS	12
THE RAIL ACT IS CONSTITUTIONAL WITHOUT REFERENCE TO THE TUCKER ACT	17
CONCLUSION	22
APPENDIX	1a

TABLE OF AUTHORITIES

Page

Cases:

Brooks Scanlon v. Railroad Commission, 251 U.S. 396 (1920) 13

Hurley v. Kincaid, 285 U.S. 95 (1932) 18

In re Central Ry of New Jersey, 485 F.2d 208 (3rd. Cir. 1973) 15

In re Penn Central Trans. Co., (3rd. Cir., June 14, 1973) cited by the Report of Committee on Interstate and Foreign Commerce, H.R. Rep. No. 43-620, 93rd. Cong., 1st. Sess., Nov. 3, 1973 at 29 9

In re Penn Central Trans. Co., 494 F.2d 270 (3rd. Cir. 1974) *petition for cert. filed* 42 U.S.L.W. 3633 (May 8, 1974) 13-14

New Haven Inclusion Cases, 399 U.S. 392 (1970) . . . . . *passim*

Oklahoma v. Guy Atkinson & Co., 313 U.S. 508, 527, 533 (1941) 10

Palmer v. Massachusetts, 308 U.S. 79 (1939) 15

Penn Central Inclusion Cases, 389 U.S. 486, 510-511 (1968) 13

Penn Central Transportation Company Reorganization, I.C.C. Finance Docket No. 26241, Sept. 28, 1973 (slip opinion at 87, 88-89), and I.C.C. Release No. 193-73, Oct. 1, 1973 20

Reconstruction Finance Corp. v. Denver & Rio Grande Western R. Co., 328 U.S. 495, 535-36 (1946) 12-13

Thompson v. Texas Mexican R. Co., 328 U.S. 134, 144 (1946) 15

United States v. Causby, 328 U.S. 256 (1945) 18

Wright v. Union Central Life Insurance Co., 311 U.S. 273 (1940) 14

Page

Statutes:

Regional Rail Reorganization Act, 87 Stat. 985, P.L. 93-236 (1974) ..... *passim*

11 U.S.C. §205 (1970) 6

28 U.S.C. §1253 (1970) 4

Tucker Act, 28 U.S.C. §1491 (1970) ..... *passim*

U.S. Constitution:

Bankruptcy Clause Art. I, Sec. 8, cl. 4 ..... vi, 4

Commerce Clause Art. I, Sec. 8, cl. 3 ..... vi, 4

Fifth Amendment 4

Miscellaneous:

Hearings, Subcommittee on Transportation & Aeronautics, House Committee on Interstate and Foreign Commerce, 93rd. Cong., 1st. Sess. Report No. 93-30 at page 248, Apr. 16, 1973 15

H.R. Conf. Rep. No. 93-744, 93rd. Cong., 1st. Sess. at 58-59 (1973) 19

H.R. Rep. No. 93-620, 93rd Cong., 1st Sess., at 2 (1973) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

UNITED STATES RAILWAY ASSOCIATION,

Appellant,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF CERTAIN UNITED STATES REPRESENTATIVES

The undersigned United States Representatives respectfully move this Court for leave to file the accompanying brief *amicus curiae*. This brief will also be circulated to all Members of the House of Representatives prior to a motion by *amici curiae* to participate in oral argument. The attorneys for all

parties except those representing the Government have consented to the filing of this brief.

Applicants have an interest in this case as members of the national legislature who participated in the legislative process which led to the enactment of the Regional Rail Reorganization Act, (hereinafter referred to as the Rail Act), 87 Stat. 985, P. L. 93-236 (1974), the constitutionality of which is in question. They have a direct and immediate interest that the intent of the Congress in passing this law be accurately and properly presented to this Court. Moreover, the *amici curiae* have a direct and immediate interest and responsibility for the continuation of rail service and a responsibility to protect the interest of the tax paying public, an interest which differs from the Government agencies and creditor interests represented before the Court in this litigation.

The basic issue presented in the case is whether or not the Rail Act is constitutional without reference to the Tucker Act, 28 U.S.C. 1491 (1970). We disagree with the concessions made by the Government parties before the lower court that, without the present availability of a Court of Claims remedy, the Rail Act would be unconsitutional as to the appellees. See Joint Appendix (J.A.) 42-43. We also disagree with the argument of the appellees that the Act fails to provide sufficient constitutional compensation for interim erosion pending final implementation of the process and, thereby, contravenes the Fifth Amendment of the United States Constitution.

We maintain that the process of the Act is a constitutional exercise by the Congress of its powers under the Bankruptcy Clause and the Commerce Clause of the Constitution (Art. I, Sec. 8, cl. 4 and Art. I, Sec. 8, cl. 3). Furthermore, there is no showing that the reorganization process provided in the Act will cause an unconstitutional taking of the property of the appellees either during the period of reorganization or thereafter.

This is not an ordinary reorganization case where the debt structure of the bankrupt is simply restructured. The bankrupt Penn Central Transportation Company, together with other similarly situated railroads in the United States, constitute a vital public service for the Nation. After lengthy debate, the Congress created a system whereby certain rail properties of the bankrupt estates were to be reorganized, with the estates to retain the ownership interest in the property, and the Government to provide benefits in a total of more than $2 billion to make the reorganization process successful. The question of whether or not the bankrupt estates would be entitled to an additional open-ended deficiency judgment against the United States was specifically considered and rejected by the Congress.

We consider it essential to the integrity of the legislative process that the specific intent of the law as passed be upheld and, therefore, the *amici curiae*

respectfully request this Court to grant permission to file the annexed brief.

Respectfully submitted,

Brock Adams,
Herman Badillo,
Robert E. Bauman,
Edward P. Boland,
Silvio Conte,
Charles C. Diggs,
John D.Dingell,
Robert F. Drinan,
Bob Eckhardt,
Donald M. Fraser,
Bill Frenzel,
Louis Frey, Jr.,
James M. Hanley,
Michael Harrington,
H. John Heinz, III
Henry Helstoski,
Frank Horton,
Dan Kuykendall,
Peter Kyros,
Norman F. Lent,
Thomas A. Luken,
Stewart B. McKinney,
Ralph H. Metcalfe,
Joe Moakley,
William S. Moorhead,
John E. Moss,
John M. Murphy,
Richardson Preyer,
Thomas M. Rees,
Robert A. Roe,
Fred B. Rooney,
Dick Shoup,
Gerry E. Studds,
Frank Thompson, Jr.,
Robert O. Tiernan,
Richard F. Vander Veen,
H. John Heinz, III.

IN THE

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OCTOBER TERM, 1974

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UNITED STATES RAILWAY ASSOCIATION,

Appellant,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF AMICUS CURIAE OF CERTAIN UNITED STATES REPRESENTATIVES

INTEREST OF AMICI CURIAE

Some of the *amici curiae* are United States Representatives who participated in the development of the Regional Rail Reorganization Act of 1973 (hereinafter referred to as the Rail Act). Some were involved in the original drafting of the bill; others were Managers

on the Part of the House in Conference Committee, or participated in the final approval of the Conference Report which became Public Law 93-236. Many of the *amici curiae* represent constituents who are directly dependent on the continuation of adequate transportation service. If the Rail Act should fail, the cessation or significant curtailment of rail service will cause unemployment, disruption of public services, environmental damage, and immediate economic hardship to their constituents. All of the *amici curiae* have a vital interest in upholding the intent of the statute that vital public rail service should be continued at the lowest reasonable cost to the Federal tax paying public.

Our interest can be stated simply and directly: it is our opinion that none of the parties before this Court have accurately described the intent of the Congress in enacting this law. The constitutionality of the Rail Act has been challenged on the grounds that it is violative of the just compensation provisions of the Fifth Amendment to the United States Constitution. The governmental parties argue that the Rail Act is consitutional because of an implied Tucker Act remedy. (The Tucker Act is codified at 28 U.S.C. §1491 et. seq. (1970)). The appellee creditors argue that the Rail Act is *un*constitutional because of the *absence* of a Tucker Act remedy.

We disagree with *both* parties on this point. There is no evidence in the legislative history that Congress intended to afford Tucker Act relief, and much evidence to the contrary. We disagree with the government parties to that extent. On the other hand,

we forcefully maintain that the absence of Tucker Act relief does not render the Rail Act unconstitutional and therefore disagree with the argument of the appellees. We particularly disagree with the concession by counsel for the Government that absence of a Court of Claims remedy renders the Act unconstitutional. (J.A., 42-43).

In the course of the legislative process, the Congress was required to balance many conflicting interests, including those of the creditors and of those certain governmental agencies who are before this Court. In addition, the Congress was required to weigh the interests of the general public, local governments, communities, shippers, the competing modes of transportation, and the interests of the Federal taxpayers, none of whom are specifically represented before this Court.

If a Tucker Act remedy is declared to be necessary to continue rail service in the Northeastern portion of the United States, it is the tax paying public of the United States, represented by all of the *amici curiae*, who will be called upon to pay any deficiency judgment assessed against the United States Government.

OPINION BELOW

The opinion of the three-Judge court below has not yet been reported. The opinion is reproduced in the Joint Appendix (J.A.) to the briefs of the Appellants and Appellees at pages 9-83.

JURISDICTION

The jurisdiction of this Court has been invoked under 28 U.S.C. §1253 (1970). Notice of appeal was timely filed on July 17, 1974, by attorneys for Defendant United States Railway Association. Additional notices of appeal have also been timely filed by other parties.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Bankruptcy Clause of the Constitution, Art. I, sec. 8, cl. 4, provides:

> The Congress shall have Power . . .
>
> * * *
>
> To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.

The Commerce Clause, Art. I, sec. 8, cl. 3, provides:

> The Congress shall have power . . .
>
> * * *
>
> To regulate Commerce . . . among the several States . . . .

The Fifth Amendment to the Constitution provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Regional Rail Reorganization Act of 1973 is set forth in the Joint Appendix at 391.

The Tucker Act, 28 U.S.C. §1491 (1970), provides:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:
>
> (1) Founded upon the Constitution . . . .

QUESTIONS PRESENTED

1) Does the Regional Rail Reorganization Act during the reorganization period unconstitutionally erode the assets of the bankrupt estate unless a Tucker Act deficiency judgment is now declared to be available to appellees?

2) Does the Regional Rail Reorganization Act, requiring an exchange of rail assets for securities between the bankrupt estate and a government assisted private corporation, constitute an unconstitutional taking of property unless a Tucker Act deficiency judgment is now declared to be available to the appellees?

STATEMENT

In a very important sense, this is not an ordinary brief *amicus curiae*. We believe the government attorneys and the private parties have misconstrued the basic intent of the statute. This statute was never intended to be a taking of private property by the United States Government. Rather, it was an attempt to

build on the principles of private reorganization outlined by this Court in the *New Haven Inclusion Cases*, 399 U.S. 392 (1970). It was necessary to provide a private enterprise reorganization partner (where none could be found) and provide financing (where none existed) so a reorganization process could occur.

The new private enterprise reorganization partner, to be known as the Consolidated Rail Corporation (hereinafter referred to as ConRail), would give *all* of its original stock and securities to the bankrupt estates in exchange for certain rail assets owned by those estates; the rest of the assets of the estates (rail and otherwise) would be left in the original reorganization courts under section 77 of the Bankruptcy Act, 11 U.S.C. § 205 (1970), hereinafter referred to as Sec. 77 proceedings. The original reorganization courts would thus have available for each estate the ConRail securities, abandoned rail properties, non-rail assets, and as much as $500,000,000 in government guaranteed securities from a government-assisted financing organization to be known as the United States Railway Association (hereinafter referred to as U.S.R.A.)

ConRail is a private corporation, and therefore, this reorganization would be between private parties. A consolidated court proceeding under the Rail Act sec. 209(b) is authorized so that several bankrupt estates in the same condition can combine parts of their rail assets before a Special Court, which will exchange these rail assets for *all* of the ConRail securities. The Special Court will thereafter divide these securities among the respective bankrupt estates. In addition to leaving this

beneficial ownership of the rail assets in the bankrupt estates, the Rail Act provides substantial benefits to the estates, including the Penn Central Transportation Company estate (hereinafter referred to as The Estate). These benefits include the $500,000,000 in government-guaranteed securities referred to above; $85,000,000 in cash grants and $150,000,000 in loan guarantees to prevent erosion during the reorganization process; $250,000,000 in labor protection payments; $500,000,000 in government guaranteed loans for ConRail plant improvements; $180,000,000 for rail service subsidies; and $500,000,000 in government guarantees to the National Railroad Passenger Corporation to finance by lease or purchase the acquisition from ConRail of the rail corridor from Washington, D.C. to Boston. This totals $2,165,000,000 in government assistance.

Finally, the Act provides that if for any reason the process has not worked as planned, the Special Court can order a deficiency judgment against ConRail in favor of the debtor estates. This gives the debtor estates the ultimate right to have the ConRail properties improved by the massive government assistance subjected to a judicial sale, with the proceeds distributed to the estates.

The reorganization process of the Rail Act thus provides an orderly process for distributing beneficial ownership of the transferred rail assets among the original owners, with expedited disposal of rail properties not to be included in the system. The

payment of potential labor claims, cash operating subsidies, and money to maintain the rail properties until ConRail acquires them, protects the value of the rail properties during the reorganization. The Rail Act does not interfere with the regular ongoing section 77 process of restructuring the remaining assets of the estates. Thus, the bankruptcy courts can proceed to deal with each estate in the traditional manner.

SUMMARY OF ARGUMENT

We wish to urge upon the court three fundamental propositions:

1) The Act provides a constitutional reorganization process for the Estate since the exchange of all of the stock and securities of Conrail (Rail Act Sec. 301-304), plus additional governmental benefits for the transferred properties of The Estate, leaves the bankrupt estate with more valuable property interests than it originally possessed;

2) The United States Government should not now be constitutionally required to assume any additional liabilities to The Estate beyond those provided in the statute for any losses incurred by The Estate during the reorganization process;

3) No deficiency judgment against the United States is provided for in the Rail Act and such a declaratory finding by this court is not necessary to establish the constitutionality of the Rail Act.

We do not agree with appellee creditors that the Act is unconstitutional on its face. Neither do we agree with the position of the appellee that a Tucker Act remedy

providing for a deficiency judgment against the United States is necessary to provide a constitutionally fair and equitable process for The Estate under the Rail Act, either with regard to any interim losses or the final exchange of Estate rail properties for securities of Conrail.

ARGUMENT

THE REORGANIZATION PROCESS PROVIDED IN THE RAIL ACT IS A CONSTITUTIONAL EXERCISE OF THE COMMERCE AND BANKRUPTCY POWERS OF THE CONGRESS

From the beginning of the Congressional consideration of this problem, it was clear that the traditional regulated private system of railroads in the Northeast was no longer functional and that the separate traditional court reorganization proceedings under section 77 of the Bankruptcy Act were not capable of ever bringing most of the debtor railroads in the Northeastern section of the United States out of bankruptcy.

The Congress was aware of the statement of the Third Circuit that a reappraisal of the factors to be considered in modern rail bankruptcies might be beyond the faculties of a court. *In re Penn Central Trans. Co.*, (3rd Cir., June 14, 1973), cited by the Report of Committee on Interstate and Foreign Commerce, H.R. Rep. No. 93-620, 93rd Cong., 1st Sess., Nov. 3, 1973 at 29. The Congress has created a

system to solve this very difficult problem. The Congressional judgment on what is a reasonable and responsible approach is entitled to substantial weight in this court and should be followed if there is a likelihood it will accomplish its purpose. *Oklahoma v. Guy Atkinson & Co.*, 313 U.S. 508, 527, 533 (1941).

At all times the Congress was trying to create a constitutional reorganization following the process outlined by this court in the *New Haven Inclusion Cases*, 399 U.S. 392 (1970). As indicated by legislative history, this reorganization process was used as a model for the Rail Act. 119 Cong. Rec. H9731-32 (daily ed. Nov. 8, 1973). This legislative history also shows that the Congress did not intend for the Government to take any property from the debtor estate, but rather to provide a reorganization partner (where none could be found) and provide financing (where none existed) so a reorganization process as outlined in the *New Haven Inclusion Cases* could occur.

In the *New Haven* case, the reorganization court approved a plan under which the bulk of the consideration paid to the estate of the bankrupt New Haven Railroad was in the form of Penn Central stock. Under this plan, the issuer of the stock was required to underwrite its value. If the stock did not attain a per share value of $87.50 within 10 years of its issuance, then the Penn Central was to become liable in cash for the amount by which the mean market value of the stock for a 30-day period at the end of the 10 year period fell short. Based on the record before the reorganization court at the time of the order, this Court expressed its approval of the plan. The intervening

bankruptcy of the Penn Central, however, caused this Court to remand for further proceedings. *New Haven Inclusion Cases*, 399 U.S. 392, 483-89 (1970).

The method of compensation provided by the Rail Act can be compared favorably with the plan approved in the *New Haven* case: First, under the Rail Act, *all* of the initially issued securities of Conrail would be issued to the estates of the debtor railroads, whereas the New Haven received only a portion of the publicly traded stock in the Penn Central system. Second, the Rail Act confers a package of benefits on Conrail to help assure its success, including planning, subsidies, labor protection, and expedited abandonment, whereas the new Penn Central Company received no government aid. Third, the Rail Act gives the debtor estates the right to a deficiency judgment against Conrail for the amount necessary to make the conveyance fair and equitable, whereas the New Haven Reorganization Court made Penn Central liable only for the shortfall in the mean value of the stock at the end of a ten year period. Finally, although the Rail Act contains no provision for a *government* guarantee of the value of the stock, neither did the plan approved in New Haven case. Rather, the guarantee of the value of the stock was by the *issuer* of the stock. A similar provision could if necessary be provided by the Special Court as part of this statutory process to give proper value to the bankrupt estates. Finally, if Conrail should fail (as did the Penn Central) the Special Court can enter a deficiency judgment against Conrail.

It has been objected that such a deficiency judgment against Conrail would be "circular" or "illusory," and

that it would further depress the value of the securities issued by Conrail. Yet the same argument could have been raised against the *New Haven* plan – the cash liability on the Penn Central at the end of the ten year period could well have further depressed the value of its stock. Nevertheless, this Court approved that plan. The statutory scheme of the Rail Act is therefore within the rationale of the *New Haven* case.

A future deficiency judgment would not be a judgment against the equity in Conrail held by the debtor estates. Rather, it would be a judgment against Conrail's assets, which will include the rail properties increased in value by the government benefits made available as part of this reorganization. If such a deficiency judgment should endanger the viability of Conrail, the Congress might be faced with a decision whether to permit the partial or total liquidation of Conrail or instead to appropriate funds sufficient to support Conrail as a continuing concern. In that event, the decision may be made by Congress when and if the necessity arises, but not before.

THERE IS NO UNCONSTITUTIONAL EROSION OF CREDITORS' RIGHTS DURING THE PERIOD REQUIRED TO COMPLETE THE REORGANIZATION PROCESS

There is no question that a secured lienholder's interest in an immediate judicial sale may be subordinated by Congress to the overriding public interest. *Reconstruction Finance Corp. v. Denver & Rio Grande*

Western R. Co., 328 U.S. 495, 535-36 (1946). Nor is there any question that the public interest can require a continuation of rail service which may cause losses to the secured creditors. In the *Penn Central Inclusion Cases*, 389 U.S. 486, 510-511 (1968) this Court stated the proposition as follows:

> While the rights of the bondholders are entitled to respect, they do not command Procrustean measures. They certainly do not dictate that rail operations vital to the Nation be jettisoned despite the availability of a feasible alternative. The public interest is not merely a pawn to be sacrificed for the strategic purposes or protection of a class of security holders whose interests may or may not be served by the destructive move.

In the *Penn Central Inclusion case, supra*, and two years later in the *New Haven Inclusion Cases* 399 U.S. 392, 492 (1970), this Court quoted with approval the following statement by the Interstate Commerce Commission:

> [I]t is a fundamental aspect of our free enterprise economy that persons assume the risks attached to their investments, and the N[ew] H[aven] creditors can expect no less because the N[ew] H[aven]'s properties are devoted to a public use.

The lower court opinion indicates the Act is unconstitutional because it requires continued operation of service and prohibits abandonment of rail lines during the limited reorganization period and this cannot be done under the doctrine announced in the case of *Brooks Scanlon v. Railroad Commission*, 251 U.S. 396 (1920). See also *In Re. Penn Central Trans. Co.*, 494 F.2d 270 (3rd Cir. 1974), *petition for cert. filed* 42

U.S.L.W. 3633 (May 8, 1974). To the contrary, we maintain that the present bankruptcy powers of the government, as set forth in section 77 of the Bankruptcy Act, allow the courts to require creditors to suffer reasonable losses incident to a reorganization.

The Congress may use methods other than a judicial sale to give creditors the value of their claims. In *Wright v. Union Central Life Insurance Co.*, 311 U.S. 273 (1940), this Court upheld a statute which imposed a three-year moratorium on the mortgagor's right to foreclose, subject to payment of reasonable rent, and gave the former debtor the right to buy the property at its appraised value at the end of the moratorium. This type of relief can be decreed by the courts in this case if it is deemed necessary.

When the facts and the alternatives available are examined it becomes clear this statute is a rescue operations for all concerned and not an arbitrary use of government power.

First, the fact that the Penn Central Transportation failed; that there have been continuing losses in the section 77 bankruptcy proceedings; and that there is no viable buyer for the operating properties has not been caused by the Rail Act.

Second, the estate will be required in any event to continue operations under the Interstate Commerce Act. 49 U.S.C. sec. 1(18). In the *New Haven Inclusion Case, supra*, this Court affirmed the proposition that "in the event of a liquidation, New Haven would have been obliged to obtain a certificate from the Commission pursuant to sec. 1(18) of the Interstate Commerce Act." 399 U.S. 392, 461 (1970). See also:

Thompson v. Texas Mexican R. Co., 328 U.S. 134, 144 (1946). There are also many state statutes requiring continuation of public service. *Palmer v. Massachusetts* 308 U.S. 79 (1939), *In re. Central Ry of New Jersey*, 485 F.2d 208 (3rd Cir. 1973). If this court disapproves the reorganization rescue operation authorized by the Act the time spent by the estate in attempting to close down operations will be far longer than under the expedited abandonment provided in sec. 304 of the Act. The present abandonment procedures require the ICC and the courts to balance the public interest against the individual creditor's interest in abandoning and liquidating the rail properties. We suggest that history shows that the existing process is far longer and more difficult than those provided in the Act.

Third, the Congress was well aware of the conditions which the trustees deemed necessary as outlined in testimony by Mr. Jervis Langdon, the spokesman for the trustees of the estate. See Hearings, Subcommittee on Transportation & Aeronautics, House Committee on Interstate and Foreign Commerce, 93rd Cong., 1st Sess. Serial No. 93-30 at page 248 Apr. 16, 1973. The lower Court accepted these identical areas of change in its opinion (J.A. 127) and indicates the solution presented by the Rail Act has a strong presumption in its favor, for practical as well as legal reasons (J.A. 131-32).

The Congress in creating the Rail Act not only followed the legal model set forth by the Supreme Court in *New Haven Inclusion Cases, supra*, but also carefully tailored this statute to meet the specific problems of the Penn Central estate by:

1. Providing for a reduced total rail system. Rail Act sec. 206 and 304.
2. Providing for Government support for lines not necessary to the reduced system. Rail Act sec. 402, 403.
3. Providing for takeover of Northeast corridor rail services by Amtrak and for rail line subsidies to State and local authorities. Rail Act sec. 206(a)(3), 206(c)(1)(C), 210(b), 304 and 402.
4. Providing for direct Federal grants in the amount of $250,000,000 to employees who may be displaced by the reorganization. Rail Act sec. 501-509.
5. Providing assistance for interim deferred maintenance and future upgrading and modernization of the rail system. Rail Act sec. 215, 210(b).

One need only examine the alternatives available to the estate, and it becomes clear the process is "fair and equitable" and provides the only hope for the estates which otherwise must continue suffering erosion as losses mount. This erosion cannot be recovered in liquidation because the estates will eventually be required to sell the properties piecemeal at individual "fire sales" which cannot help but bring lower and lower prices.

It would seem that some creditor appellees hope and expect that if they can destroy the Act, they will force the government to nationalize the Penn Central which they hope would require the rail properties to be taken under eminent domain principles which might result in a greater cash return for them. One of the purposes of this brief *amicus curiae* is to indicate the strong resistance which exists in Congress to paying any additional amounts of government money to these estates beyond that provided in the Act.

THE RAIL ACT IS CONSTITUTIONAL WITHOUT REFERENCE TO THE TUCKER ACT

While we agree with the main contention of the Appellant Government Agencies that the Rail Act is fair and equitable and does not amount to an unconstitutional Fifth Amendment taking, we do differ with their contention in the alternative that the possibilty of a future Tucker Act remedy can affect the constitutionality of the Act itself. We contend that the Act must be construed as constitutional, without such reliance upon the Tucker Act. The Tucker Act was not considered by the Congress in creating the Rail Act. It is a jurisdictional statute often used to settle private claims that was neither repealed, nor engrafted onto the Act to create a possible deficiency judgment against the government.

The Tucker Act, 28 U.S.C. 1491 (1970), waiver of the sovereign's jurisdictional immunity was enacted to provide adequate opportunity for expeditious and orderly determination of claims against the government. The Tucker Act deals with the five limited areas of liability to which the government consents. The five areas do not purport to deal with the upholding of other Acts of Congress. This Court has never relied upon the presence of the Tucker Act to uphold the constitutionality of another Act of Congress.

The logic employed in attempting to argue that the Rail Act is constitutional because of a potential Tucker Act remedy is indeed strained. Each and every act of Congress of a similar nature, irrespective of the amount of authorization or the process provided for in any such

act, could be constitutionally upheld on the grounds that a future Tucker Act remedy might be invoked. The intent of Congress in passing the Tucker Act was not to insure the constitutionality of potential unconstitutional laws and such a precedent would be very dangerous.

The Tucker Act remedy in such cases as *United States v. Causby* 328 U.S. 256 (1945), and *Hurley v. Kincaid*, 285 U.S. 95 (1932), is based upon a lawful government action inadvertently causing injury to a private party which gives rise to a cause of action in the Court of Claims. Such a lawful action by the Government may result in an "implied taking," i.e., low-flying airplanes or flooding of property. In any of these cases, however, the original statutory action was proper, i.e., flying military airplanes or carrying out a flood control project. As in those cases, the process created by the Rail Act is proper exercise of Governmental power and in addition it provides a procedure for the Special Court (similar to the Court of Claims procedure) to correct any inequities arising because of the original transfer of the rail assets to Conrail. This can involve a deficiency judgment against Conrail or valuing the assets as of the effective date of the Rail Act.

The House bill originally defined "fair and equitable value" as either the fair liquidation value or the going concern value as of *September 30, 1973*. H.R. Rep. No. 93-620, 93d Cong., 1st Sess., at 2 (1973). This definition, modeled on the definition adopted by the trial court in the *New Haven Inclusion Case, supra*, 399 U.S. at 492, was designed to protect the creditors from the effects of continued erosion of the bankrupt

estates. The designation of this cut-off date in the statute itself was not in the Senate bill. The Conference compromise adopted instead a standard of "fairness and equity" applicable to the approval of a plan of reorganization, or a step in such a plan as contemplated under section 77 of the Bankruptcy Act.

The report of the Conference Committee does not explain the reasoning behind this compromise. See H.R. Conf. Rep. No. 93-744, 93rd Cong., 1st Sess. at 58-59 (1973). Whatever the reason for the substitution, nothing in the statute as finally enacted, nor in its legislative history, precludes the special court from incorporating a cut-off date into its finding so that the conveyance of rail properties is fair and equitable within the meaning of section 77. In fact, the documented reliance of the Congress on the approach of the *New Haven* case would appear to support the proposition that the concept of judicially determined cut-off date was incorporated into the statutory standard. This recognizes that such a designation is better left to the judicial process after the facts have been established. Establishment of a proper date involves a traditional function of the Federal Judiciary, in that the court must apply the Constitution and the laws of the United States to the specific facts of each case.

The Special Court, having been clothed with the powers of a section 77 reorganization Court by Section 209(b) of the Act, would clearly have the power to determine the point at which the erosion of the debtor estate reached unconstitutional levels, and to set the fair and equitable value of the rail properties at that

date. After setting the cut-off date, the Special Court also has the power under Sec. 303(c)(2)(B) of the Act to order an increased allocation of the government-guaranteed obligations of the U.S.R.A. to the estates if necessary. The Act authorizes up to $500,000,000 in obligations of U.S.R.A. for this purpose. It cannot now be said that this amount is unreasonable on its face.

To the contrary, it is possible that the extent of erosion has been over-stated by many of the interested parties. In this connection, reference is made to the Interstate Commerce Commission Report to Judge Fullam on October 1, 1973. The Commission stated its belief that the Penn Central was financially able to continue its railroad operations through the first quarter of 1974, and probably through the remainder of 1974. The Commission was unable to determine the erosion of traffic alleged by the Trustees. A number of factors suggested to the Commission that the company's traffic erosion had largely stabilized. See *Penn Central Transportation Company Reorganization,* I.C.C. Finance Docket No. 26241, Sept. 28, 1973 (slip opinion at 87, 88-89), and I.C.C. Release No. 193-73, Oct. 1, 1973.

The result of the above-stated reorganization process is to create a valuation system which amply protects the creditors from interim erosion. The Court of Claims may some day have another theory but there is no question that in considering the process under this Act the 93rd Congress, specifically the House of Representatives, rejected giving the Federal Courts the key to the Treasury which would result from an open-ended deficiency judgment against the United States. The

legislative history of this Act is emphatic in restricting the total amount of funds to be used in carrying out the reorganization process authorized by the Act.

> [Mr. Dan Kuykendall] Will the gentleman give us his interpretation of the guarantees we have to keep that [giving the Federal courts the key to the Treasury] from happening in the court proceedings?
>
> [Mr. Brock Adams] Mr. Speaker, there is a definite limitation on the total amount that can be authorized under this bill. Any amounts that go beyond that, or the shifting of the way it is spent, is to be approved by an act of Congress, to be signed by the President.

Colloquoy between Reps. Adams and Kuykendall, Managers on the Part of the House, at 119 Cong. Rec. H-11876 (daily ed., Dec. 20, 1973), quoted in the Opinion of the three-Judge court, J.A. 49-50. The full colloquoy is set forth in Appendix A of this Brief.

The court should *not* at this time consider the availability of a future Tucker Act remedy in considering the constitutionality of the Rail Act. Any Tucker Act remedy must be based upon the facts which show an implied taking or improper erosion of creditor rights if and when the matter is presented to the Court of Claims. Any potential Tucker Act remedy is, therefore, not before this Court. If this Court should

decide at this time that a mechanism of a deficiency judgment against the United States under the Tucker Act is necessary to make this Act constitutional, the the Act must fall since the legislative history and the language of the Act are clear that no deficiency judgment against the U.S. is authorized by the Act.

CONCLUSION

The order of the three-Judge court granting injunctive relief should be reversed and the declaratory judgment set aside.

Respectfully submitted,

BROCK ADAMS
United States Representative
436 Cannon House Office Bldg.
Washington, D.C. 20515
Attorney for Amici Curiae

APPENDIX A

Excerpt from floor debate in House of Representatives, December 20, 1973, 119 Cong. Rec. H11876 (daily edition):

Mr. ADAMS. Mr. Speaker, will the gentleman yield?

Mr. STAGGERS. Mr. Speaker, I yield to the gentleman from Washington, a member of the committee on conference.

(Mr. ADAMS asked and was given permission to revise and extend his remarks.)

Mr. ADAMS. Mr. Speaker, I think the chairman of the conferees and the gentleman from Tennessee have explained the bill very well. I just want to confirm with the chairman that the conferees did reach an agreement on the meaning of section 206(i) of the act, particularly with regard to the fact that the association does not have authority to recommend any form of Federal guarantee of corporation stock.

Mr. STAGGERS. Mr. Speaker, the gentleman is correct. The conferees agreed that the planners of the association do not have the authority to recommend and plan the Federal guarantee of the value of corporation stock under section 206(i) of the bill.

Mr. ADAMS. Mr. Speaker, I thank the chairman. I think the gentleman from Tennessee explained it very well and I wanted to confirm that again.

Mr. Speaker, I would be very happy to answer any questions, but basically the House bill was followed. As the gentleman from Tennessee stated, we removed from the bill the maximum items. I hope the conference report will be adopted.

Mr. KUYKENDALL. Mr. Speaker, will the gentleman yield?

Mr. STAGGERS. Mr. Speaker, I yield to the gentleman from Tennessee.

Mr. KUYKENDALL. Mr. Speaker, I would like to ask the gentleman from Washington to clarify one point, and that is the matter of the deficiency judgment. There was a lot of colloquy in the original debate which expressed fears that the Federal court had the key to the Treasury. Will the gentleman give us his interpretation of the guarantees we have to keep that from happening in the court proceedings?

Mr. ADAMS. Mr. Speaker, there is a definite limitation on the total amount that can be authorized under this bill. Any amounts that go beyond that, or the shifting of the way in which it is spent, is to be approved by an Act of Congress, to be signed by the President. It is defined as a joint resloution [sic] in the bill, and the statement of the managers, and it was the clear intent of the managers that any amount other than common stock was to be at the lowest possible limit to meet the constitutional guarantees.

Mr. KUYKENDALL. Mr. Speaker, is it not true, I will ask the gentleman from Washington (Mr. Adams) that the creditors, of course, are given

protection, and that the Board of Directors, under the control of Government officials, is the owner of the entire block of stock of 100 million shares, whatever it is?

Mr. ADAMS. The gentleman is correct. It is controlled by the United States, so long as the Secretary determines that there is an amount of obligation funds which the United States might, in any way ever, have to have anything to do with.

During that period of time, it is controlled by a board of directors which consists of Government officials.

Mr. KUYKENDALL. There is no way the Federal court may assess the taxpayers or this Congress on the judgments of the creditors: is that correct?

Mr. ADAMS. The gentleman is correct.

Mr. KUYKENDALL. There is no way they can assess the Congress for the money?

Mr. ADAMS. The gentleman is correct.

Mr. KUYKENDALL. Mr. Speaker I yield myself such time as I may consume.

In The
Supreme Court of the United States

OCTOBER TERM, 1974

No. 74–166

REGIONAL RAIL REORGANIZATION

FILED
AUG 28 1974

RICHARD JOYCE SMITH, Trustee of the Property of The New York, New Haven and Hartford Railroad Company, Debtor, Cross-Appellant

v.

UNITED STATES OF AMERICA, *et al.*, Cross-Appellees

ON CROSS-APPEALS FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF CROSS-APPELLANT

Of Counsel:

MORRIS RAKER
CHARLES W. MORSE, JR.

SULLIVAN & WORCESTER
225 Franklin Street
Boston, Massachusetts
02110

JOSEPH AUERBACH
225 Franklin Street
Boston, Massachusetts
02110

JAMES WM. MOORE
54 Meadow Street
New Haven, Connecticut
06506

Attorneys for Appellant Richard Joyce Smith, Trustee of the Property of The New York, New Haven and Hartford Railroad Company, Debtor

TABLE OF CONTENTS

	Page
Table of Citations	iii
Introduction	1
Opinions Below	2
Jurisdiction	3
Questions Presented	3
Constitutional Provisions and Statutes Involved in This Cross-Appeal	5
Statement of the Case	5
Summary of Argument	15
Argument:	
I. THE COURT BELOW ERRED IN NOT DECIDING WHETHER THE COMPULSORY CONVEYANCES MANDATED BY THE RRRA VIOLATE THE FIFTH AMENDMENT RIGHTS OF THE NEW HAVEN TRUSTEE	24
II. THE COMPULSORY CONVEYANCE PROVISIONS OF THE RRRA VIOLATE THE NEW HAVEN TRUSTEE'S FIFTH AMENDMENT RIGHTS	37
A. Legal and Factual Setting of the RRRA	37
B. The Compulsory Conveyance Provisions of the RRRA Involve an Intentional Taking, Not Compensated by Money or its Perfect Equivalent, of the Property of Penn Central in Violation of the Fifth Amendment Rights of its Creditors and Stockholders	52
C. The Fifth Amendment Requires that a Railroad in Reorganization, Which Is Unable to Earn Net Railway Operating Income and Whose Properties Are Required to Be Continued in Perpetual Public Service, Be Paid Not Less than the "Highest and Best Use" Value of its Rail Properties	61
D. The RRRA Is Constitutionally Defective in Requiring Payment for Rail Assets in the Form of Securities of Conrail Without Any Provision for a Guarantee that the Value of Such Securities Will Be the Perfect Monetary Equivalent of the "Highest and Best Use" Value of the Rail Assets	69

Page

E. A Requirement that Rail Properties of Penn Central Be Exchanged for Securities of Conrail Is a Denial of Constitutional Rights to Dismissal of the Reorganization Proceedings and Termination of Loss Operations 84

F. Adjudication that the Compulsory Conveyance Provisions of the Present RRRA Are Unconstitutional Can and Should Result in a Congressional Enactment Amending the RRRA to Authorize Payment as Required by the Fifth Amendment for Penn Central's Rail Properties . 88

III. THE PROCEDURES OF THE RRRA OFFEND PROCEDURAL DUE PROCESS BY MANDATING CONVEYANCE OF RAIL ASSETS PRIOR TO JUDICIAL REVIEW OF THE ADEQUACY OF THE CONSIDERATION PAID WHERE THERE IS NO POSSIBILITY THAT A COURT MAY SET ASIDE THE CONVEYANCES 93

IV. TO THE EXTENT THAT THE RRRA AMENDS THE SUBSTANTIVE AND PROCEDURAL PROVISIONS OF §77 OF THE BANKRUPTCY ACT, THE RRRA IS A "LAW ON THE SUBJECT OF BANKRUPTCIES" AND IS VOID FOR WANT OF GEOGRAPHICAL UNIFORMITY 99

A. The RRRA Is an Invalid Non-Uniform Statute as Applied to Penn Central, and Creditors of Penn Central Have Standing to Challenge the Lack of Geographical Uniformity 99

B. The Court Below Was in Error in Concluding that the RRRA's Defect as Non-Uniform Legislation on the Subject of Bankruptcies Taints Only the Provision Requiring Mandatory Dismissal of §77 Proceedings 103

Conclusion 107

Appendix A-1

TABLE OF CITATIONS

Cases:	Page
Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470 (1973)	57, 58, 59
Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936)	32
Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970)	28
Baltimore & Ohio R.R. v. United States, 298 U.S. 349 (1936).	58
Baltimore & Ohio R.R. v. United States, 386 U.S. 372 (1967)	5
Brooks-Scanlon Co. v. Railroad Commission, 251 U.S. 396 (1920)	84, 85
Bullock v. Florida ex rel. Railroad Commission, 254 U.S. 513 (1921)	84
Case v. Los Angeles Lumber Products Co., 308 U.S. 106 (1939)	38, 39
Central R.R. of New Jersey v. Manufacturers Hanover Trust Co., 421 F. 2d 604 (3d Cir.), *cert. denied*, 398 U.S. 949 (1970)	84, 85
Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1 (1961)	32
Consolidated Rock Products Co. v. Du Bois, 312 U.S. 510 (1941)	38 *et passim*
Continental Ill. Nat. Bank v. Chicago, R.I. & Pac. Ry., 294 U.S. 648 (1935)	74
Data Processing Service v. Camp, 397 U.S. 150 (1970)	34
Eccles v. Peoples Bank, 333 U.S. 426 (1948)	32
Ecker v. Western Pacific R.R. Corp., 318 U.S. 448 (1943)	39, 40, 105
Epperson v. Arkansas, 393 U.S. 97 (1968)	33, 34
Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944)	91
Flast v. Cohen, 392 U.S. 83 (1968)	28, 34

	Page
Group of Institutional Investors v. Chicago, M., St.P., & P. R.R., 318 U.S. 523 (1943)	39, 40, 105
Hanover National Bank v. Moyses, 186 U.S. 181 (1902)	101
In re City of New York (Fifth Avenue Coach Lines), 18 N.Y. 2d 212, 219 N.E. 2d 410, *appeal dismissed sub. nom. Fifth Avenue Coach Lines v. City of New York*, 386 U.S. 778 (1966)	63 *et passim*
In re New York, N.H. & H. R.R., 289 F. Supp. 451 (D. Conn. 1968)	40, 64
In re New York, N.H. & H. R.R., 304 F. Supp. 793 (D.Conn. 1969), *aff'd in part, rev'd in part, New Haven Inclusion Cases*, 399 U.S. 392 (1970).	73
In re New York, N.H. & H. R.R. Co., 330 F. Supp. 131, 150 331 F. Supp. 212 (D. Conn. 1971), *rev'd*, 457 F. 2d 683 (2d Cir.), *cert. denied*, 409 U.S. 890 (1972).	82
In re New York, N.H. & H. R.R., 378 F. 2d 635 (2d Cir. 1967)	93
In re New York, Ontario & Western Ry., 171 F. Supp. 634 (S.D.N.Y. 1958)	40
In re Penn Central Transportation Co. (Order No. 124 approving $100 million of Trustees' Certificates), 325 F. Supp. 302 (E.D. Pa. 1971) ..	7, 71
In re Penn Central Transportation Co. (Order No. 546, Providing for a Temporary Lien Pending Adjudication of New Haven Trustee's Proof of Claim), 337 F. Supp. 779 (E.D. Pa. 1972) ..	82
In re Penn Central Transportation Co. (Order No. 602), 340 F. Supp. 851 (E.D. Pa. 1972) implementing *In re Penn Central Transportation Co. (reversal of Orders Nos. 192 and 193)*, 454 F. 2d 9 (3d Cir. 1972)	90
In re Penn Central Transportation Co. (Order No. 1137), 355 F. Supp. 1343 (E.D. Pa. 1973) .	8, 9
In re Penn Central Transportation Co. (Columbus Option Appeals), 494 F. 2d 270 (3d Cir. 1974), *petition for cert. filed*, 42 U.S.L.W. 3633 (May 8, 1974), No. 73-1672	45, 84

	Page
In re Penn Central Transportation Co. (Opinion & Order No. 1507 re Philadelphia Commuter Service) (E.D. Pa. March 18, 1974)	82
In re Penn Central Transportation Co. (Opinion in Support of Order No. 1543) ("120-Day" Findings under §207(b)) (E.D. Pa. May 2, 1974)	87
In re Penn Central Transportation Co. (Memorandum in Support of Findings & Order No. 1596 Pursuant to the Second Sentence of §207(b) of the Regional Rail Reorganization Act of 1973) (E.D. Pa. July 2, 1974)	18 *et passim*
In re Penn Central Transportation Co. et al. (Memorandum in Support of Findings and Orders Pursuant to the Second Clause of §207(b) of the Regional Rail Reorganization Act of 1973 in the Secondary Debtors' Proceedings) (E.D. Pa. July 2, 1974)	59
In re Port Authority Trans-Hudson Corp., 20 N.Y. 2d 457, 231 N.E. 2d 743, *cert. denied sub. nom. Port Authority Trans-Hudson Corp. v. Hudson Rapid Tubes Corp.*, 390 U.S. 1002 (1968)	63 *et passim*
In re 620 Church Street Bldg. Corp., 299 U.S. 24 (1936)	19, 26
In re Third Avenue Transit Corp., 198 F. 2d 703 (2d Cir. 1952)	84, 85
Investment Co. Institute v. Camp, 401 U.S. 617 (1971)	34
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951)	25, 36
Juilliard v. Greenman, 110 U.S. 421 (1884)	58
Knox v. Lee, 79 U.S. (12 Wall.) 457 (1871)	58
Lockerty v. Phillips, 319 U.S. 182 (1943)	26
Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935)	74, 75, 84
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)	98
Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893)	56, 57, 58

	Page
New Haven Inclusion Cases, 399 U.S. 392 (1970)	2 *et passim*
Norman v. Baltimore & Ohio R.R., 294 U.S. 240 (1935)	58
Northern Pacific Ry. v. Boyd, 228 U.S. 482 (1913)	20, 38, 39
Penn Central Merger Cases, 389 U.S. 486 (1968)	2 *et passim*
Poe v. Ullman, 367 U.S. 497 (1961)	32, 33
Railroad Commission v. Eastern Texas Railroad, 264 U.S. 79 (1924)	84, 85
Railroad Transfer Service, Inc. v. Chicago, 386 U.S. 351 (1967)	35, 36
Reconstruction Finance Corp. v. Denver & R.G.W. R.R., 328 U.S. 495 (1946)	39, 69, 95
Roe v. Wade, 410 U.S. 113 (1973)	33, 34
Steffel v. Thompson, 42 U.S.L.W. 4357 (U.S., March 19, 1974)	34
United Public Workers v. Mitchell, 330 U.S. 75 (1947)	32
United States v. Miller, 317 U.S. 369 (1943)	56, 58
United States v. Raines, 362 U.S. 17 (1960)	101
United States v. Reynolds, 397 U.S. 14 (1970)	56, 57, 58
Vanhorne's Lessee v. Dorrance, 2 Dall. 304 (Circuit Court Pa. 1795)	59
Vanston Bondholders Protective Committee v. Green, 329 U.S. 156 (1946)	101
Wright v. Union Central Life Ins. Co., 311 U.S. 273 (1940)	74, 75
Wright v. Vinton Branch Mountain Trust Bank, 300 U.S. 440 (1937)	74, 75
Yakus v. United States, 321 U.S. 414 (1944)	26

	Page
Administrative Decisions:	
New York, Ontario and Western Railroad Reorganization, 295 I.C.C. 346 (1956)	40
Penn Central Transportation Company Reorganization, Report on Reorganization Plans, Finance Docket No. 26241 (September 28, 1973)	9 *et passim*
Constitutional Provisions and Statutes:	
Constitution of the United States:	
Article I, Sec. 8, Cl. 3 (Commerce Clause)	4 *et passim*
Article I, Sec. 8, Cl. 4 (Bankruptcy Clause)	4 *et passim*
Article I, Sec. 9, Cl. 7	5
Article III	50, 51
Amendment V (Takings and Due Process Clauses)	4 *et passim*
Statutes:	
Bankruptcy Act:	
Section 24, 11 U.S.C. §47	51
Section 77, 11 U.S.C. §205	2 *et passim*
§77(b)(5)	47, 104, 105, 106
§77(c)(3)	7
§77(d)	9 *et passim*
§77(e)	6 *et passim*
§77(g)	44 *et passim*
§77(i)	44, 108
§77(o)	47 *et passim*
Chapter X, 11 U.S.C. §§501-676 (successor to §77B)	20, 38, 39
Emergency Price Control Act of 1942, 56 Stat. 23, 50 U.S.C. App. §§901 *et seq.*	26
Emergency Rail Services Act of 1970, §3, 45 U.S.C. §662	7
Frazier-Lemke Act, 48 Stat. 1289; Amended Frazier-Lemke Act, 49 Stat. 942	74, 75
Interstate Commerce Act, 49 U.S.C. §§1 *et seq.*:	
§1(18)	42, 86
§5(2)(d)	41

	Page
Judicial Code, 28 U.S.C.	
§1252	3, 14
§1253	14
§1254	19
§1331	26, 27
§1404(a)	10
§1491 (Tucker Act)	11 *et passim*
§1651	19, 26
§2282	11, 26, 30
§2284	11, 26
§2322	107
Railway Labor Act, 45 U.S.C. §§151 *et seq.*	7
Regional Rail Reorganization Act of 1973, Public Law 93-239, 87 Stat. 985, 45 U.S.C. §§701 *et seq.*:	
§101(a)	64, 65
§102(9)	18
§102(10)	16
§102(12)	18, 45
§102(13)	99
§201	10, 17
§205	17
§206(a)	17, 60, 78
§206(b)	17
§206(c)	17 *et passim*
§206(d)	17 *et passim*
§206(e)	17
§206(f)	17, 52, 107
§206(g)	17
§206(h)	17, 52
§206(i)	17 *et passim*
§207(b)	12 *et passim*
§207(c)	17, 26
§208(a)	17, 29
§208(b)	17, 29
§209(a)	19, 27
§209(b)	50, 100
§209(c)	12 *et passim*
§209(d)	17 *et passim*
§210	48 *et passim*
§213	47 *et passim*
§215	48, 102
§301(a)	17
§301(b)	71
§301(d)	17 *et passim*
§302	108

	Page
§303(a)	17, 35, 98
§303(b)	4 *et passim*
§303(c)	18 *et passim*
§304	12 *et passim*
Title IV	48, 102
Title V	48, 102
§601(b)	99, 100
§601(d)	21, 44, 60
Senate Joint Resolution No. 59, Public Law 93-5, 87 Stat. 5 (February 9, 1973)	8
Trading With the Enemy Act, 50 U.S.C. App. §§1 *et seq.*	89

In The
Supreme Court of the United States

OCTOBER TERM, 1974

No. 74–166

REGIONAL RAIL REORGANIZATION CASES

RICHARD JOYCE SMITH, Trustee of the Property of
The New York, New Haven and Hartford Railroad Company, Debtor, Cross-Appellant

v.

UNITED STATES OF AMERICA, *et al.*,
Cross-Appellees

ON CROSS-APPEALS FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF CROSS-APPELLANT

INTRODUCTION

This brief is submitted on behalf of cross-appellant, Richard Joyce Smith, Trustee of the Property of The New York, New Haven and Hartford Railroad Company, Debtor (the "New Haven Trustee" and "New Haven," respectively). Since July, 1961, the New Ha-

ven has been in reorganization under §77 of the Bankruptcy Act, 11 U.S.C. §205; however, since December 31, 1968 New Haven's former railroad has been operated by Penn Central Transportation Company ("Penn Central"), pursuant to the inclusion approved by this Court in *Penn Central Merger Cases*, 389 U.S. 486 (1968) and *New Haven Inclusion Cases*, 399 U.S. 392 (1970). On June 21, 1970 Penn Central filed a petition seeking reorganization under §77. The New Haven Trustee is presently owed $123,809,404 by Penn Central, exclusive of interest, out of a total purchase price, approved in *New Haven Inclusion Cases*, of $174,635,899, and his standing in this case is predicated upon that unpaid claim. The New Haven Trustee, together with certain other plaintiffs (whose actions were consolidated for oral argument and disposition), prevailed in the court below as to certain of the constitutional contentions presented for decision; however the court below failed to reach other, even more basic, constitutional issues. As a result, although an appellee as to the appeals taken by the defendants below, the New Haven Trustee is a cross-appellant as to so much of the order below as denied in part his claim for relief.

OPINIONS BELOW

The opinions and order of the district court have not yet been reported; they are reproduced in the Joint Appendix of the Appellants and Appellees, pp. 9-83 (hereinafter cited as "JA"). The instant case, *Smith v. United States* (E.D. Pa. Civil Action No. 74-1107) was consolidated for oral argument and disposition below with two related cases, *Connecticut General Ins. Corp. v. United States Ry. Ass'n* (E.D. Pa. Civil Action No. 74-189) and *Penn Central Co. v. Brinegar* (E.D. Pa. Civil Action No. 74-1149).

JURISDICTION

Jurisdiction in this Court is based on 28 U.S.C. §1252. On August 23, 1974, the New Haven Trustee filed a Jurisdictional Statement relating specifically to the jurisdiction of this Court to hear this cross-appeal. By stipulation of counsel for the New Haven Trustee as cross-appellant and all other appellants and appellees, this Brief is being filed in advance of the determination of the Court as to probable jurisdiction in order to facilitate an expedited briefing and hearing schedule as sought by all the parties.

QUESTIONS PRESENTED

1. Was the court below in error in refusing to adjudicate whether or not the compulsory conveyance provisions of the Regional Rail Reorganization Act, 45 U.S.C. §§701 *et seq.* ("RRRA"), are void on their face as repugnant to the constitutional rights of the New Haven Trustee and other claimants to the Penn Central estate?

2. Did the New Haven Trustee have standing to assert that the enforcement of the compulsory conveyance provisions of the RRRA, if not enjoined, would cause irreparable injury to the New Haven estate?

3. Where a railroad in reorganization under §77 of the Bankruptcy Act is unable to achieve an earnings-based reorganization by reason of large deficits in net railway operating income and the lack of any prospect of earnings, can Congress by enactment of new legislation deprive claimants to the railroad's estate of their right to insist upon termination of rail operations and the sale of rail properties subject to their mortgage liens for their "highest and best use" value?

4. Considered as an exercise of Congress' Commerce Clause and eminent domain powers, do the compulsory conveyance provisions of the RRRA involve an intentional uncompensated taking, or a taking not compensated in money or its perfect equivalent, of the property of Penn Central, and of claimants to its estate, in violation of the Fifth Amendment to the Constitution?

5. Considered as an exercise of Congress' Bankruptcy Clause powers, do the compulsory conveyance provisions of the RRRA offend substantive due process rights of claimants to the Penn Central estate by divesting such claimants' liens on valuable rail transportation properties in exchange for common stock and other securities of uncertain value of a governmentally-controlled corporation and an illusory deficiency judgment against such corporation?

6. Do the compulsory provisions of §303(b)(1) and (2) of the RRRA, requiring conveyance of rail properties and divestment of the liens of claimants to the Penn Central estate, in advance of judicial determinations as to "highest and best use" value of such properties and the equitable equivalent value of the securities and common stock to be exchanged therefor, offend the procedural due process rights of claimants to the Penn Central estate?

7. Are the compulsory conveyance provisions of §§206, 207, 208, 209, 303 and 304 of the RRRA void as a law, purportedly on the subject of bankruptcies, which is not uniform geographically throughout the United States?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CROSS-APPEAL

The constitutional provisions and statutes involved in this cross-appeal include:[1]

Constitution of the United States:

Article I, Section 8, Clauses 3 and 4
Article I, Section 9, Clause 7
Fifth Amendment

Statutes of the United States:

Regional Rail Reorganization Act, Public Law 93-236, 45 U.S.C. §§701 *et seq.* (JA 391)

Section 77 of the Bankruptcy Act, 11 U.S.C. §205

STATEMENT OF THE CASE

Penn Central is the successor to The Pennsylvania Railroad Company and The New York Central Railroad Company, whose merger was finally approved by this Court in *Penn Central Merger Cases, supra.*[2] As one of the conditions of the merger, the Pennsylvania and New York Central Railroads agreed to purchase the assets of the New Haven, which had been in reorganization under §77 of the Bankruptcy Act since 1961 (United States District Court for the District of Connecticut, No. 30226). Penn and Central effected their merger on February 1, 1968; and New Haven's

[1]The text of the Regional Rail Reorganization Act of 1973 is printed in full at JA 391 *et seq.* The text of pertinent provisions of the United States Constitution and of Section 77 of the Bankruptcy Act is printed in the Appendix hereto at A-1 *et seq.*

[2]See also *Baltimore & Ohio R.R. v. United States*, 386 U.S. 372 (1967), refusing to approve the initial decision of the Interstate Commerce Commission ("ICC") until it afforded adequate protection to certain eastern railroads not to be included in the merger.

railroad assets were conveyed to Penn Central on December 31, 1968, by Richard Joyce Smith, Trustee of the New Haven (together with his then co-Trustee), subject to later judicial review of adequacy of the purchase price ordered by the ICC.

On June 21, 1970, Penn Central filed for reorganization under §77 of the Bankruptcy Act (United States District Court for the Eastern District of Pennsylvania, Bky. No. 70-347). Eight days later, this Court indicated approval of the terms fixed by the New Haven Reorganization Court (under §77(e) proceedings on New Haven's plan of reorganization) for sale of New Haven's assets to Penn Central, but reversed and remanded for further proceedings to consider the effect of Penn Central's bankruptcy on the value of the Penn Central's payment, particularly its common stock, included in the consideration. *New Haven Inclusion Cases, supra.*

The early stages of the Penn Central §77 proceedings were devoted to an effort by the Penn Central Trustees to identify the problems which had to be overcome in order to achieve an earnings-based reorganization as contemplated by §77. The initial cash crisis was temporarily alleviated by orders of the United States District Court for the Eastern District of Pennsylvania, Judge John P. Fullam ("Penn Central Reorganization Court") permitting deferrals of interest on debt (other than equipment debt), and most leased line rentals and real estate taxes.[3] In addition, acting

[3]Through December 31, 1973, the following amounts had been deferred: interest, $104 million; leased line rentals, $101 million; taxes, $241 million. Stipulation as to Factual Matters (printed at JA 317-24; hereinafter cited as "Stip. Fact"), ¶¶12, 13, 14. The total of such deferrals was $446 million as of December 31, 1973, and represents a priority administration claim. This total does not include $57 million of interest on $300 million of notes secured by pledge of Penn Central's stock interest in Pennsylvania Co., a non-rail subsidiary. If the interest on the notes secured by the Pennsylvania Co. stock is included, deferrals amounted to $503 million as of December 31, 1973.

pursuant to §77(c)(3), the Penn Central Reorganization Court approved $100 million of Trustees' Certificates,[4] which in order to be marketable required the guarantee of the United States authorized by §3 of the Emergency Rail Services Act of 1970, 45 U.S.C. §662.

A series of Penn Central Trustees' Reports dated February 10, 1971, March 22, 1971, September 17, 1971, February 15, 1972, April 1, 1972, July 1, 1972, October 1, 1972, January 1, 1973, February 1, 1973, and April 3, 1974[5] disclose the history of the Trustees' efforts to achieve a private income-based reorganization of Penn Central. The Trustees began by asserting that Penn Central could be reorganized if certain conditions, not within their control, were met.[6] Subsequent reports spelled out a lack of success in implementing these conditions. Finally, in their January 1, 1973 and February 1, 1973 Reports, the Trustees acknowledged that reorganization would not be possible without a *government grant* (not merely financial assistance by way of loans or guarantee of borrowings) on the order of $600 million to $800 million.

There followed an attempt by the Trustees to implement certain crew-consist changes (which had been the subject of exhaustive, but unproductive, proceedings under the Railway Labor Act), that resulted

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[4]*In re Penn Central Transportation Co. (Order No. 124)*, 325 F. Supp. 302 (E.D. Pa. 1971).

[5]These Trustees' Reports are reproduced as Documents 1 through 10 in the Joint Documentary Submission in the court below, ten copies of which have been filed with the Clerk of this Court.

[6]The New Haven Trustee on March 10, 1972 advised the Penn Central Reorganization Court that in his opinion the Penn Central Trustees' predictions as to reorganizability of Penn Central on an income basis were unduly optimistic. See Doc. No. 11 in the Joint Documentary Submission.

in a strike on February 8, 1973. Congress responded by enacting Senate Joint Resolution No. 59, which imposed a 90-day moratorium on both the work-rule changes and the strike.[7]

Shortly thereafter, acting *sua sponte*, the Penn Central Reorganization Court entered an opinion and order regarding the status of reorganization efforts. *In re Penn Central Transportation Co.*, 355 F. Supp. 1343 (E.D. Pa. 1973). Judge Fullam concluded as follows:

> "Whether the constitutional limit [of erosion] has been exceeded depends primarily upon how the remaining assets are to be valued; and this in turn may well depend upon how those assets are to be used at the conclusion of this reorganization. Under any view of the matter, *it seems clear that the point of unconstitutionality is fast approaching, if it has not already arrived.*
>
> "The essence of §77 of the Bankruptcy Act is that the legal remedies normally available to creditors may be held in suspension for a *reasonable time* in order to permit rehabilitation of the enterprise. Whenever it appears that there is *no genuine likelihood of ultimate success, the legal and constitutional justification for restraining creditors from exercising their normal remedies disappears.*
>
> "It has long been apparent that the particular problems of Penn Central cannot be completely divorced from problems of national transportation policy. Railroads are, after all, a regulated industry. However unappealing may be the notion that a regulated industry can become bankrupt, the Trustees' efforts to rehabilitate the Debtor are circumscribed by existing statutes and regulations. To the extent that these statutes and regulations . . . preclude the exercise of self-help in achieving prof-

[7]Public Law 93-5, 87 Stat. 5 (February 9, 1973). Following that rebuke by Congress, the Trustees never again attempted to implement the work-rule changes.

itability, the legislative and executive branches of government must be looked to for solutions, if solutions are to be forthcoming.

* * *

"The legal and constitutional rights of the parties to this reorganization should be evaluated in the light of whatever changes Congress sees fit to enact.

"By the same token, however, this Court cannot ignore the realities of the Debtor's situation. On the basis of the record to date, it appears *highly doubtful that the Debtor could properly be permitted to continue to operate on its present basis beyond October 1, 1973." Id.* at 1344-46 (emphasis added).[8]

There then followed proceedings before the ICC in August, 1973 upon proposed plans of reorganization of Penn Central filed by the New Haven Trustee and subsequently by the Penn Central Trustees and Penn Central Company. The ICC's Report dated September 28, 1973 rejected on various grounds all plans submitted for the reorganization of Penn Central,[9] and declined to certify to the Reorganization Court any plan of reorganization under §77(d), essentially adopting the position urged by the United States that reorganization of Penn Central had to await a "solution" for the Northeast that would, in turn, require Congressional action.

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[8]By the time this appeal has been heard, Penn Central will have been "permitted to operate on its present basis" for more than one year beyond the date of "highly doubtful" constitutionality.

[9]The ICC's Report dated September 28, 1973 is Doc. No. 54 in the Joint Documentary Submission. Extracts from the testimony in the ICC proceedings are set forth in Docs. Nos. 38-53 in the Joint Documentary Submission.

See *infra*, Part II-A, for a detailed discussion of the plans submitted to the ICC under §77(d) and its Report dated September 28, 1973.

On October 9, 1973, the New Haven Trustee filed a Motion to dismiss Penn Central's §77 proceedings pursuant to §77(g), alleging that the point of unconstitutional erosion of the Penn Central estate had commenced not later than January 1, 1973.[10]

On January 2, 1974, the RRRA was signed into law by the President.[11]

On January 25, 1974, the New Haven Trustee filed a complaint asserting that the RRRA was unconstitutional on its face and as applied to Penn Central, naming as defendants the United States, United States Railway Association ("USRA") created pursuant to §201 of the RRRA, and Secretary of Transportation Brinegar (herein referred to collectively as the "Governmental Defendants"). The action was filed in the United States District Court for the District of Columbia. On the same day, other creditors of Penn Central filed a similar complaint in the United States District Court for the Eastern District of Pennsylvania (*Connecticut General v. USRA*, Civil Action No. 74-189). In order to achieve a single expedited proceeding, the New Haven Trustee consented to a motion of the United States and other Governmental Defendants to transfer *Smith v. United States, et al.* to the Eastern District of Pennsylvania pursuant to 28 U.S.C. §1404(a). A third case, *Penn Central Co. v. Brinegar*, was also transferred, under §1404(a), from the District of Columbia.

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[10]Doc. No. 13 in the Joint Documentary Submission. As is noted in greater detail in Part II-A of the Argument, this Motion and a related petition seeking an equity receivership have not been decided. No hearing was held on the §77(g) Motion until May 6, 1974. A previously filed petition of the New Haven Trustee, seeking, *inter alia*, the fixing of a date for termination of operations (Doc. No. 12 in the Joint Documentary Submission), filed on March 16, 1973, was never set down for hearing.

[11]Public Law 93-236, codified as 45 U.S.C. §§701 *et seq.* Section references to the RRRA are to the Section numbers in Public Law 93-236, and not to the codification in 45 U.S.C.

Pursuant to 28 U.S.C. §§2282 and 2284, a three-judge district court, consisting of Circuit Judge Ruggero J. Aldisert and District Judges John P. Fullam and Louis C. Bechtle, was constituted to hear all the cases concerning the constitutionality of the RRRA.

The Penn Central Trustees, who intervened as defendants, answered that the RRRA was constitutional by virtue of the alleged existence of a "Tucker Act remedy" under 28 U.S.C. §1491 to "underwrite" any constitutional deficiency in the RRRA.

After joinder of issue, the New Haven Trustee on April 29, 1974 filed a motion for summary judgment as to certain of the legal issues raised by his Complaint.[12] The Governmental Defendants and the Penn Central Trustees each then filed counter-motions for summary judgment. The factual record was then completed by a Stipulation as to the Record in the Penn Central Reorganization Proceedings, a Stipulation as to Factual Matters, a Joint Documentary Submission, and affidavits of two government witnesses.[13] *Smith v. United States* was then consolidated for purposes of oral argument and disposition on the merits with the *Connecticut General* and *Penn Central Company* cases, in which motions for summary judgment had also been filed.

The issue before the court below was whether an injunction should issue restraining the enforcement of

[12]The New Haven Trustee's Memorandum of Points and Authorities in Support of Motion for Summary Judgment (filed May 2, 1974, E. D. Pa. C. A. No. 74-1107, Doc. No. 4; see JA 258) at pp.1-8 lists the issues included in his motion for summary judgment.

[13]As noted above, ten copies of the Joint Documentary Submission have been filed with the Clerk of this Court. One of the government's affidavits is Doc. No. 61 in the Joint Documentary Submission; the other is reprinted at JA 226-55. The Stipulation as to Factual Matters is printed at JA 317-24. The Stipulation as to the Record is identical to that set forth at JA 197-99.

various sections of the RRRA on grounds of repugnance to the Constitution. The court below granted, in part, the motion of the New Haven Trustee for summary judgment, and issued an order dated June 25, 1974 ("Order"; JA 82-83) which enjoined defendant USRA from certifying a final system plan to the Special Court pursuant to §209(c) of the RRRA, and enjoined all defendants from taking any action to enforce the provisions of §304(f) of the RRRA with respect to any abandonment, cessation or reduction of railroad service determined by a court of competent jurisdiction to be necessary for the preservation of rights guaranteed by the Constitution (Order, ¶¶1, 2; JA 82). In addition, the court below enjoined all parties "from enforcing, or taking any action to implement, so much of Section 207(b) of the RRRA as purports to require dismissal of pending proceedings for reorganization [of Penn Central] under Section 77 of the Bankruptcy Act" (Order, ¶3; JA 82).[14] Finally, the court below entered a declaratory judgment that §303 of the RRRA is null and void insofar as it fails to provide compensation for interim erosion pending final implementation of the final system plan contemplated by the RRRA and that §304(f) of the RRRA is null and void as violative of the Fifth Amendment to the Constitution insofar as it would require continued operation of rail services at a loss in violation of the constitutional rights of the owners and creditors of Penn Central (Order, ¶¶4a, 4b; JA 82-83). The court below also declared a portion of the third sentence of §207(b) of the RRRA to be null and void as violative of Article I, Section 8, Clause 4 of the Constitution in that the RRRA is not uniform geographi-

[14]This portion of the Order was entered *sua sponte* as none of the plaintiffs sought this relief.

cally throughout the United States and, to the extent that the RRRA amends §77 of the Bankruptcy Act, it is a law on the subject of bankruptcies within the meaning of Article I, Section 8, Clause 4 (Order, ¶4c; JA 83).

The court below was not unanimous in every respect. Circuit Judge Aldisert, who wrote the Opinion of the Court, was joined by District Judge Bechtle in disposing of "plaintiffs' threshold contention that the possible future conveyance of rail properties to Conrail [Consolidated Rail Corporation] in consideration for Conrail stock and securities constitutes a Fifth Amendment taking without payment of just compensation" (Opinion of the Court; JA 23) by concluding that "we do not meet these Fifth Amendment questions because we are persuaded that these issues are premature" (Opinion of the Court; JA 23). Judge Fullam concurred in the result, but took the view that certain of the constitutional issues presented were ripe for adjudication and should not have been deferred (Concurring Opinion of Fullam, J., Part I; JA 55-60). The New Haven Trustee as cross-appellant asserts that the court below was in error in finding that it was premature to judge the facial constitutionality of the compulsory conveyance provisions of the RRRA.

The court below was also in disagreement as to whether the RRRA was, to the extent it represents a "law on the subject of bankruptcies," void for want of geographical uniformity under Article I, Section 8, Clause 4 of the Constitution. Judges Fullam and Bechtle so held, but concluded that the only provision in the RRRA that could not be rationalized as being based on Commerce Clause powers was the provision requiring mandatory dismissal of §77 proceedings,[15]

[15]RRRA, §207(b), third sentence, clause (2).

which they held to be void for lack of geographical uniformity (Concurring Opinion of Fullam, J., Part II; JA 64-65). Judge Aldisert dissented from this conclusion on the ground that the RRRA is uniform in its application to creditors, and that creditor parties lack standing to assert the constitutional defect of the RRRA's non-applicability to a debtor railroad located outside the region (JA 26-29). The New Haven Trustee, by this appeal, asserts that the RRRA is void for want of geographical uniformity in a number of respects, including (but not limited to) clause (2) of the third sentence of §207(b), and that, for the reasons set forth in Part II of Judge Fullam's concurring opinion (for the majority of the court), the New Haven Trustee has standing to assert this constitutional defect.

The United States and the other Governmental Defendants, and the Penn Central Trustees as intervening defendants, each filed appeals to this Court from the Order pursuant to 28 U.S.C. §§1252 and 1253 (docketed as No. 74-167, *United States Ry. Ass'n v. Connecticut General Ins. Corp., et al.*; No. 74-168, *United States, et al. v. Connecticut General Ins. Corp., et al.* and No. 74-165, *Blanchette, et al. v. Connecticut General Ins. Corp., et al.*). The New Haven Trustee filed a cross-appeal to this Court (28 U.S.C. §1252) from so much of the Order as denied, in part, his motion for summary judgment (docketed as No. 74-166, *Smith v. United States, et al.*).

SUMMARY OF ARGUMENT

This cross-appeal challenges the constitutional validity of the compulsory conveyance provisions of the RRRA, an issue which the majority of the court below refused to reach on grounds of alleged prematurity. The RRRA was declared unconstitutional in part by the court below, and the court below enjoined certification of any "final system plan" by USRA to the Special Court. This judgment, however, was based solely on the constitutional defect that the RRRA requires Penn Central to sustain enormous operating deficits, and consequent erosion of the estate available to satisfy Penn Central claimants, during the period January 1, 1974 to the date when the compulsory conveyances mandated by the RRRA may occur. The RRRA was held unconstitutional in that it failed to make provision for payment to the estate of just compensation in respect of these operating deficits and consequent erosion. While the decision below is of some help in preventing an unconstitutional taking from being implemented, the issues which the court below found to be ripe for adjudication represent, in effect, but the tip of the iceberg. The issues as to the constitutional defects, both facial and as applied to Penn Central, of the compulsory conveyance provisions of the RRRA are inherently important issues which require concurrent resolution.

The RRRA was enacted by Congress on January 2, 1974 to deal with the unfortunate fact that the Penn Central System[16] and certain smaller railroads in the

[16]The Penn Central System comprises railroad properties of Penn Central Transportation Company, the Principal Debtor, 15 leased lines of Penn Central which have filed for reorganization under §77 as "Secondary Debtors," and numerous other railroads controlled by Penn Central (Penn Central's Form R-1 Report for 1973 (Doc. No. 37 in Joint Doc-

(footnote continued on next page)

Northeast-Midwest region[17] are unable to generate operating revenues in excess of operating expenses, and hence are unable to achieve any net earnings before fixed charges.

The Penn Central system, for example, has incurred deficits of $851,000,000 from the date of its filing (June 21, 1970) through December 31, 1973 (Stip. Fact, ¶10) and an additional deficit of $103,579,392 during the year 1974 through June 30 (Trustees' Report dated August 5, 1974, Doc. No. 7970). Thus the total deficit of the Penn Central System during four years of operations under §77 is $954,000,000.

The basic scheme of the RRRA is to require that all reorganization courts having jurisdiction over railroads in reorganization in the Northeast/Midwest Region issue findings and orders (RRRA, §207(b)) as to whether or not such railroad shall be "reorganized" by means of conveyance, free of all existing mortgage

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(footnote continued from prior page)

umentary Submission) lists 44 transportation companies, including the 15 Secondary Debtors, which are directly controlled by Penn Central and more which are indirectly controlled). The 15 Secondary Debtors own (or lease from other railroads) 9,304 route miles of track (46.9% of the 19,853 route miles included in the System). The RRRA subjects the rail properties of all these subsidiary and leased line companies to the compulsory conveyance provisions of the Act. See §102(10): " 'rail properties' means assets or rights owned, leased or otherwise controlled by a railroad. . . ." This Section contains an exception for non-leased, controlled, but less than wholly-owned subsidiaries, which are Class I railroads, thereby excluding from the RRRA the Pittsburgh & Lake Erie Railroad, a 92.6% owned subsidiary of Penn Central.

[17]There are seven Class I railroad systems operating in the Northeast/Midwest region of the United States now in reorganization proceedings pursuant to §77 of the Bankruptcy Act: Penn Central, Reading, Central of New Jersey, Lehigh Valley and Ann Arbor (each of which has been found to be non-reorganizable on an income basis under §77); and Erie Lackawanna and Boston & Maine (each of which has been found reorganizable on an income basis under §77 and hence excluded from the RRRA). There is one Class II railroad (defined as a railroad with operating revenues of less than $5 million) in reorganization, the Lehigh & Hudson River.

liens (§303(b)(2)), of its "designated" rail properties (§206(c)) to Consolidated Rail Corporation ("Conrail"), a nominally private for-profit corporation incorporated under state law (§301(a)) which, however, is controlled by the United States Government through the device of a statutory provision (§301(d)) which mandates that 8 of the 15 directors of Conrail be government officials or persons appointed by the President with the advice and consent of the Senate. The "designation" is to be done by a final system plan prepared by USRA, a governmental agency specially created for this purpose (§201), with the assistance of the Rail Services Planning Office of the ICC (§205) pursuant to statutory goals (§206(a)), factors (§206(b)), and provisions (§§206(c), (d), (e), (f), (g), (h), and (i)). The final system plan is to be adopted within 420 days of enactment (§207(c)), and submitted to Congress for its approval, which will be deemed given if neither house passes a resolution vetoing the plan during a 60-day period (§208(a)). In the event of a Congressional veto, it is USRA's duty to prepare and submit to Congress a revised final system plan (§208(b)), although there is no time limit for it to do so. When, as and if a final system plan becomes "effective" by surviving the Congressional veto under §208(a), it is to be delivered to the Special Court, Regional Rail Reorganization Act (§209(c)), and copies filed with each reorganization court (§209(d)). Within 10 days after certification of the final system plan by USRA to the Special Court, Conrail must deposit with the Special Court the stock and other securities of Conrail and any obligations of USRA designated in the final system plan (§303(a)(1)). Within 10 days of such deposit, the Special Court must order the trustees of the railroads (whose courts entered §207(b) orders subjecting

them to the RRRA) to convey forthwith to Conrail[18] the rail properties designated in the final system plan. Only *after* the conveyances are made and are irrevocable is there any judicial review (§§303(c) and 303(d)) of the final system plan to assure that it comports with the standards of "fairness and equity" developed judicially during the era of equity receiverships and given statutory sanction by §77.

The foregoing statutory scheme of the RRRA is referred to in this Brief as the "compulsory conveyance provisions of the RRRA." This cross-appeal asserts that the compulsory conveyance provisions of the RRRA are void for repugnance to the Constitution of the United States. This was an issue which the Court below declined to reach on the grounds that the issue was "premature" and not "ripe" for decision. It is also an issue, however, which the Penn Central Reorganization Court was required to reach in its §207(b) "180-day" decision; that Court decided in favor of the New Haven Trustee's position, holding squarely that the RRRA could not be sustained either under the Bankruptcy Clause powers or the Commerce Clause (eminent domain) powers of Congress, and that the RRRA violated the Fifth Amendment rights of secured creditor and stockholder claimants to the Penn Central estate. *In re Penn Central Tranportation Co. (Memorandum in Support of Findings and Order No. 1596 Pursuant to the Second Sentence of §207(b) of the Regional Rail Reorganization Act of 1973)*, (E.D. Pa. July 2, 1974) (JA 124-51).[19] That decision has been appealed by the

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[18]Conveyances may also be directed by USRA to be made to "profitable" railroads operating in the region. A "profitable railroad" means a railroad which is not in reorganization (§102(9)), which in turn is limited to railroads subject to the RRRA (§102(12)). Thus the Erie Lackawanna and Boston & Maine, each in §77 reorganization, are "profitable railroads" as defined.

[19]Hereinafter cited as "Opinion in Support of Order No. 1596."

United States, USRA and the ICC to the Special Court (where it is docketed as No. 74-8), whose decision thereon will be known before this appeal is heard; however, by reason of the seventh sentence of §207(b), no appeal from the Special Court's decision will lie to any Court of Appeals, and hence this Court's statutory *certiorari* jurisdiction under 28 U.S.C. §1254 can not be invoked to review the Special Court's decision.[20]

In the Argument section of this Brief, the New Haven Trustee analyzes why the court below was in error in finding the constitutional issue as to compulsory conveyances under the RRRA "premature" and not "ripe" for adjudication. The basic error was the court's failure to acknowledge the features of the RRRA which will preclude effective judicial review of the same constitutional issues at a later time, namely §209(a) and the last sentence of §303(b)(2). The court below also mis-applied the prior decisions of this Court dealing with when constitutional issues can be avoided by reason of the speculative character of the alleged injury. The New Haven Trustee points out how the RRRA, if the Government Defendants are not enjoined from enforcing it, threatens to destroy the collectibility of the sum of $123,809,404 plus interest owed to him by Penn Central under this Court's decision in *New Haven Inclusion Cases, supra,* and thereby subject the New Haven bondholders (for whom he is a fiduciary) to further diminution in the assets of the New Haven estate available to support their claims to the equivalent of a per-parcel liquidation sale of New

[20]However, if a party aggrieved by the Special Court's §207(b) decision files a petition for *certiorari* to this Court under 28 U.S.C. §1651 alleging that the decision gives effect to an unconstitutional enactment of Congress, and that the seventh sentence of §207(b) is itself unconstitutional, this Court may have power to issue a writ "necessary or appropriate in aid of [its] jurisdiction" directly to the Special Court. 28 U.S.C. §1651. *Cf. In re 620 Church Street Bldg. Corp.,* 299 U.S. 24 (1936).

Haven's rail assets as of December 31, 1966. *New Haven Inclusion Cases, supra* at 489-90.

In Section II of the Argument, the New Haven Trustee describes the manner in which the compulsory conveyance provisions of the RRRA violate his Fifth Amendment rights. The legal and factual setting of the RRRA is described, including an historical review of the development of the law in the field of equity receiverships, §77B, Chapter X and §77 of the Bankruptcy Act, from *Northern Pacific Ry. v. Boyd*, 228 U.S. 482 (1913) through the latest definitive decision of this Court, *New Haven Inclusion Cases, supra.* The factual setting includes the treatment of the New Haven Trustee's Plan dated June 27, 1973 for reorganization of Penn Central, an admittedly novel but nevertheless serious attempt by private interests to propose a settlement with the representatives of the public interest which was designed to permit private claimants to receive fair and equitable value of their claims while allowing public-interest claimants to receive securities and common stock of a "core system" made up of Penn Central rail properties comprising 11,000 route miles of mainline and principal feeder lines to be operated as a freight-only railroad divested of responsibility for passenger service. The rejection of that plan, first by the United States Departments of Transportation and Justice (whose cooperation was essential), and then by the ICC by its Report of September 28, 1973 (refusing to certify any plan for Penn Central), casts a long shadow on the Government's principal contention in support of the constitutionality of the RRRA: that Conrail's operations can be made viable through reduced trackage and divestment of responsibility for passenger train operation.

The New Haven Trustee then analyzes the compulsory conveyance provisions of the RRRA in terms of the nature and amount of securities of Conrail and obligations of USRA which can be included in a final

system plan, the limited ability of the Special Court to order additional amounts of the same types of securities provided for in the plan, and its authority to issue a deficiency judgment against Conrail, a provision aptly described below as "essentially circuitous." These features of the statute are then compared to the decisions of this Court in cases where private property is taken for a public use under authority of an act of Congress, which set forth the principle that just compensation means an amount of money or its perfect equivalent equal to the "highest and best use" value of the properties taken for public purposes. The dubious constitutionality of Conrail's acquiring the Boston–Washington corridor properties free of lien in exchange for securities, and then *selling* the corridor properties to Amtrak for $500 million as contemplated by §206(c)(1)(C) and §601(d) of the RRRA, is analyzed, and a decision of Judge Fullam, in the §207(b) proceedings of the Secondary Debtors, holding this feature of the RRRA unconstitutional, is noted (JA 153-56).

The brief then discusses the Government's principal rationale in support of the constitutionality of the compulsory conveyance provisions of the RRRA. The Government contends that if Congress and the governmental agencies can design a Conrail with some limited prospect of earnings, the capitalized value of those prospective earnings automatically fixes the value of all rail properties to be conveyed to Conrail, and that, based on *New Haven Inclusion Cases, supra*, there is no constitutional necessity for the value of the securities issued in a reorganization to be equal to the "highest and best use" value of the railroad property conveyed in exchange for such securities. The Government further contends that even if the fair capitalized value of the reasonably projected net earnings of a reorganized company would be substantially less than the liquidation value of the debtor railroad's rail properties, creditor and stockholder claimants must

nevertheless accept those securities in full satisfaction of their claims. The New Haven Trustee points out that both the opinion of this Court in *New Haven Inclusion Cases, supra,* and the opinion of the New Haven Reorganization Court, fail to support the Government's principal thesis and, in fact, squarely recognize that the claimants to a railroad estate have a right to realize value not less than the "highest and best use" value of the properties subject to their claims.

The brief then discusses the nature of Conrail as a governmentally created and controlled entity, and the distinctions which set the RRRA apart from all prior laws on the subject of bankruptcy. With specific reference to the provisions of §301(d) of the RRRA, the New Haven Trustee points out that Conrail will, for the indefinite future, be wholly controlled by the United States Government, and the owners of 100% of Conrail's common stock will have absolutely no right to control basic decisions which would affect Conrail's viability and profitability, and therefore the value of its stock. Accordingly, viewed solely as an exercise of the Bankruptcy Clause power, it is contended that the compulsory conveyance provisions of the RRRA violate substantive due process rights accorded to claimants by the Fifth Amendment.

The brief next discusses the contention that the requirement that rail properties of Penn Central be exchanged for securities of Conrail is the practical and legal equivalent of a denial of Penn Central's constitutional rights to dismissal of reorganization proceedings and termination of deficit rail operations. The brief discusses the cases which hold that a common carrier's responsibility for continued public service is not absolute but is subject to the Fifth Amendment right to withdraw the carrier's property from service once it has become clear that there is no reasonable expectation of its earning a reasonable return on its investment.

The New Haven Trustee then analyzes the manner in which public interest goals of the RRRA could be implemented by an amendment to the statute which would cure its constitutional defects. It is suggested that the basic defects of the Act could be cured by having USRA initially subscribe to the capital stock of Conrail and thereby assume the burden of entrepreneurial risk with respect to the proposition that Conrail's operations can be so structured as to make Conrail a profitable carrier.

In Section III, the New Haven Trustee turns to a discussion of how the procedures of the RRRA offend procedural due process by mandating conveyance of rail assets prior to judicial review of the adequacy of the consideration, particularly when there is no possibility that a court may subsequently set aside the conveyances upon a finding that just compensation has not been paid.

Section IV of the Argument discusses the contention that the compulsory conveyance provisions of the RRRA, as an amendment of §77 of the Bankruptcy Act, constitute legislation "on the subject of bankruptcy" which is void on grounds of lack of geographical uniformity required by Article I, Section 8, Clause 4 of the Constitution. It is asserted that the court below was correct in holding that claimants to the Penn Central estate have standing to challenge the RRRA on grounds of lack of geographical uniformity, but erred in limiting the impact of its holding to a single provision of the RRRA requiring mandatory dismissal of §77 proceedings upon a finding that the Act's processes are not "fair and equitable." The court's conclusion that the RRRA adds nothing to the powers of reorganization courts under §77 to impair the obligations of contracts of secured creditors of a railroad is asserted to be in error based on a comparison of the operative provisions of the RRRA and their asserted counterparts found in §77.

ARGUMENT

I

THE COURT BELOW ERRED IN NOT DECIDING WHETHER THE COMPULSORY CONVEYANCES MANDATED BY THE RRRA VIOLATE THE FIFTH AMENDMENT RIGHTS OF THE NEW HAVEN TRUSTEE

In his summary judgment motion, the New Haven Trustee sought a permanent injunction against the enforcement of so much of the RRRA as would constitute an unconstitutional taking of Penn Central's rail properties and his mortgage and other lien interests therein.[21] This issue was characterized by the New Haven Trustee in his Memorandum of Points and Authorities in Support of Motion for Summary Judgment (filed May 2, 1974, E.D. Pa. C.A. No. 74-1107, doc. no. 4; see JA 258) as follows:

> "Legal Issue No. 1. Various sections of the 1973 Act [i.e., the RRRA] hereinafter enumerated constitute a taking by force of law for a public use of the property of Penn Central, a railroad in reorganization owning rail properties within the

[21] As is noted in his Jurisdictional Statement, the New Haven Trustee's standing in this case is predicated on ownership of $34,025,800 of defaulted mortgage bonds of Penn Central (Stip. Fact ¶¶1, 2) and also based on his claimed equitable lien, temporarily protected by Order No. 546 of the Penn Central Reorganization Court (Stip. Fact ¶3), to secure the total unpaid portion ($123,809,404, as of December 31, 1973, plus interest) of the purchase price ($174,635,899) approved in *New Haven Inclusion Cases, supra.* In terms of standing, the New Haven Trustee must be deemed to have the rights of a secured creditor to the full extent of his claim, based on the "underwriting" imposed by the New Haven Reorganization Court as to the value of $87.50 per share relative to the 956,000 shares of Penn Central Company common stock which he holds pending adjudication of the New Haven's plan of reorganization, based on this Court's remand, 399 U.S. at 488-89.

meaning of the 1973 Act, and operating under lease rail properties of railroads 'leased, operated or controlled' by Penn Central within the meaning of the 1973 Act

* * *

"(b) upon the date when certain rail properties of Penn Central and the several Lessors (the 'Designated Properties') will be ordered under the 1973 Act to be conveyed pursuant to §303(b) of the Act to Conrail and other transferees referred to in §§206(c), 206(d) and 303(b) of the 1973 Act, as a law providing for a taking for a public use of (i) the right, title and interest of Penn Central as owner in fee or as to a leasehold estate of said Designated Properties; and (ii) of the right, title and interest of Plaintiff as owner of Bonds secured by the Divisional Mortgage, which lien will be divested by operation of §303(b) of the 1973 Act insofar as it attaches to Designated Properties." (*Id.* at 4).

A majority of the Court below (Judges Aldisert and Bechtle) never reached the merits of this contention because of the belief, which it is submitted was erroneous, that this issue was "premature." It is of course true that:

"Courts do not review issues, especially constitutional issues, until they have to." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 154-55 (1951) (Frankfurter, J., concurring).

But that assumes that the issues so deferred can later be reviewed. The New Haven Trustee asserts by this cross-appeal that there may not be a later time at which a court can *effectively* protect the New Haven Trustee against the threatened unconstitutional taking of his property. If a later opportunity for judicial intervention to prevent an unconstitutional taking will never effectively exist, then the constitutional issue presented here must fall in the "have to" review area where courts should be available to pass on claims of

constitutional right to judicial process, and to provide such process if the claim is sustained.

Judges Aldisert and Bechtle failed to give appropriate significance to the provisions of the RRRA whereby, with the exception of a pre-final system plan civil action attacking the RRRA as violative of the Constitution, under 28 U.S.C. §§1331, 2282 and 2284, Congress has created in the RRRA an exclusive self-contained system of judicial review even more preclusionary than that contained in the Emergency Price Control Act of 1942, which this Court sustained in *Lockerty v. Phillips*, 319 U.S. 182 (1943) and *Yakus v. United States*, 321 U.S. 414 (1944).[22]

Under the second sentence of §207(b) of the RRRA, a decision by the Special Court that Penn Central must reorganize by conveying its rail properties to Conrail has the following effects which preclude later judicial review:

(a) It is a final, non-appealable order, which is purportedly not reviewable in this Court (§207(b), last sentence);

(b) It has an arguable *res judicata* effect on any subsequent contentions that the compulsory conveyance provisions of the RRRA (§§206(c), 206(d), 207(c), 208, 209(c) and (d), and 303(b)) are unconstitutional, since the §207(b) judgment would necessarily have been that the "process" of the RRRA is "fair and equitable" (§207(b), third sentence);

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[22]In *Yakus*, Mr. Justice Rutledge interpreted §204(d) of the 1942 legislation not to preclude a challenge to the constitutionality of price regulations in the Emergency Court of Appeals, and on review by *certiorari*, in the Supreme Court. §207(b), last sentence, purports to exclude this Court from reviewing the Special Court's §207(b) decision by withdrawing the jurisdiction of the Courts of Appeal, whose judgments are reviewable by writ of *certiorari* under 28 U.S.C. §1254. But see 28 U.S.C. §1651 and *In re 620 Church Street Bldg. Corp., supra.*

(c) The implementation of the §207(b) finding by USRA certifying to Congress and then to the Special Court the final system plan would be governed by §209(a) of the RRRA which provides that:

> "Notwithstanding any other provision of law, the final system plan . . . *is not subject to review by any court* except in accordance with this section." (Emphasis added).

(d) The implementation of the §207(b) finding by USRA certifying to the Special Court the final system plan and the Special Court's ordering the conveyances therein set forth would be governed by §303(b)(2), last sentence, of the RRRA, which provides that:

> "Such conveyances [i.e., the conveyances pursuant to §303(b)(1) which Judge Aldisert's opinion assumes could be enjoined in a subsequent civil action under 28 U.S.C. §1331 on constitutional grounds] *shall not be restrained or enjoined by any court.*" (Emphasis added).[23]

Judges Aldisert and Bechtle erred in their approach to the prematurity issue because they failed to observe the consequences of a §207(b) decision in the light of the prohibitions against subsequent judicial action provided in §§209(a) and 303(b)(1).

The foregoing is consistent with Judge Fullam's concurring opinion below[24]:

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[23]Judge Aldisert's opinion below does not treat with the problem created by §209(a) and §303(b)(2).

[24]Although Judge Fullam clearly concurred in the judgment, he parted company with Judge Aldisert on the "prematurity" issue, and his opinion should be read as a dissent as to that issue, particularly since the order in which he concurred enjoins USRA from certifying a final system plan to the Special Court under §209(c) of the RRRA.

". . . the majority fails to reach a number of issues which I feel must be faced, not only because they are indeed ripe for decision, but because the principal conclusion expressed by the majority—that the Regional Rail Reorganization Act of 1973 is unconstitutional because it fails to provide compensation for interim erosion during the planning period—necessarily depends upon an evaluation of the nature and validity of the Act's provisions concerning mandatory conveyance of rail properties to Conrail. In short, I believe the majority has attempted to isolate an issue which cannot be isolated.

* * *

"In considering which issues must be faced at this time, it is important to keep in mind the distinctions between concepts of standing, ripeness, and the need for injunctive relief.

"Unquestionably, one or more of the parties to these law-suits have standing to raise every issue which has been presented. That is, the statute affects these parties in particular, as distinguished from the public at large, in substantial ways. They thus meet the tests of *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), and *Flast v. Cohen*, 392 U.S. 83 (1968).

"The question of whether all of the constitutional issues are ripe for decision requires us to analyze the inevitability of the alleged unconstitutional impact, whereas the immediacy of the alleged threat bears upon the propriety of injunctive relief.

"By July 1, 1974, each of the reorganization courts will have made, or failed to make, findings pursuant to §207(b) of the Act. Under the statute, the effect of these findings or non-findings (as affirmed or reversed by the Special Court within 80 days thereafter) will be either that the statutory processes will inexorably apply to these estates, or

that the §77 proceedings will be dismissed. The plaintiffs assert that the §*207(b) proceedings themselves are unconstitutional on due process grounds. Surely this challenge is now ripe for decision; indeed, the defendants do not contend otherwise.*"

"Plaintiffs challenge the *entire Act* as a violation of the *uniformity requirement* of the bankruptcy clause, Article I, Section 8, Clause 4 of the Constitution. *Again, this issue is undeniably ripe for decision.*

"Finally, plaintiffs pose a series of challenges to the statutory provisions which contemplate the mandatory transfers of rail assets to Conrail or to existing solvent carriers, at prices to be determined by the Special Court after the event, and to be paid in the form of a to-be-determined mixture of Conrail securities, undefined 'other benefits', and possibly a limited amount of guaranteed obligations of USRA. Whether some or all of these 'ultimate conveyance' issues are now ripe for decision is a more difficult question.

* * *

"No one doubts, and in fact the parties have stipulated, that Penn Central rail properties will be included in the Final System Plan. Equally certain is the fact that USRA will deliver to Congress a Final System Plan which is to become effective 60 session-days thereafter. In order to prevent the Plan from taking effect, one House of Congress must act affirmatively by passage of a resolution expressing disapproval of the Plan, §208(a). Section 208(b) makes it the continuing duty of USRA to present final system plans to the Congress until one becomes effective. I cannot equate Congress' reservation of the right to veto the first Final System Plan, or even the second or third, to a situation in which Congressional action is necessary as a precondition to a Final System Plan becoming effective. I believe this Court must assume that the Act means what it says, and that the expressed intent of Congress would be carried out.

"Once a Final System Plan is effective, *i.e.*, when the 60-day Congressional action period expires, the Special Court is required under §303(b) to order conveyance of the property, *there remains no discretionary role to be played by the Special Court, or any other court, at that point.* Therefore, it is clear that if the reorganization court *does not make §207(b) findings that remove the railroad from the RRRA, conveyances are certain,* save only amendment or repeal of the RRRA. Of course, the possibility of future legislative and executive action is always present during the judicial evaluation of the constitutionality of a statute, and does not render such adjudication premature.

"The last potential exit would be a finding by the reorganization court that the RRRA 'does not provide a process which would be fair and equitable to the estate of the railroad in reorganization,' §207(b). In my view, this possibility does not raise an issue of ripeness, but rather, a question more akin to abstention.

* * *

". . . it is highly improbable that a reorganization court could successfully reject the statute as unfair or inequitable under §207(b) for reasons of less than constitutional magnitude. Indeed, the government's position at the June 10 hearing in the reorganization court was that nothing short of unconstitutionality would justify rejection of the Act under §207(b). Thus, the issue is essentially whether it is preferable for the three-judge court to rule on the constitutional issues surrounding the conveyance provisions, either directly or in conjunction with plaintiffs' due process attack on §207(b), before the reorganization courts act under §207(b).

"The policies embodied in 28 U.S.C. §2282 appear applicable in this case. Enforcement of major federal legislation is sought to be enjoined. As a prac-

tical matter, a decision by the reorganization court under §207(b) that a constitutional infirmity requires the Act to be found not fair and equitable would be equivalent, for all practical purposes, to an injunction that might issue as a result of this three-judge court litigation; and a contrary decision would be equivalent to denial of an injunction.

* * *

". . . I am satisfied that, in the final analysis, many of the constitutional issues concerning the mandatory conveyance features of the Act are necessarily ripe for decision at this time because of their relationship to the issues of interim erosion. While it is not necessary to determine whether or not the contemplated transfers would amount to takings in the constitutional sense, requiring advance assurance of payment in cash or equivalent, I am persuaded that the constitutional validity of uncompensated interim erosion cannot be properly decided except in the light of the constitutionality of the ultimate result which implementation of the Act would produce." (JA 55-60; emphasis added).

Judge Fullam has thus, it is submitted, correctly shown why it is not premature now to judge the constitutionality of the compulsory conveyance provisions of the RRRA, or to reach the issues as to denial of procedural due process by §207(b) and related provisions of the RRRA. The cases cited in Judge Aldisert's opinion on the prematurity issue are, on the other hand, inapposite for a number of reasons relating to the structure of the RRRA's provisions relative to judicial process.

Judge Aldisert treated the claim that the compulsory conveyance provisions of the RRRA will, if not enjoined, constitute an inadequately compensated taking of plaintiff's property as being analogous to cases

seeking an injunction to restrain threatened enforcement of criminal statutes, invoking the following cases: *Poe v. Ullman*, 367 U.S. 497 (1961); *Eccles v. Peoples Bank*, 333 U.S. 426 (1948); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947); and *Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1 (1961). In each of the foregoing cases the plaintiffs attempted, by pre-enforcement suits challenging the constitutionality of the relevant statute, to restrain the enforcement of the statute as applied to them. In each instance, the Court was compelled to gauge the immediacy of the threat of enforcement and held that none of the fact situations evidenced the clear, present threat of injury necessary to sustain a justiciable controversy.

In *Poe v. Ullman, supra*, for example, plaintiffs were two married persons, and their doctor, who sought a declaratory judgment as to the unconstitutionality of a Connecticut statute prohibiting the use of contraceptive devices or the giving of medical advice about them. The Connecticut courts upheld the statute, even as applied to married couples. After plenary consideration in this Court, the appeal was dismissed, with the Justices voting 5-4 and without an opinion of the Court. Justice Frankfurter (joined by Chief Justice Warren and Justices Clark and Whittaker) thought the case fell within the rules of judicial self-restraint summarized in Mr. Justice Brandeis' concurrence in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (1936). Justice Brennan concurred in the result on the practical ground that:

> "The true controversy in this case is over the opening of birth-control clinics on a large scale; it is that which the State has prevented in the past, not the use of contraceptives by isolated and individual married couples. It will be time enough to decide

the constitutional questions urged upon us when, if ever, that real controversy flares up again." 367 U.S. at 509.

Cases such as *Poe v. Ullman* must, however, be compared with the cases such as *Epperson v. Arkansas*, 393 U.S. 97 (1968), where plaintiffs sought an injunction and declaratory judgment that a 1928 law prohibiting the teaching of evolution was unconstitutional. The Court disposed of any "justiciability" problems as follows:

> "There is no record of any prosecutions in Arkansas under its statute. It is possible that the statute is presently more of a curiosity than a vital fact of life in [Arkansas, Mississippi and Tennessee]. Nevertheless, the present case was brought, the appeal as of right is properly here, and it is our duty to decide the issues presented." *Id.* at 101-02.

In *Roe v. Wade*, 410 U.S. 113 (1973), plaintiff "Jane Roe" was an unmarried woman who was pregnant at the inception of litigation and who

> "sought a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face, and an injunction restraining the defendant from enforcing the statutes." *Id.* at 120.

This Court found the case of "Jane Roe" presented a justiciable controversy ripe for determination, but that the case of "John and Mary Doe," a married, childless couple, was of a

> ". . . speculative character. Their alleged injury rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health. Any one or more of these several possibilities may or may not take place, and all may not combine. . . .But we are not prepared

to say that the bare allegation of so indirect an injury is sufficient to present an actual case or controversy. [Citations omitted] The Does' claim falls far short of those resolved otherwise in the cases the Does urge upon us, namely *Investment Co. Institute v. Camp*, 401 U.S. 617 (1971); *Data Processing Service v. Camp*, 397 U.S. 150 (1970); and *Epperson v. Arkansas*, 393 U.S. 97 (1968)." *Id.* at 128.

In the instant case, the New Haven Trustee's standing and the immediacy of the threatened harm clearly favor justiciability of his claim that the RRRA is unconstitutional under the reasoning of *Epperson v. Arkansas* and *Roe v. Wade*, which cases are not cited in Judge Aldisert's opinion.[25] See also *Steffel v. Thompson*, 42 U.S.L.W. 4357 (U.S., March 19, 1974).

The New Haven Trustee is owed $123,809,404, plus interest, by Penn Central; the entire debt is secured by a claimed (but unadjudicated) equitable lien deriving from this Court's remand, in *New Haven Inclusion Cases, supra*, and $34,025,800 is secured by a first mortgage on the former rail properties comprising the largest portion of the assets conveyed by New Haven to Penn Central on December 31, 1968.[26] The defendant USRA, if not enjoined, presently intends, and thus can be expected, to prepare a final system plan under §206 designating a significant portion, if not all, of these same rail properties for conveyance

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[25]Judge Fullam, dissenting as to prematurity, cited two of the recent cases on the related issues of standing and justiciability, namely *Data Processing Service v. Camp, supra*, and *Flast v. Cohen, supra*.

[26]The United States and the other governmental defendants have conceded for the purpose of this litigation that "It is likely that some of the rail properties of Penn Central subject to the Divisional Mortgage and the indeterminate lien . . . will be designated pursuant to each subsection of §206(c)(1) [of the RRRA] for transfer, sale or conveyance pursuant to §206(d) of the Act in any final system plan made effective under the Act." Stip. Fact ¶4.

to Conrail; Congress intends, and thus can be expected, to approve a final system plan prepared by USRA under §208; the plan so approved is intended, and thus can be expected, to be certified by defendant USRA to the Special Court, under §209(c); Conrail can be expected to deposit the securities provided for in the plan under §303(a); the Special Court can be expected within 10 days of the §303(a) deposit to obey the directive contained in §303(b)(1) to order the Penn Central Trustees to convey forthwith the properties designated in the plan to Conrail; and the Penn Central Trustees can be expected to comply with the Special Court's order. Therefore, if these provisions of the RRRA are not enjoined, the New Haven Trustee's lien, securing $123,809,404, plus interest, can be expected to be divested as provided in §303(b)(2). Obviously, once his lien is divested, the New Haven Trustee is faced with the clear and present danger that in a subsequent §77 plan Penn Central would not have assets sufficient to pay the New Haven Trustee's claim, which will rank junior to administration expenses and Trustees' Certificates which now aggregate close to $1 billion.

In weighing ripeness considerations, the court below should have been guided by this Court's pronouncement in *Railroad Transfer Service, Inc. v. Chicago*,[27] 386 U.S. 351, 357 (1967), that

> "It is difficult to imagine a controversy more actual, alive, and ripe than this one. It has lasted for more than a decade."

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[27]The case involved a Chicago ordinance which purported to require a local inter-terminal carrier to demonstrate annually to the City of Chicago its ability to satisfy the public convenience and necessity, before the City would grant it a license to do business. The issue was whether this ordinance placed an undue burden on interstate commerce and infringed upon an area preempted by the Interstate Commerce Act. The Court reached the merits of this issue over the City's objections that the issue was premature.

With all due respect, *Smith v. United States* may well pose the one case which is even more ripe than *Railroad Transfer Service*, since the New Haven Bondholders, who initially had mortgage liens on certain of the rail properties involved in this case, have had their right to foreclose, and to realize payment of their claim, postponed since 1961. The end of the litigation to assure the New Haven Bondholders payment on their claims, if not hastened by this Court, may well be deferred into the 1980's. Surely, the ultimate impact on the New Haven estate of a §303(b) conveyance order is sufficiently likely and clearly foreseeable that its constitutionality should be adjudicated now. See *Joint Anti-Fascist Refugee Committee v. McGrath, supra*, 341 U.S. at 156.

II

THE COMPULSORY CONVEYANCE PROVISIONS OF THE RRRA VIOLATE THE NEW HAVEN TRUSTEE'S FIFTH AMENDMENT RIGHTS

A. Legal and Factual Setting of the RRRA

As was noted in Judge Fullam's concurring opinion below, in approaching the question of the constitutionality of the compulsory conveyance provisions of the RRRA, it is necessary first to review the "legal theories underlying the reorganization provisions of the Bankruptcy Act, and their application to the Penn Central proceedings apart from, and in relation to, the RRRA itself."[28]

The early cases of corporate reorganization under equity receiverships involved a decision by senior creditor and equity groups that their respective financial interests would be better served by having a new company with scaled-down capitalization assume the business of the financially embarrassed debtor and thereby maintain the values of a going business. The devices chosen evolved out of the procedures of equity: instead of separate bills of foreclosure by each secured creditor group, the court was asked to enter what amounted to a consent decree of foreclosure under which a newly formed company purchased the assets of the debtor in exchange for the securities comprising a portion of the new capital structure. Since the consent of the stockholders of the debtor was considered essential to a consent decree, in an equity receivership plan the new company might exchange a portion of its capital stock for the entire capital stock of the old com-

[28]Concurring Opinion of Fullam, J. (JA 65); Judge Fullam's analysis is directed primarily to the constitutional limits upon imposing further uncompensated rail deficits on the estate of a railroad in reorganization.

pany.[29] Decisions of this Court, cited in the note, held that these arrangements were subject to judicial scrutiny at the insistance of any non-consenting creditor who claimed that he should be entitled to full recognition in the plan if junior creditors or stockholders were to be allowed to participate at all.

The amendments of the Bankruptcy Act dealing with corporate reorganizations (§77B and Chapter X) and railroad reorganizations (§77, enacted in 1933 and amended in 1935) enacted in the 1930's must be read in the light of practices developed in the field of equity receiverships. Terms such as "fair and equitable" and "conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders" appearing in §77(e) of the Bankruptcy Act were phrases of art which re-

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[29]See, *e.g., Northern Pacific Ry. v. Boyd*, 228 U.S. 482 (1913), and earlier cases therein cited. The device of the consent decree was held not to foreclose a non-consenting creditor of the old company whose claim was reduced to judgment many years later from claiming, even in the absence of fraud, that he was entitled to have his claim paid since valuable consideration was paid to stockholders of the old company. See also *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939), in which a consent arrangement involving participation by stockholders of the old company was denied judicial approval under §77B of the Bankruptcy Act. This case was followed by *Consolidated Rock Products Co. v. Du Bois*, 312 U.S. 510 (1941), also under §77B, in which the "absolute rule of priority" doctrine was held not satisfied in the absence of detailed valuation findings as to the capitalized value of the entire enterprise and the ability of the reorganized company to meet the interest and dividend requirements of the new securities. The consent arrangements in the equity receivership and §77B cases involved intricate packages of corporate securities such as fixed-income bonds, contingent interest bonds, participating preferred stock and common stock, with voting power allocated in different ways depending on such matters as whether contingent interest was earned or preferred stock dividends paid. Such reorganizations were "income-based" reorganizations in the sense that the debtor was a going concern with a record of sufficient income before fixed charges to support a modified capital structure although not its existing structure.

flected the accumulated judicial experience of dealing with equity receiverships.[50]

Section 77, the Bankruptcy Act provision which has governed railroad reorganization from 1933 until the enactment of the RRRA, while departing in many respects from equity receivership and §77B reorganizations, nevertheless involved judicial scrutiny as to whether the standards of the *Boyd*, *Case* and *Consolidated Rock* decisions, *supra* note 29, were met. Section 77(e) required that before a plan of reorganization could be carried out the judge must find that the plan, certified to the court under §77(d) by the ICC, was "fair and equitable." Under §77, the ICC and the court could determine that the stockholders of the railroad, or any class of creditors, had no equity and could properly be awarded nothing in the plan. See *Ecker v. Western Pacific R.R. Corp.*, 318 U.S. 448 (1943); *Group of Institutional Investors v. Chicago, M., St. P. & P. R.R.*, 318 U.S. 523 (1943). The 1935 amendments to §77 included a "cram-down" exception to the voting requirement that the plan be approved by at least two-thirds in interest of each class entitled to participate in the plan. The cram-down exception, which essentially completed a statutory scheme which has remained intact until the RRRA, permitted the judge to override the objections of a dissenting class of creditors provided he determined that the plan provided fair and equitable treatment for the interests of those rejecting it and found that "such rejection is not reasonably justified." See *Reconstruction Finance Corp. v. Denver & R.G.W. R.R.*, 328 U.S. 495 (1946).

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[50] "The words 'fair and equitable' . . . are words of art which prior to the advent of §77B [the predecessor of Chapter X] had acquired a fixed meaning through judicial interpretations in the field of equity receivership reorganizations." *Case v. Los Angeles Lumber Products Co., supra*, 308 U.S. at 115.

Until the reorganization proceeding of the New Haven Railroad which commenced in 1961, prior railroad reorganization cases under equity receiverships and §77 had generally involved debtor corporations which were viable businesses but were financially embarrassed in the sense that their operations could not support their existing capital structures. As Judge Fullam noted in his concurring opinion,

> "Both §77(e) and the Supreme Court's pronouncements in *Consolidated Rock Products, Ecker* and *Institutional Investors* cases require that earning power or income-generating capacity of the debtor be the measure of a railroad's value." (JA 68)

Except for the happenstance of the Penn Central merger, hereinafter discussed, the New Haven's reorganization might well have gone the way of the New York, Ontario & Western Railroad, which ended in a liquidating equity receivership,[31] since the ICC and the Court each found that the New Haven had no possibility of achieving profitable status, or even net income before fixed charges:

> "The concept of 'going concern value' is fictional as applied to the New Haven because it ignores the Railroad's long and continuous history of deficit operations." *In re New York, N.H. & H. R.R.*, 289 F. Supp. 451, 455 (D. Conn. 1968).

In the case of the New Haven's §77 proceedings, a totally fortuitous event emerged to make possible a reorganization plan under §77, rather than dismissal of reorganization proceedings and a liquidating equity receivership: two major, profitable trunk-line carriers,

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[31]See *New York, Ontario & Western Reorganization*, 295 I.C.C. 346 (1956), in which the railroad was declared unreorganizable by the ICC, leading to a dismissal and liquidation of the enterprise. See also *In re New York, Ontario & Western Ry.*, 171 F. Supp. 634, 635, 647 (S.D.N.Y. 1958).

one operating in the New Haven's territory, the New York Central Railroad, and the other a connecting carrier with the New Haven, the Pennsylvania Railroad, petitioned the ICC for authority to merge, thereby opening up the possibility of an inclusion petition by the New Haven Trustee pursuant to §5(2)(d) of the Interstate Commerce Act. What then followed is known to this Court and need not bear repetition. See *Penn Central Merger Cases, supra; New Haven Inclusion Cases, supra.*[32]

In relation to an assessment of the RRRA, the most important aspect of the New Haven experience is that the Trustees of the New Haven perceived that the merger of the Pennsylvania and New York Central Railroads offered the possibility of a solution which recognized both the compelling public interest in maintaining rail transportation in Southern New England and the satisfaction, through securities of a (then perceived to be) profitable trunk line railroad system, of the private interest in realizing the equitable equivalent of the highest and best use value of the New Haven's rail properties. There was thus a *voluntary* decision and recommendation by the Trustees of the New Haven to pursue inclusion in the proposed merged Penn Central, and to seek to sell the New Haven's rail assets to the merged Penn Central, subject to administrative and judicial determinations as

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[32]One aspect of the New Haven situation which does deserve repetition is the fact that the rights of the New Haven bondholders have now been held in suspension under §77 since July, 1961, and no immediate relief is in sight. As Judge Fullam commented in his opinion below:

> "I find it difficult to characterize as due process of law the notion that further interim erosion can be justified because, if the lengthy and complex procedures of the Act do not permit a constitutionally permissible result, the parties may then start over again in the Court of Claims. The rights of the secured creditors of the New Haven, for example, have already been held in suspension for more than ten years." (JA 81).

to the equivalence of value of the assets and the consideration (in the context of a §77 plan of reorganization), as being in the financial self-interest of the claimants to the New Haven estate, as well as in the public interest. The New Haven Bondholders' representatives initially acquiesced in the concept of inclusion, although reserving their rights with respect to the adequacy of the consideration. The Bondholders originally opposed consummation of inclusion prior to a final decision as to the consideration (leading to the "Procrustean measures" language by Mr. Justice Fortas in *Penn Central Merger Cases*, 389 U.S. at 510-11), but later consented to the conveyance of New Haven's assets and divestment of their liens on the basis of assurance of subsequent judicial review as to the adequacy of the consideration. Thus, *New Haven Inclusion Cases* arose in a procedural context totally at variance with the factual setting of the present case.

In the case of Penn Central's reorganization, there was no possibility of a solution involving voluntary acquisition of the rail assets by another carrier or carriers, since no carrier could afford to assume Penn Central's deficits in net railway operating income amounting to some $90 million annually. This, however, did not prevent the private parties in interest from attempting to seek a solution. Particularly significant in the present context was an attempt by the New Haven Trustee to achieve an accommodation between the interests of the public sector in continued rail transportation and the interests of the private creditors and stockholders of Penn Central in receiving value equal to their respective equities in an estate whose overall liquidation value is indicated to be upwards of $4 billion. The New Haven Trustee's Plan for Reorganization of Penn Central, filed with the ICC on June 28, 1973, called for expedited action by the ICC under §1(18) of the Interstate Commerce Act to adopt

a "core system" of 11,000 miles, and to approve and certify pursuant to §77(d) a plan under which the rail properties of Penn Central required for the 11,000-mile system would be transferred to a new corporation, "Core Railroad;" the Boston-Washington passenger corridor would be operated on the basis of a governmental subsidy providing for a return on investment by a new corporation, "Northeast Railroad," which would lease trackage rights for which it would pay Core Railroad a fair rental based on the value of the property fairly allocable to passenger operations; non-rail and surplus rail assets would be segregated; and an investment company called Penn Central Enterprises (all of the securities of which would be issued to private creditor and stockholder claimants of Penn Central, in the order of the priority of their claims) would be created to hold all of the non-rail assets of Penn Central, plus all of the stock of Northeast Railroad, a portion of the stock of the Core Railroad and all the stock of a liquidating subsidiary to which non-essential rail properties would be conveyed. The New Haven Trustee's Plan required the United States and other public interest claimants, including labor claimants, to accept senior debt securities, junior securities and common stock of Core Railroad in exchange for all of their claims. The Plan was not approved by the ICC, which held hearings in August 1973 on the New Haven Trustee's Plan and two other proposed plans for reorganization submitted to it pursuant to §77(d).[33] The United States Departments of

[33]The other plans included a plan filed by the Penn Central Trustees which called for cessation of operation and sale of all rail properties to others, hopefully to public authorities and other railroads interested in operating the properties; and a plan filed by Penn Central Company which contemplated an action against the United States in the Court of Claims under 28 U.S.C. §1491 ("Tucker Act"). The ICC held that the Trustees' proposed plan was not a "plan" within the meaning of §77(d). The ICC rejected the plan filed by Penn Central Company.

Transportation and Justice opposed the New Haven Trustee's Plan. In a report dated September 28, 1973, the ICC rejected the New Haven Trustee's Plan on a number of grounds, but principally that the Core Railroad would not be economically viable.[34]

The efforts represented by the New Haven Trustee's Plan, the opposition to it of the government and its rejection by the ICC, are significant to the decision here. The refusal of the ICC, after objection by the government, to approve a plan calling for an 11,000 mile streamlined "core" freight-only railroad; made up of principal main line and high density feeder routes, as proposed by the New Haven Trustee, must fairly be deemed to cast a long shadow on the underlying theory of the RRRA, which is based on the assumption that Conrail, a freight-only railroad[35] made up of the essential or "core" lines of Penn Central and a few other relatively small bankrupt carriers, could be designed so as to be economically viable.

In any event, the New Haven Trustee treated the ICC's rejection of his Plan as dispositive of any private attempt to arrange an accommodation with the public sector. The Plan provided that, if it were not promptly accepted by the ICC, the United States, organized labor and the States (in respect of tax claims), whose voluntary consent thereto was a necessary precondition, the New Haven Trustee would move promptly under §77(g) for dismissal of the §77 proceedings, and, under §77(i), for an equity receivership calling for the

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[34]As noted above, the ICC's September 28, 1973 Report is Doc. No. 54 in the Joint Documentary Submission. The New Haven Trustee's Plan is described at pp. 27-36; the ICC's conclusions are set forth at pp. 59-77 and in App. DD.

[35]The RRRA contemplates that Conrail will sell or lease the Washington-Boston passenger corridor to National Railroad Passenger Corporation (Amtrak). See §§206(c) (1) (C) and 601 (d) of the RRRA.

prompt liquidation of Penn Central's rail properties.[36] The New Haven Trustee accordingly on October 9, 1973 filed his §77(g) Motion to dismiss Penn Central's §77 proceedings.[37]

Congress was aware of the pendency of the §77(g) motion while it was considering the RRRA, as evidenced by the legislative history.[38] Apparently with the intention of mooting the §77(g) motion, Congress then amended pending bills so as to expand the definition of "railroad in reorganization" (RRRA, §102(12)) to include railroads in equity receiverships.[39] Congress also

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[36]A liquidation equity receivership would not, of course, be inconsistent with a series of sales of rail properties for continued railroad use (at the "highest and best use value") to public authorities (federal and state) and other railroads (such as the major trunk line carriers in the West and South, as well as the Northeast, which carry substantial Penn Central originated and terminated traffic).

[37]Doc. No. 13 in the Joint Documentary Submission. The Penn Central Reorganization Court at first did not hold any hearing on the §77(g) Motion on the ground that it was waiting for a legislative solution. See *In re Penn Central Transportation Company (Columbus Option Appeals)*, 494 F. 2d 270 (3d Cir. 1974), *petition for cert. filed*, 42 U.S.L.W. 3633 (May 8, 1974). On May 6, 1974, a hearing was held on the §77(g) Motion, but no decision has been forthcoming. Judge Fullam has stated that he deliberately deferred action on the §77(g) Motion of the New Haven Trustee: "By a series of actions and inactions which need not be detailed here, this Court held all such proposals in abeyance pending action by Congress on the RRRA." *Opinion in Support of Order No. 1596, supra* (JA 131). On August 8, 1974, by Order No. 1648, Judge Fullam ordered the Penn Central Trustees to file a report on September 3, 1974, and called a hearing on September 17, 1974, with respect to the desirability of sequestration of non-rail income for the purpose of paying taxes and other administration expenses now being deferred, and again specifically deferred any adjudication of the §77(g) Motion pending said hearing.

[38]See, *e.g.*, 119 Cong. Rec. H. 9767 (daily ed. Nov. 8, 1973; remarks of Rep. Shoup, co-sponsor of the Shoup-Adams bill which eventually became the House version of the RRRA); 119 Cong. Rec. H. 9731 (daily ed. Nov. 8, 1973; remarks of Rep. Adams relative to the Shoup-Adams bill).

[39]Compare §103(11) in "Working Paper No. 1, Rail Services Act of 1973," dated Nov. 11, 1973: "(11) 'Railroad in reorganization' means a railroad which is a debtor in a reorganization proceeding under section 77 of the Bankruptcy Act (11 U.S.C. 205)," with §103(12) in S. 2767, reported to the Senate on Dec. 3, 1973, in which the following sentence first appears: "A 'bankruptcy proceeding' includes a proceeding pursuant to section 77 of the Bankruptcy Act (11 U.S.C. 205) or an equity receivership or equivalent proceeding."

designed §207(b) in such a way that one of the possible factual foundations for the granting of the §77(g) Motion, that an income-based reorganization was not possible, would itself trigger compulsory conveyances (RRRA, §207(b), first sentence) rather than a dismissal of the proceedings under §77(g).

Subsequently, the Institutional Investors Penn Central Group and substantially all indenture trustees of Penn Central System bonds petitioned for a prompt termination of rail operations. This petition was premised on a view that termination of rail operations and sale of rail properties could be achieved even if §77 proceedings continued. A petition was also filed by Penn Central Company, the holding company owning all of Penn Central's stock, for a segregation of non-rail properties from rail properties and cessation of rail operations.[40] These petitions, together with the New Haven Trustee's §77(g) Motion, establish the unanimity of substantially all creditor and stockholder parties in the position that deficit rail operations of Penn Central are constitutionally required to terminate.

The relationship between the RRRA and the pending motions to dismiss Penn Central's §77 proceedings and terminate rail operations is clearly stated by Judge Fullam in his opinion below:

> "Another aspect of the RRRA's impact that warrants consideration, is the relationship of the availability of the RRRA's processes to the pending petitions to terminate rail services and to dismiss Penn Central's §77 proceeding. *Obviously, the RRRA is an important factor to be weighed by the reorganization court in assessing [the] validity of the petitioners' contentions*

[40]The petitions to terminate rail operations were heard by the Reorganization Court on May 6, 1974, together with the hearing on the New Haven Trustee's §77(g) Motion, and remain undecided. As noted above, a hearing has been scheduled for September 17, 1974 with respect to the desirability of sequestering non-rail income for the purpose of paying administrative expenses, and Order No. 1648 calling such hearing has specifically deferred adjudication of these petitions and the §77(g) Motion.

that operations can no longer be constitutionally required." (JA 59-60; emphasis added).

Given the history of Penn Central's hopelessly unprofitable rail operations and chronic cash crises resulting from deficit operations,[41] and the utter futility of the private efforts to reorganize Penn Central in the face of opposition of the government and the ICC, it became obvious that if any solution contemplating ongoing operation of the Penn Central System were to be forthcoming, it would have to be a solution created by Congress.

The congressional solution has been aptly described by Judge Fullam as follows:

> "To summarize, the RRRA represents an amalgam of sale, reorganization, and eminent domain concepts. Implementation of the Final System Plan would produce transactions akin to sales under §77(o) or §77(b) (5) of the Bankruptcy Act, *but without the safeguards of participation by the parties or advance judicial scrutiny;* sales in which the price would be paid in a form somewhat like that encountered in a plan of reorganization. The transactions would somewhat resemble a reorganization in which the 'cram down' decision is made by Congress, or at least virtually compelled by Congress, *in advance of formulation of the plan.* And the plain purpose of the entire arrangement would be to insure the continued availability of these rail properties for use in meeting the public need for continued rail service, *without regard to the wishes of the present owners of the*

[41] As is indicated by Stip. Fact ¶11, in order to continue its operations, it was necessary for Penn Central not only to defer all real estate taxes, leased line rentals and interest payments, but also to utilize extraordinary sources of cash to the extent of $157 million. This amount is exclusive of $28.8 million made available in 1974 to Penn Central by the United States Department of Transportation under §213 of the RRRA; of this amount, $10.8 million was made available in the form of a purchase by the United States of a participation in certain equipment obligations of Penn Central. See Order No. 1480 and Memorandum in Support thereof (Docs. Nos. 29 and 30 in the Joint Documentary Submission). Appeals from Order No. 1480 are pending in the Third Circuit.

properties." (Fullam, J., concurring; JA 77-78; emphasis added).

In the RRRA, Congress set forth what it was willing to do, by way of amending §77 and authorizing and committing monies of the United States[42] by way of a solution, and equally importantly, what it was *not* willing to do. Specifically, Congress indicated that it was *not* willing (except possibly to the extent of $500 million of government-guaranteed bonds of USRA) to permit the estates of Penn Central and other bankrupt carriers subject to the RRRA to be paid the "highest and best use" value of the designated rail properties in any form save that of common stock and possibly more senior securities of Conrail. While the RRRA employs words of "reorganization" and utilizes phrases of art in the law of reorganization, such as "fair and equitable," it does not in fact contemplate reorganization in the accepted legal definition of that word. If "reorganization" in the conventional sense were *possible*, there would have been no need for the RRRA.

As Judge Fullam noted in his concurring opinion below:

> "The Regional Rail Reorganization Act of 1973 represents the Congressional response to the unfortunate fact that the processes and concepts of

[42]A total of $2.165 billion is authorized by Congress in the RRRA in the form of loans, guarantees and grants: $250 million for labor protection (Title V); $180 million for local rail continuation subsidies (Title IV); $1,500 million for obligations of USRA §210(b); $150 million for loans for acquisition, maintenance or improvements of property (§215); and $85 million for grants to railroads in reorganization (§213). To date, a total of $28.8 million has been made available to Penn Central, of which $10.8 million was in the form of a purchase of outstanding equipment obligations (see Order No. 1480 and Memorandum in Support thereof, Docs. Nos. 29 and 30 in the Joint Documentary Submission) and $18 million was in the form of a grant (see Order No. 1542 and Memorandum in Support thereof, Doc. No. 31 in the Joint Documentary Submission).

§77 outlined above proved inadequate to deal with the current plight of railroads in the Northeast. Section 77 is adequate only when a railroad's revenues are, or can reasonably be predicted to be, in excess of operation expenses.

* * *

"Penn Central and most of the other bankrupt northeastern carriers do not generate net operating revenues, but incur large operating deficits. They cannot achieve reorganization on an income basis under §77." (JA 69-70).

The Congressional response, as reflected in the RRRA, is to mandate that all railroads in reorganization in the Northeast which cannot reorganize on an income basis (RRRA, §207(b)) convey their designated rail properties (§206(c)) to Conrail, a corporation controlled by United States government appointed officials (§301(d)), in exchange for: (1) stock and other securities of Conrail (§206(d)), including obligations of USRA (if affirmatively approved by a joint resolution of Congress—§206(i)—which in any event are limited to $500 million principal amount (§210(b)); and (2) the undefined "other benefits" accruing to such railroad by reason of such transfer (§206(d)). Once a railroad's reorganization court concludes that the railroad should be reorganized by means of conveyance of its rail properties to Conrail (§207(b)), there is no further judicial review provided until after the conveyances of property (§303(b)(1)) and the concurrent divestment of creditors' liens (§303(b)(2)) have been completed. The only "out" from the compulsion of the statute which a reorganization court could exercise if an income-based reorganization is not possible,[43] is a finding that "this Act does not provide a

[43]The reorganization courts supervising the Erie-Lackawanna and Boston & Maine reorganizations found that income-based reorganizations were possible, and thus avoided the compulsion of the RRRA.

process which is fair and equitable to the estate of the railroad in reorganization. . ." (§207(b), third sentence, clause (2)). This finding inherently requires a determination whether or not the processes of the RRRA would be unconstitutional as applied to the railroad.

In the case of Penn Central, the finding has been made that the RRRA does not provide a process which would be fair and equitable to the estate. *Opinion in Support of Order No. 1596, supra* (JA 124-52). The issue raised by this cross-appeal, asserting that the compulsory conveyance provisions of the RRRA violate the New Haven Trustee's constitutional rights, is essentially the same issue which has thus already been decided by the Penn Central Reorganization Court in favor of the New Haven Trustee. The Reorganization Court's decision, however, is subject to review by the Special Court (created pursuant to §209(b) of the RRRA).[44] The Special Court's decision is required by the terms of the sixth sentence of §207(b) to be rendered no later than September 30, 1974. Thus, as of the date of this Brief, it is not known whether the Special Court will decide (a) to sustain a plea of *res judicata*, based on the order of the court below in *Connecticut General* that the RRRA is unconstitutional in failing to provide just compensation in respect of erosion, (b) to affirm Order No. 1596 on the merits,

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[44]The Special Court is a three-judge district court consisting of Circuit Judges Henry J. Friendly (presiding) and Carl McGowan and District Judge Roszel C. Thomsen. It has before it appeals on the merits of Order No. 1596 (docketed as No. 74-8) by the United States, USRA and the ICC (in which the State of New Jersey and the Railway Labor Executives' Association has joined); and a cross-appeal by the New Haven Trustee limited to his jurisdictional contention that the jurisdiction conferred by §207(b) is void under Article III and under Article I, Sec. 8., Cl. 4 of the Constitution. The Penn Central Trustees, although partially aligned with the United States and USRA as to the "Tucker Act remedy" argument, are appellees in support of Order No. 1596 on the merits, as are all of the plaintiffs in *Connecticut General* and the related cases, *Smith v. United States* and *Penn Central Co. v. Brinegar.*

(c) to reverse Order No. 1596 on the merits in spite of the decision below, (d) to decline to reach the merits by finding that jurisdiction is improperly conferred by §207(b), or (e) to defer decision pending a decision by this Court of the appeals and cross-appeals from *Connecticut General* and related cases. The Special Court's decision will presumably have been made prior to the argument of this case. Whatever the Special Court's decision, appeals from its decision are purportedly excluded by the seventh sentence of §207(b).[45]

With this background, we turn to an analysis of why the Congressional "solution" requiring Penn Central, which is unable to reorganize in the conventional manner, to convey its rail assets to Conrail in exchange for stock and securities of Conrail and USRA, is necessarily a violation of the Fifth Amendment rights of secured creditors and other claimants to the Penn Central estate.

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[45]Jurisdictional appeals by the New Haven Trustee from orders Nos. 1543 and 1596 (120-day and 180-day orders under §207(b)) have been filed under §24 of the Bankruptcy Act with the Court of Appeals for the Third Circuit (Nos. 74-1501 and 74-1649). The former appeal was argued on July 18, 1974 and the Third Circuit panel reserved decision pending a decision by this Court in this case. The New Haven Trustee has acknowledged to the Court of Appeals that a favorable decision of his cross-appeal here would moot his jurisdictional appeals from the §207(b) orders and thereby avoid the necessity of decisions as to whether or not §207(b) is void under Article III of the Constitution and the doctrine of separation of powers.

B. The Compulsory Conveyance Provisions of the RRRA Involve an Intentional Taking, Not Compensated by Money or its Perfect Equivalent, of the Property of Penn Central in Violation of the Fifth Amendment Rights of its Creditors and Stockholders

The New Haven Trustee submits, for the reasons set forth below, that the compulsory conveyance provisions of the RRRA (§§206(c), (d), (f), (h) and (i)), 207, 208, 209(c) and (d) and 303(b) and (c), hereinafter collectively referred to as the "compulsory conveyance provisions," are constitutionally void on their face and as applied to Penn Central.

The RRRA authorizes for issuance to the estates of bankrupt railroads, which are subject to the compulsory conveyance provisions of the RRRA, only common stock of Conrail, other unspecified securities of Conrail which may be issued subject to the limitations set forth in §206(i), plus (if Congress concurs by joint resolution pursuant to §206(i)) not in excess of $500 million of obligations of USRA which might be guaranteed by the United States.[46] If the securities of Conrail plus any obligations of USRA authorized by Congress should be determined in the §303(c) proceedings to have less value than the "highest and best

[46]The $500 million limitation is derived from §210(b), fixing the maximum obligational authority at $1,500 million of USRA securities, of which $1,000 million may be issued to Conrail. Of the latter amount, not less than $500 million is available solely for rehabilitation and modernization of rail properties. Under §206(i), the final system plan may include terms and conditions for any securities to be issued by Conrail in exchange for rail properties which in the judgment of USRA will minimize any actual or potential debt burden on Conrail, and any securities of Conrail which purport to obligate USRA shall not become effective without approval by joint resolution of Congress. Hence, without further action by Congress, even the $500 million of potentially available United States guaranteed debt securities is unauthorized. While Congress could amend the $500 million limitation of §210(b) by a joint resolution, the constitutionality of the RRRA cannot be made to depend on conjecture as to future actions which Congress may or may not take.

use" value of the designated rail properties conveyed, the only remedies allowed for by the statute are the possibility of the Special Court's ordering additional amounts of the same types of securities of Conrail specified in the final system plan(§303(c)(2)(B)), plus entering the §303(c)(2)(C) deficiency judgment against Conrail.

Judge Fullam aptly described the deficiency judgment provision of §303(c)(2)(C) in his opinion below as "essentially circuitous." (JA 77). If the Conrail common stock and securities are insufficient, a deficiency judgment against the property having insufficient value to support the securities representing the property will produce no possible satisfaction of the judgment. Moreover, even if the judgment were satisfied, Conrail's assets would be depleted by the same amount, thereby reducing the value of the common stock, creating a need for a further deficiency judgment. In his *Opinion in Support of Order No. 1596, supra,* Judge Fullam described the deficiency judgment as a "relatively pointless" remedy.(JA 137).

Neither the Penn Central Trustees, as intervening defendants below, nor the Governmental Defendants have presented any analysis of the RRRA which supports any contrary conclusion. The Trustees argued below that the compulsory conveyance provisions of the RRRA are unfair and inequitable to the Penn Central estate *unless* this Court definitively adjudicates that there is a Tucker Act remedy under 28 U.S.C. §1491 to take care of any "short fall" between the consideration provided by the RRRA and the constitutional minimum which would prove to be due under the Takings Clause of the Fifth Amendment.[47]

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[47]The Governmental Defendant's brief below was "in partial opposition to intervening defendants motion for summary judgment" (Doc.

(footnote continued on next page)

The Governmental Defendants likewise relied below upon the "Tucker Act remedy," but with a somewhat different emphasis. The Governmental Defendants argued that if USRA were able to design a final system plan under which Conrail could be shown to have the potential to earn net income before fixed charges, then the capitalized value of the prospective net earnings (*i.e.*, the value of Conrail common stock and its other securities for purposes of reorganization) would automatically *fix the value of the rail properties conveyed* to Conrail. However, recognizing that the value thus determined for rail properties of the bankrupt carriers might be far less than the liquidation value of those properties if sold for their highest and best use, the Governmental Defendants argued below that any constitutional "short fall" could be remedied by a suit in the Court of Claims against the United States.

The Court below unanimously rejected the "Tucker Act remedy" arguments of both the Penn Central Trustees and the Governmental Defendants. The New Haven Trustee asserts that this disposition was correct, and the point will be fully briefed in his Brief herein as an Appellee. In the instant Brief the New Haven Trustee will assume that the Court below was correct without argument of the question, and that no "Tucker Act remedy" exists for any failure of the stock and other securities of Conrail (including up to $500 million of obligations of USRA if subsequently authorized by Congress under §206(i)) to equal the "highest and best use" value of the Penn Central rail assets designated in a final system plan for conveyance to Conrail.

(footnote continued from prior page)

no. 12 in E.D.Pa.C.A. No. 74-1107, May 17, 1974) because the United States interposed the defense of sovereign immunity to any declaratory judgment that a "Tucker Act remedy" exists, while at the same time asserting the affirmative defense of an "adequate remedy at law."

In his motion for summary judgment below, the New Haven Trustee alleged that the RRRA constitutes a taking by force of law for a public use of the property of Penn Central of two types: (a) during the period from enactment of the RRRA through the date of conveyances under §303(b), as a law requiring that private property be devoted to public use without the owner being afforded a reasonable expectation of profit or return on his investment;[48] and (b) upon the happening of the §303(b) conveyances, as a law providing for the taking for public use of (i) the right, title and interest of Penn Central as owner in fee or as to a leasehold estate of the designated rail properties, and (ii) the right, title and interest of the New Haven Trustee as mortgagee and lienholder. The first type of taking was enjoined by the Court's order below. The instant cross-appeal deals with the failure of the Court below to enjoin the second type of taking.

There is no dispute that, once a §207(b) order compelling Penn Central to convey its property were to be entered by the Special Court,[49] the RRRA would, by force of law, inexorably require conveyance of designated rail properties of Penn Central to Conrail in exchange for the consideration of the types specified in the RRRA. There is also no dispute that the consideration specified in the RRRA does not include money.

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[48]The Court below granted this portion of the New Haven Trustee's motion for summary judgment.

[49]As is sought by the United States, USRA, the ICC and the other governmental parties who have filed a joint brief dated August 5, 1974 seeking to reverse Judge Fullam's Order No. 1596 (Special Court, Regional Rail Reorganization Act, No. 74-8). As noted above, the Penn Central Trustees, although they argue for a "Tucker Act remedy" to save the RRRA, are aligned with the creditors and stockholders of Penn Central as appellees in support of Order No. 1596 rejecting the RRRA as not being "fair and equitable" to Penn Central.

The New Haven Trustee submits that, once a taking of private property is established to have taken place under an Act of Congress, or to be the inevitable consequence of the implementation of such an Act, the implementing legislation must provide for payment to the owners of that property of the "full monetary equivalent of the property taken." *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473 (1973).[50] See *United States v. Reynolds*, 397 U.S. 14, 16 (1970). In *United States v. Miller*, 317 U.S. 369, 373 (1943), this Court held:

> "The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." (Footnotes omitted).

See also *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893), where it was stated that:

> "The noun 'compensation' [as used in the phrase 'just compensation' in the Fifth Amendment], standing by itself, carries the idea of an equivalent. . . . And this is made emphatic by the adjective 'just.' There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken. . . . This excludes the taking into account as an element in the compensation of any

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[50]The full quotation is as follows:

"The Fifth Amendment provides that private property shall not be taken for public use without 'just compensation.' 'And 'just compensation' means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken' *United States v. Reynolds*, 397 U.S. 14, 16 (footnotes omitted). See also *United States v. Miller*, 317 U.S. 369, 373."

supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated, and leaves it to stand as a declaration that no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner."[51]

The only question which remains, assuming that the "full monetary equivalent" test must be met, is whether the Congress is free to legislate, in connection with a taking, that something other than money shall be the equivalent of money. In other words, can Congress declare, for example, that the stock of Conrail is to be the legal equivalent of money and, if it does, what is the constitutional effect of that legislative declaration? The question was squarely presented in the *Monongahela Navigation* case, *supra*, and was squarely answered as follows:

"By this legislation Congress seems to have assumed the right to determine what shall be the measure of compensation. *But this is a judicial, and not a legislative question.* The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or *even what shall be the rule of compensation.* The Constitution has declared that just compensation shall be paid, and the ascertainment of that

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[51]This holding was cited with approval by this Court in 1970 in *United States v. Reynolds, supra,* and the *Reynolds* decision was in turn cited with approval by the Court in 1973 in *Almota Farmers Elevator & Warehouse Co. v. United States, supra.* Thus there can be no doubt that the *Monongahela Navigation* decision in 1892 remains the current and authoritative holding of this Court on the issue.

is a judicial inquiry." 148 U.S. at 327 (emphasis added).[52]

In the compulsory conveyance provisions of the RRRA (particularly §§206(d), 303(b) and 303(c)), Congress has specifically legislated the nature and rule of the compensation to be provided to railroads in reorganization for the compulsory "transfers or conveyances" of their property. By providing as a limit on, and a test of, "just compensation," that the Special Court shall decide "fairness and equity" on the basis of solely (i) stock and possibly other securities of Conrail, (ii) obligations of USRA not exceeding $500 million principal amount, and (iii) "other [undefined] benefits," Congress is in contravention of the clear holding of the *Monongahela Navigation* case.

There is, in fact, but one medium of exchange which is the "perfect equivalent of the property taken," namely money prescribed by Congress as legal tender for the payment of all debts, public and private. While it has the power to declare what "money" is, and what shall be legal tender for payment of private and public debts, and even to override inconsistent provisions in private contracts,[53] Congress has no power to declare that something which is not money is, as a matter of law, the perfect equivalent of money. As the *Monongahela Navigation, Miller, Reynolds* and *Almota* cases make plain, the law on this subject has not changed since 1795 when it was stated:

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[52]See *Baltimore & Ohio R.R. v. United States*, 298 U.S. 349,364(1936): "Congress has no power to make final determination of just compensation or to prescribe what constitutes due process of law for its ascertainment." (Footnote omitted). The Court cited with approval the portion of the *Monongahela Navigation* opinion quoted in the text.

[53]As to the power of Congress to make Treasury notes legal tender, see *Knox v. Lee*, 79 U.S. (12 Wall.) 457 (1871) ; *Juilliard v. Greenman*, 110 U.S. 421 (1884). As to the power of Congress to invalidate gold clauses in private contracts, see *Norman v. Baltimore & Ohio R.R.*, 294 U.S. 240 (1935); and see other "Gold Clause Cases" decided the same day.

"No just compensation can be made except in money. Money is a common standard, by comparison with which the value of any thing may be ascertained. It is not only a sign which represents the respective value of commodities, but it is an universal medium, easily portable, liable to little variation, and readily exchanged for any kind of property. Compensation is a recompense in value, a *quid pro quo*, and must be in money. True it is, that land or any thing else may be a compensation, but then it must be at the election of the party; it cannot be forced upon him. His consent will legalize the act, and make it valid; nothing short of it will have the effect." *Vanhorne's Lessee v. Dorrance*, 2 Dall. 304, 313 (Circuit Court Pa. 1795).

These legal precedents establish that the RRRA is unconstitutional on its face and as applied to Penn Central, when considered as an exercise of Congress' Commerce Clause/eminent domain powers, and results in a permanent taking of the property of Penn Central and the New Haven Trustee without payment of just compensation in legal tender, in violation of the Fifth Amendment. As an eminent domain statute, not even the existence of a "Tucker Act remedy" under 28 U.S.C. §1491 to cover a "short fall" between the consideration provided by the Act and the "highest and best use" value of Penn Central's rail properties would suffice to render the statute constitutional, since claimants of Penn Central are entitled to *full payment* in money or its perfect equivalent. *Almota Farmers Elevator & Warehouse Co. v. United States*, *supra*, and other cases cited above. Whether or not the stock or other securities of Conrail have demonstrable value, such securities are plainly not money or its perfect equivalent.

In its *Opinion in Support of §207(b) 180-Day Findings in the Secondary Debtor Proceedings* (E.D. Pa. July 2, 1974) (JA 153-56), the Penn Central Reorganization

Court held unconstitutional the provisions of §§206(a)(3) and 601(d) of the RRRA, which require rail properties in the Boston-Washington passenger corridor to be sold or leased by Conrail to National Railroad Passenger Corporation (Amtrak), following the §303(b)(1) conveyances and the §303(b)(2) divestments of liens. The basis of this holding was that the RRRA, at least in this area, clearly involves an exercise of eminent domain powers without provision for payment of just compensation in money. Judge Fullam observed:

> "A further problem . . . arises in connection with the provisions of the Act dealing with the so-called "northeast corridor" from Boston to Washington. Virtually all of this property is owned by the Secondary Debtors[54] and leased to Penn Central. . . . The Government, in the present proceedings, has taken the position that Conrail will be able to raise $500 million in cash by acquiring the northeast corridor properties and then selling them to Amtrak pursuant to §601(d) of this Act. While the public purpose of these provisions of the statute is quite clear, *the constitutionality of that approach seems particularly dubious.* Certainly, if Congress were to give Amtrak the power of eminent domain, Amtrak could properly acquire the corridor properties. But I find it difficult to accept the theory that it is constitutionally permissible for the government to achieve that result by means of the RRRA, *without providing the present owners of the property with cash or its equivalent.*" (JA 155; emphasis added).

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[54]The corridor properties owned by the Secondary Debtors are located between New York City and Washington. Between the New York-Connecticut state line and Providence, R.I., the corridor properties are former New Haven properties which are subject to the New Haven Trustee's Mortgage and claimed equitable lien.

C. The Fifth Amendment Requires that a Railroad in Reorganization, Which Is Unable to Earn Net Railway Operating Income and Whose Properties Are Required to Be Continued in Perpetual Public Service, Be Paid Not Less than the "Highest and Best Use" Value of its Rail Properties

Aside from Tucker Act remedy considerations,[55] the gist of the contentions of the United States and USRA that the processes of the RRRA do not involve an unconstitutional taking of property rests on an assumption as to a valuation theory which appears to be a complete misreading of the holding of *New Haven Inclusion Cases, supra.* The point was specifically addressed in a colloquy between counsel representing the United States and USRA and Judge Fullam at the "180-day" hearing on June 10, 1974:

> THE COURT: "Perhaps it is the lateness of the hour, but it would seem to me one of the factors the Court would certainly have to consider in deciding whether this Act provides a fair and equitable process would be what the probable outcome or what the possible outcome would be at the valuation stage.
>
> MR. CUTLER: "My difficulty with that is there are so many imponderables involved on both sides of that valuation equation.
>
> "To begin with, if a profitable railroad can be created, then it may be the only value that these estates are entitled to is the capitalized earning power of the profitable railroad. They may not be entitled to liquidation value. So you may not have to add in any other benefits at that point.

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[55]As noted above, the unavailability of a "Tucker Act remedy" is not argued in this Brief but will be discussed fully in the New Haven Trustee's Brief as Appellee.

"That is a point the Supreme Court expressly reserved in the New Haven case. It is one Judge Anderson never reached himself when he said that he thought the right thing was liquidation value, not because it is constitutionally required. So that is an open issue.

THE COURT: "Of course, it has always been assumed up until this point that going concern value was greater than liquidation value, hasn't it? Hasn't that usually been the assumption?

MR. CUTLER: "The point was in the earlier reorganization cases that may very well be true, the early going concern value cases, but the precise point was reserved, as I said, by the Supreme Court in the New Haven case. So there is an open issue.

"If a profitable railroad can be created, even if it is a billion-dollar railroad, let's say its value capitalized is a billion dollars, and the liquidation value were theoretically more, that doesn't automatically demonstrate that the consideration to be paid is less than a constitutional minimum. That is an open point.

"As to liquidation itself, there are many open points, as you know. There are discounts to be applied. There are the problems of succeeding in abandonments, all of the different things that the Supreme Court considered in the New Haven case." (Transcript of June 10, 1974 hearing, E.D. Pa. No. 70-347, on the 180-day findings pursuant to §207(b) of the RRRA, at pp. 12, 610-12).

In his *Opinion in Support of Order No. 1596, supra,* Judge Fullam noted that this theory of valuation appears in the legislative history to be the basic rationale of the RRRA.

"The legislative history of the Act suggests that many responsible public officials may be proceeding on the assumption that the Common Stock of Conrail (i.e., the capitalized value of its prospective earnings) necessarily and automatically estab-

lishes the value of the rail assets conveyed to Conrail, even if those assets had a higher liquidation value, and even though their value for 'highest and best use' might be much greater." (*Opinion in Support of Order No. 1596, supra*; JA 138).

The Government argues in effect that the value of Penn Central's rail assets can, for Fifth Amendment purposes, be valued solely by reference to the value of the securities issued by a *buyer* of the properties in a context where the properties are the only asset of the buyer. The argument is thus both circular and question begging where the issue is whether the *seller* could realize greater value by a sale of its properties for non-rail use, or by condemnation of its properties by a public authority for continued rail use, or a combination of both. The New Haven Trustee submits that the Government's circular reasoning does not in any event withstand close analysis of the holding of this Court in *New Haven Inclusion Cases, supra.*

Mr. Justice Stewart's opinion (399 U.S. at 481-82) discussed the contention of the New Haven Bondholders "that Penn Central should pay an added amount [in addition to per-parcel sale liquidation value] to reflect the 'going-concern' value of the New Haven." This particular contention was rejected by the Court, not because it was reserving any issue, but because it considered that such payment would give the New Haven Bondholders "the best of both worlds" (*Id.* at 482), a result which the Court found would be "unfair" and "inequitable" to Penn Central (*Id.*). Of particular significance to the instant case is that the Court distinguished the *Fifth Avenue Bus* and *Hudson Rapid Tubes* cases,[56] cited in 399 U.S. at 482, note 80, on the

[56] *In re City of New York (Fifth Avenue Coach Lines)*, 18 N.Y. 2d 212, 219 N.E. 2d 410, *appeal dismissed sub nom. Fifth Avenue Coach Lines v. City of New York*, 386 U.S. 778 (1966); *In re Port Authority Trans-Hudson Corp.*, 20 N.Y. 2d 457, 231 N.E. 2d 734, *cert. denied sub nom. Port Authority Trans-Hudson Corp. v. Hudson Rapid Tubes Corp.*, 390 U.S. 1002 (1967).

ground that:

> "In neither of these cases did the New York courts require the taking authorities to pay *both* an operating and a liquidating value. Rather, they awarded the owners the value reflecting the highest and best use for their properties—precisely the treatment accorded the New Haven here." (Emphasis in original).

The New Haven Trustee submits that the findings made by Congress in the RRRA, §101(a), constitute a recognition that the railroad properties of Penn Central are, in the words of one of the Government briefs below, an "irreplaceable national asset." As such, the highest and best use value of at least Penn Central's principal rail properties is presumptively for continued railroad use by one or more public authorities. The New Haven Trustee submits that, prior to the valuation hearings by the Special Court (RRRA, §303(c)) at which a definitive theory of valuation of Penn Central's rail properties can be decided upon, the facial constitutionality of the RRRA must be adjudged in the light of the constitutional requirement that valuation of a debtor railroad's rail properties be based on "highest and best value" in the words of Mr. Justice Stewart, and not on an automatic application of a predetermined valuation technique.

On the New Haven's facts, both Judge Anderson and this Court found that liquidation value was greater than going concern value.[57] In both the *Fifth Avenue Bus* and *Hudson Rapid Tubes* cases, the transportation entities were in a hopeless loss situation, and yet they were "irreplaceable" local assets which the public authorities would not tolerate being abandoned and sold piece-meal. The New Haven Trustee submits that Penn Central's case is analogous to *Fifth Avenue*

[57] *In re New York, New Haven & Hartford R.R.*, 289 F. Supp. 451, 454-55 (D. Conn. 1968); *New Haven Inclusion Cases, supra*, 399 U.S. at 481-82.

Bus and *Hudson Rapid Tubes*, and §101(a) of the RRRA confirms this to be so. In *Fifth Avenue Bus* and *Hudson Rapid Tubes*, the amount awarded to the owners of the transportation facility was somewhere between scrap value (argued for by the taking authority) and reproduction cost new, less depreciation (argued for by the owners of the property). This mid-point represented application of the valuation principle of "highest and best use" to the facts of those cases.

All the *New Haven Inclusion Cases* decide is that where, under the peculiar facts of that case, value based on "highest and best use" was equal only to liquidating value for non-rail use, the Court would not compel payment of a greater amount. The Court's opinion does not stand for the proposition that going concern value, *when less than liquidation value*, could be judicially approved as meeting the test of "highest and best use."

It is in light of the discussion at 399 U.S. at 481-82 that one must read the following single sentence of the Court's opinion (399 U.S. at 490) upon which Government counsel presumably relied in his oral argument (see Transcript of June 10, 1974 hearing at p. 12, 637):

> "Nor is it necessary to consider the bondholders' claim that anything less than full liquidation value would amount to an uncompensated taking in violation of the Fifth Amendment."

This sentence is immediately preceded by the following passage which, it is submitted, is totally inconsistent with the Governmental Defendants' reliance on that sentence for its "reservation of issue" position:

> "The purchase price that the Commission and the reorganization court have required Penn Central to pay to the New Haven estate is based upon the liquidation value of the seller's assets, appraised as of

> December 31, 1966. That price hypothesizes a shutdown of New Haven, followed by a sell-off of its assets *at their highest and best value*. In the circumstances of this case, and for the reasons we have already set out at length, we agree with the reorganization court that it would be unfair and inequitable to allow Penn Central to take the properties for any lesser sum. Moreover, we today require a reassessment of the consideration that Penn Central is to give in exchange for those properties. We thereby accord the bondholders the right to a liquidation and a per-parcel sale that is theirs by virtue of their mortgage liens. The Bankruptcy Act does not require that they be given more." 399 U.S. at 489-90 (emphasis added).

The portion of Judge Anderson's August 13, 1968 opinion presumably relied upon by the Governmental Defendants is the following two sentences:

> "It is the opinion of the court that the Penn-Central should pay to the Trustees of the New Haven at least the liquidation value of the New Haven as of December 31, 1966. This is so not because the Constitution necessarily requires it but because that standard, under the circumstances of this case, is fair both to the creditors and to the Penn-Central." 289 F. Supp. at 454.

It is submitted that neither Mr. Justice Stewart nor Judge Anderson was reserving the issue as to whether the New Haven Trustees could, consistent with the Fifth Amendment, have been paid *less* than liquidation value. Rather, each court was limiting its respective opinion to the facts of the New Haven situation. Each court concluded that the "highest and best use" value of the New Haven's rail assets was to be measured by a hypothetical liquidation and per-parcel sale for non-rail use. Judge Anderson (289 F. Supp. at 454) refers to the "constitutional minimum of value" as to which the creditors were "entitled," and that those "rights of

creditors cannot be arbitrarily sacrificed or restricted . . . ." It is wholly inconsistent with Judge Anderson's "constitutional minimum" language to read into his opinion an intent to reserve the issue that creditors of a railroad in reorganization might be entitled to less than liquidation value and a per-parcel sale in a situation where "going concern value" was less than liquidation value. This is particularly true since Judge Anderson specifically rejected the "going-concern value" arguments of the New Haven Bondholders because:

> "The concept of 'going concern value' is fictional as applied to the New Haven because it ignores the Railroad's long and continuous history of deficit operations." 289 F. Supp. at 455.[58]

In the case of the Penn Central System, it is now *res judicata* that its railroad properties are not reorganizable on an income basis (Order No. 1543 (JA 103); the governmental parties to this case have not appealed this order). Penn Central's rail properties thus have no "going-concern value." Penn Central is in the same position now that New Haven was in the 1960's. The Government's "capitalized earning power" argument amounts to this: if there had been no Penn-Central merger to serve as the medium by which rail service in the New Haven's territory could have been maintained consistent with the protection of creditor rights which is mandated by the Fifth Amendment, it would have been open to Congress to enact a law under which the New Haven Trustees would have been

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[58]See *New Haven Inclusion Cases*, *supra*, 399 U.S. at 436:

"In approving the negotiators' approach to the price question, the Commission observed that asset value rather than earning power was the primary determinant because 'New Haven had long been dry of earning power.' 331 I.C.C., at 657. 'If there is one thing on this record that is clear and undeniable,' the Commission concluded, 'it is that N[ew] H[aven] has neither earning power nor the prospect of earning power.' *Id.* at 687."

compelled to convey to a nominally private (but governmentally controlled) rail corporation a designated portion of New Haven's rail properties in exchange for common stock and possibly other securities of this new entity, all without benefit of any "underwriting" to assure that the value of this package of securities was equal to $174,635,899, the amount finally approved as the "highest and best use" value of New Haven's assets. Moreover, the Government argues that the capitalized value of the earnings predicted to be earned by the *buyer* of the designated rail properties determines their value to the *seller* even though such properties might have a higher value to the *seller* if sold for non-rail use or if condemned by one or more public authorities. Such an argument confuses the "apples" of the theory of capitalized value in an earnings-based reorganization with the "oranges" of the basic rationale of bankruptcy law, that a debtor's property be applied for the benefit of claimants to its estate in the order of the priority of their claims. This represents a sharp departure from any prior decision of this Court, including most particularly the *New Haven Inclusion Cases*, upon which the Government seeks to rely for its theory of valuation.

D. The RRRA Is Constitutionally Defective in Requiring Payment for Rail Assets in the Form of Securities of Conrail Without Any Provision for a Guarantee that the Value of Such Securities Will Be the Perfect Monetary Equivalent of the "Highest and Best Use" Value of the Rail Assets

This section of the Brief analyzes the nature of Conrail as a governmentally created and controlled entity, the facts in the record as to the value of the rail properties comprising Penn Central's System under the "highest and best use" standard of the *New Haven Inclusion Cases*, and the reasons why securities and common stock of Conrail, plus an amount of governmentally guaranteed debt instruments not exceeding $500 million, could not be viewed as the perfect equivalent of the "highest and best use" value of the portion of Penn Central's rail assets to be designated for conveyance to Conrail under the RRRA.

Although the *compulsory* features of the RRRA are sufficient, by themselves, to distinguish the RRRA from any prior law "on the subject of bankruptcy" heretofore enacted,[59] it is the governmental control of Conrail which most clearly marks the RRRA as an exercise of the Commerce Clause/eminent domain powers of Congress. Compulsory conveyance of properties to a governmentally created and controlled cor-

[59]It is true, of course, that the "cram-down" feature of §77(e), upheld in the *Denver & Rio Grande* case, *supra*, represents an element of judicial compulsion; however, the court in §77(e) is required to find that a plan rejected by a class of creditors "makes adequate provision for fair and equitable treatment for the interests and claims of those rejecting it" and "such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it . . . ." In the RRRA, by contrast, there is no voting by creditor or stockholder claimants to the railroad's estate, nor any judicial proceedings to determine that their rejection of Congress' plan "is not reasonably justified" in the light of their rights and interests.

poration is not a feature of any prior "law on the subject of bankruptcies." The New Haven Trustee has no quarrel with the Congressional decision to place control of Conrail in the hands of the United States and its agencies in view of the extensive governmental financial commitment to Conrail. But Conrail will necessarily be as much a creature of Congress' will as are Federal Deposit Insurance Corporation, Securities Investors Protection Corporation, and National Railroad Passenger Corporation. These are "nominally" private corporations which, however, serve primarily non-private purposes. Conrail is simply not fairly characteristic of "private enterprise." It is "government enterprise" in its creation, financing and control.

The "government enterprise" nature of Conrail may be judged by the following legislative history:

> MR. KUYKENDALL: "Mr. Speaker, is it not true, I will ask the gentleman from Washington (Mr. Adams) that the creditors are of course given protection, and that the Board of Directors, under the control of Government officials, is the owner of the entire block of 100 million shares, whatever it is?"
>
> MR. ADAMS: "The gentleman is correct. It is controlled by the United States, so long as the Secretary determines that there is an amount of obligation funds which the United States might, in any way ever, have anything to do with.
>
> "During that period of time, it is controlled by a board of directors which consists of Government officials." 119 Cong. Rec. H 11876 (daily ed. December 20, 1973).

The provisions vesting control of Conrail in the United States Government are set forth in §301(d) of the RRRA: so long as 50% or more of Conrail's indebtedness constitute debts owed to, or guaranteed, by USRA or the United States, eight of the fifteen direc-

tors of Conrail will be government officials or persons appointed by the President with the advice and consent of the Senate.[60] Thus, the owners of 100% of the common stock of Conrail will be effectively without voice, having at best 7 of 15 votes on the Board of Directors. Since management decisions will be vested in the Board of Directors by whatever state law Conrail is incorporated under (§301(b)), the owners of the stock of Conrail can expect that Conrail will be managed in the public interest whenever the public interest conflicts with the private interests of the stockholders.

When the RRRA is viewed solely as a "law on the subject of bankruptcy," the following factual distinctions set it apart from any prior exercise of the Bankruptcy Clause power: (1) the RRRA provides for a type of "reorganization" which does not depend on private claimants to the estate seeking the "reorganization" or voting upon it; (2) the "reorganization" is required to be implemented over the unanimous dissent (as exemplified by the present three constitutional complaints before the Court) of the private creditor and stockholder claimants; (3) the "reorganization" does not by its terms insure that private secured claimants will receive the equitable equivalent of a hypothetical foreclosure of their liens, measured by the "highest and best use" value of the properties subject to such liens;[61] and (4) the RRRA

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[60]The 50% test is likely to be met for a considerable period of time if the Conrail's experience parallels that of Penn Central. Private debt and capital markets have indicated a marked reluctance to lend money to Penn Central except with government guarantees. See *In re Penn Central Transportation Co. (Opinion in Support of Order No. 124 approving $100 million of Trustees' Certificates)*, 325 F. Supp. 302 (E.D. Pa. 1971).

[61]The United States and USRA have for the first time contended before the Special Court that:

"USRA and this [the Special] Court on review under Section 303(c),

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provides that private claimants, in exchange for their legal liens upon tangible physical property, will receive common stock and other securities of a government-controlled, nominally privately incorporated, corporation. The common stock of Conrail has been stripped of all the normal attributes of ownership of stock in a private enterprise. Thus the Penn Central claimants, as potential owners of the vast majority of the shares of common stock of Conrail to be issued, would not have control of the Board of Directors of Conrail, or the right to select its executive officers, or the right to discharge management for incompetence or poor economic performance, or the right to declare dividends when deemed appropriate, or the right to pass on the terms of any debt, or the right to avoid political appointments to a Board whose decisions would entail financial and fiduciary responsibilities, or the right to sell their stock on the New York Stock Exchange or possibly other national securities exchanges,[62] or the right to be assured that they could

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are empowered to provide for the issuance of such Conrail debt securities as they deem necessary or appropriate—including bonds secured by liens on specific properties identical in all security respects to the liens that presently attach." Brief of United States, *et al*, dated August 5, 1974 (Special Court No. 74-8).

While this argument might have some persuasive force if USRA were *required* by the RRRA to issue fixed income mortgage bonds secured by first mortgage liens to the extent of the "highest and best use" value of the rail properties subject to existing mortgage liens divested under §303(b)(1), this is not the case. If USRA designs the final system plan without fixed income mortgage bonds (or if Congress rejects such a proposal when the plan is submitted to it under §208), the Special Court will be unable to remedy the deficiency under §303(c)(2)(B) because that section is expressly limited to "securities of the Corporation. . .as designated in the final system plan."

[62]The provision that a majority of the directors of Conrail be elected by the Government, leaving only a minority to be elected by the holders of 100% of the common stock, would violate the New York Stock Exchange "Policy as to Non-Voting Stock" (New York Stock Exchange, Company Manual, §A-15); see also the rule as to "Unusual Voting Provisions" (*id*). The American Stock Exchange has a similar rule.

sell their stock to the United States or one of its agencies at the price at which it was valued when it was required to be accepted as "payment" of their claims secured by liens on Penn Central's rail properties.[63]

In terms of Congressional intent, it is reasonably clear from the legislative history that Congress was motivated almost entirely by a view of the Constitution which proceeds from the premise, in Senator Hartke's words, that the common stock of Conrail can be "crammed down" on the creditors, and that "judges have ruled that this is fair." 119 Cong. Rec. S 23783-4 (daily ed. December 21, 1973; remarks during debate on Conference Report accompanying H.R. 9142).[64] This view seems to stem from a mis-reading of *New*

[63]Compare the "underwriting" of the Penn Central Common Stock required by the New Haven Reorganization Court, *In re New York, N.H. & H. R.R.*, 304 F. Supp. 793 (D. Conn. 1969), *aff'd in part, rev'd in part, New Haven Inclusion Cases, supra.* It is of course highly significant that a majority of this Court in 1970 believed that Judge Anderson's "underwriting" concept was a sound and necessary provision to assure the New Haven estate's claimants that they would in fact receive the equitable equivalent of the "highest and best value" of New Haven's rail properties, and found it necessary to remand the case because the Court perceived that the underwriting might well have become unrealistic by virtue of Penn Central's subsequent §77 petition. If the RRRA were to be sustained in this Court, the 1970 decision of this Court remanding the underwriting plan because of its insufficiency would be largely mooted since the New Haven's First Mortgage Bondholders would ultimately receive, at best, non-underwritten stock and securities of Conrail, in exchange for which Conrail would receive the bulk of the New Haven's assets valued at $175 million in 1966 for which payment remains to be made.

[64]The entire quotation is as follows:

"We are providing that the creditors of this corporation would be required to take common stock in the *new quasi-government operation.* In other words, they are exchanging their present security interest in the rail properties for common stock in the new corporation.

"The railroad properties then become the properties of the new corporation free and clear of liens and encumbrances. In other words, the assets are being transferred and the rights are being changed. The nonrailroad property will remain in the bankruptcy court to be

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Haven Inclusion Cases, supra, and *Penn Central Merger Cases, supra,* since there is no other authority to support it. The Congressional theory underlying Senator Hartke's thesis must be based on the Bankruptcy Clause, since there are no cases which could be read to stand for the proposition that, for example, Congress could flood a farmer's land as a result of construction of a hydroelectric dam, and require him to accept stock of TVA instead of money for his property.

As a "law on the subject of bankruptcy," however, the RRRA is void as a violation of *substantive* due process. It is a deprivation of property without due process for Congress to divest a creditor of his contractual lien created under state law, and give him in exchange a piece of paper stripped of the normal attributes of an investment security, no matter what aspects of procedural due process are accorded.

The leading cases in which this Court explored the outer limits of Congress' power to pass laws for the relief of debtors from the claims of their secured creditors are the *Rock Island*[65] case, and the *Radford* and the two *Wright*[66] cases under the Frazier-Lemke Act and the amended Frazier-Lemke Act. In the *Rock Island* case, the Court upheld an injunction against fore-

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dealt with by them. One can talk about what is available if the railroad is liquidated and put through the wringer, but even then the chances of these creditors getting their money is relatively slim, and *this country cannot afford cessation of rail service* while the railroads are put through the wringer. So what, in effect, is called the 'cram down' theory forces them to accept this kind of settlement and judges have ruled that this is fair." (Remarks of Senator Hartke; 119 Cong. Rec. S 23783-4 (daily ed. December 21, 1973); emphasis added).

[65] *Continental Ill. Nat. Bank & Trust Co. v. Chicago, R.I. & Pac. Ry.*, 294 U.S. 648 (1935).

[66] *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555 (1935); *Wright v. Vinton Branch Mountain Trust Bank,* 300 U.S. 440 (1937); *Wright v. Union Central Life Ins. Co.,* 311 U.S. 273 (1940).

closure of a pledge in a §77 case against the contention that it represented an impairment of contract in contravention of the Fifth Amendment. The Court reasoned that "the injunction here goes no further than to delay the enforcement of the contract." 294 U.S. at 681. In *Radford* and the two *Wright* cases, there was no question of a governmental "taking;" the beneficiary of both Frazier-Lemke Acts was the debtor-farmer, and there was neither a government controlled entity involved nor any "public purpose" other than relief of poverty. The rationale of these four cases is that the Bankruptcy Clause and the Fifth Amendment can together support a law which effects a *brief moratorium* on foreclosure of a pledge or a mortgage lien, coupled with an option in the mortgagor at the end of the period to purchase the mortgagee's interest for *cash* equal to the *appraised value* of the property. This result, it is submitted, is not different from the hypothetical liquidation per-parcel sale value of the *New Haven Inclusion Cases*. By implication in all four cases (and express holding in *Radford*), a Bankruptcy Clause enactment (not supported by any possible exercise of eminent domain powers), which deprives a pledgee or mortgagee to a greater extent (such as, for example, divesting his lien and paying him less than appraised value, or not paying him in cash at all but giving him an unsecured or junior obligation of the debtor which is not the equitable equivalent of his secured claim), is a violation of the Due Process clause of the Fifth Amendment.

Thus, §303(b)(2) of the RRRA, by which mortgage liens of creditors are divested *prior* to any judicial determination that the consideration received by the bankrupt debtor upon conveyance of the property is the "fair and equitable" equivalent of the properties valued at their "highest and best use" value, is de-

ficient as Bankruptcy Clause legislation on due process grounds. This is a defect apparent on the face of the RRRA unless it can be reasonably determined that the "highest and best use" value of the designated portion of Penn Central's rail assets will be $500 million or less, that being the amount of obligations of USRA contingently[67] authorized to be included in a final system plan as payment to all estates of railroads in reorganization which convey rail assets under §303(b).[68]

Once it is determined that the stock and other securities of Conrail are not necessarily equal to the "highest and best use" value of the rail assets of Penn Central which would be required to be conveyed under a final system plan, and that the §303(c)(2)(C) deficiency judgment is "essentially circuitous," all that remains to test the facial constitutionality of the compulsory conveyance provisions of the RRRA is to assess whether and under what circumstances this $500 million of theoretically available debt securities (which might or might not carry the full faith and credit of the United States) would tend to provide the Penn Central estate with a total package of securities which could be said to be the "fair and equitable equivalent" of its rail properties.

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[67]Under RRRA, §206(i), any provision in the final system plan which purports to create a direct obligation of USRA is subject to affirmative approval by a joint resolution of the Congress. As noted above, the $500 million limitation is derived from §210(b). There is no assurance that this $500 million of USRA obligations would carry the guarantee of the United States. Section 210(c) of the RRRA provides:

> "The Secretary [of Transportation] shall guarantee the payment of principal and interest on all obligations issued by the Asssociation in accordance with this Act *and which the Association requests be guaranteed.*" (Emphasis added).

[68]Even if the full $500 million of government guaranteed USRA obligations is made available in the final system plan, Penn Central's estate would at best receive only a pro-rata portion since the estates of four other Class I railroads and one Class II railroad would be entitled to pro-rata participation.

To date no definitive valuation findings relating to the rail assets of Penn Central have been made by either the ICC (whose jurisdiction in this area is exclusive under §77(e)) or by the Penn Central Reorganization Court, nor have any hearings been held at which valuation evidence could be administratively or judicially tested. The lack of definitive valuation proceedings, such as those reviewed by this Court in *New Haven Inclusion Cases*, is a consequence of the ICC having failed to formulate any plan of reorganization, and its rejection for various reasons of those plans submitted to it.[69] No valuation hearings have been held by the Penn Central Reorganization Court because it has had no plan certified to it by the ICC. Unless the RRRA is held to be unconstitutional, valuation hearings will *never* be held until after the irrevocable conveyance of Penn Central's rail properties, free of lien, to Conrail.[70]

The evidence before the Reorganization Court on valuation of Penn Central's rail properties consisted primarily of a Day & Zimmermann study which had originally been placed in the Penn Central Reorganization Library established pursuant to Order No. 1179 and was subsequently, in a revised form, filed with the ICC.[71] The Day & Zimmermann study

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[69]ICC Report dated September 28, 1973, *supra*, Doc. No. 54 in the Joint Documentary Submission.

[70]The failure of the RRRA to provide for a definitive hearing on valuation evidence in connection with fair and equitable findings is indicative of the statute's shortcomings under the due process clause of the Fifth Amendment.

[71]Day & Zimmermann, Inc., "The PCTC Physical Asset Valuation Study," April, 1973; Doc. No. 58 in the Joint Documentary Submission; Revised Study, May, 1973, Appendix 1 to Exhibit T-21 (witness: Carlisle) in ICC Finance Docket No. 26241, *In re Reorganization Proceedings of Penn Central Transportation Co.*; Doc. No. 40 in the Joint Documentary Submission. The Reorganization Library was established pursuant to petitions filed by the New Haven Trustee (see petition dated March 16, 1973; Doc. No. 12 in the Joint Documentary Submission), and Morgan Guaranty Trust Co.

estimates the value as of December 31, 1970 of the physical assets of Penn Central and all its leased lines (exclusive of commercial properties owned by Penn Central and its leased lines in the area of Grand Central Terminal, New York City, referred to as "Park Avenue Properties"). The Day & Zimmermann study includes, in part, land not required for rail use, and lines of railroad which USRA might determine should be abandoned rather than included in a final system plan. It is impossible to know at this time what proportion of the Penn Central rail assets studied by Day & Zimmermann would be included in a final system plan. See Stip. Fact, ¶¶4, 5, 6. It is reasonable and conservative to project, however, in terms of the value of all physical assets of Penn Central and its leased lines studied by Day & Zimmermann, that the Penn Central properties designated in a final system plan would be likely to comprise not less than 50% of the total value of the physical assets of the Penn Central System.[72]

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[72]For example, the New Haven Trustee's Plan dated June 27, 1973 for reorganization of Penn Central, submitted to and rejected by the ICC in its September 28, 1973 Report, called for a reduction in route miles from some 20,000 route miles owned by companies in the Penn Central System, of which some 19,000 miles are now operated, to 11,000 route miles; the 11,000 mile "core system" would have required substantially more than half the total value of the physical assets of the Penn Central System which were included in the valuation study prepared by Day & Zimmermann. As the ICC noted in its Report, the 11,000 mile system was selected by the Penn Central Trustees with the aid of computer projections solely on the basis of maximizing profitability. To the extent that the final system plan were to implement the goals set forth in clauses (2) through (8) of §206(a), and not merely that of clause (1), it is reasonable to anticipate that a final system plan would involve more than 11,000 route miles of rail properties of the Penn Central System. The ICC, in its September 28, 1973 Report, observed:

> "The size of this reduced core system [which could be a viable system] will probably lie somewhere between the present [20,000 mile] system and the 11,000-mile and 15,000-mile core systems developed by Wyer [Dick & Co.]." ICC Report, Doc. No. 54 in the Joint Documentary Submission, App. DD, p. 5.

Two different approaches to valuation were presented by the Day & Zimmermann study—one based on a continued rail use methodology, and the other based on an assumed liquidation for non-rail use. In the case of the latter methodology, a present value of a projected stream of future liquidation proceeds was also calculated. In summary, the results of the Day & Zimmermann study were as follows:

Assumption as to "Highest and Best Use"	Total Value of Wholly Owned Assets, Penn Central and Leased Lines as of December 31, 1970[75]
Continued Railroad Use	$13,585,493,000
Liquidation for Non-Rail Uses:	
Estimated Gross Proceeds of Sales over a Period of Years	$ 3,532,110,000
Present Value of Estimated Net Proceeds, after deducting interest factor and all expenses of sale and of preservation of assets pending sale	$ 1,995,778,000[74]

While the Day & Zimmermann valuations remain to be definitively determined by administrative and judicial proceedings, and they are now some 3-1/2 years out of date, they do provide basic evidence upon

[75]Doc. No. 40 in Joint Documentary Submission.

[74]The present value approach results in *negative* values being assigned to certain leased lines; for example, New York Connecting R.R. has an assumed negative value of $2,898,000, after deducting $8,844,000 as the net cost of demolishing its bridges and tunnels. This is an aspect of the "scrap value" approach which is totally inconsistent with preservation of an "essential national asset." Cf. *In re Port Authority Trans-Hudson Corp., supra*; explained in *New Haven Inclusion Cases, supra*, 399 U.S. at 482 n. 80:

> "The tunnels, which required only $88,000 to be put in working order, had cost $32,000,000 to build, and would have cost $400,000,000 to replace; their liquidating value was a negative figure, because of costs that would have been incurred in plugging them up. [Citation omitted]. Because the Port Authority was taking the tunnels for continued operation, the Court of Appeals held that that the proper valuation was depreciated original cost plus the value of intangible assets also attributable to the operation as a going concern."

which the court below could have properly concluded that $500 million of USRA securities, even if authorized under §206(i) by the Congress, would not have the remotest likelihood of equalling payment in full for the "highest and best use" value of the Penn Central properties likely to be included in the Conrail system. As Judge Fullam observed in his *Opinion in Support of Order No. 1596*:

> ". . . it is clear on the record in this case that rail assets of Penn Central would comprise a very large percentage of the total Conrail system, and there is every reason to suppose that the included properties would be worth considerably more than $500 million. Since no one knows, or can know, at this time, the value of any stock or other securities which Conrail might issue, it would be highly imprudent to assume that there will be no need to resort to the deficiency judgment. Yet obviously, such a judgment would be relatively pointless, serving merely as a further reduction in the value of the common stock." *Opinion in Support of Order No. 1596, supra* (JA 137).

In fact, even using the discounted scrap value approach of Day & Zimmermann (an approach which the New Haven Trustee contends would be wholly erroneous under the *New Haven Inclusion Cases*), and assuming only 50% of the physical assets of the Penn Central rail system would be included in the Conrail system pursuant to the final system plan, one is forced to the conclusion in analyzing the constitutional impact of the RRRA that in no event could a value for the Penn Central rail assets conveyed to Conrail be assumed to be less than $1 billion.[75]

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[75]While the factual record as to valuation of Penn Central's rail properties is not nearly so complete as was the record of the ICC and the New Haven Reorganization Court which was reviewed in *New Haven Inclusion Cases*, the responsibility for an inadequate record does not belong to the Penn Central claimants since Congress has ordered that an irrevocable decision to convey or not to convey Penn Central's rail assets to Conrail be made in advance of any valuation hearings.

Where a *prima facie* case shows that the valuation of Penn Central rail assets required to be conveyed under the RRRA must exceed $1 billion, the Government should not be heard to argue that it is premature to judge the constitutionality of a statute which, under the most generous construction, would guarantee the estate of Penn Central (together with the estates of all other railroads whose property is included in the final system plan) at most the equitable equivalent of $500 million of value in the form of governmental obligations. Since the RRRA provides that reorganization by conveyance of Penn Central's rail assets to Conrail is mandatory, unless the RRRA is struck down as unconstitutional, or the processes of the RRRA are held not "fair and equitable" by the Special Court, this Court is required by the evidence to decide that the consideration afforded by the RRRA is not assured of being the "equitable equivalent" of the "highest and best use" value of Penn Central's designated rail properties. The situation is not essentially different from the decision in the *New Haven Inclusion Cases* where the uncertainty as to the ability of Penn Central to honor the "underwriting" commitment imposed by the New Haven Reorganization Court caused this Court to reverse and remand an otherwise acceptable plan of reorganization:

> "The fairness and equity that are the essence of a §77 proceeding forbid our approval of a payment for the transferred New Haven properties that may be worth only a fraction of its purported value. . . . Accordingly, we set aside the order of the Connecticut District Court insofar as it determines that an intrinsic value of $87.50 inheres in the Penn Central common stock and implements an underwriting plan to secure payment of that sum." *Id.* at 488-89.[76]

[76]This Court's remand on the "underwriting" issue has never been implemented; Judge Anderson attempted to implement it by imposing

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Furthermore, in a context of legislation providing for a public authority (Conrail) to acquire and operate the railroad's properties after divestment of the mortgage liens, the Fifth Amendment requires the public authority to pay, in addition to liquidation value, an incremental factor for "assemblage" of a complete transportation facility. *In re Penn Central Transportation Co. (Opinion and Order No. 1507 re Philadelphia Area Commuter Service)* (E.D. Pa. March 18, 1974) (Slip opinion, p. 12). See *In re Port Authority Trans-Hudson Corp., supra; In re City of New York (Fifth Avenue Coach Lines), supra.* See also Fullam, J., concurring:

> "As a matter of simple maximization of values, if there is no 'going concern' value in the usual sense, there is no justification for continuing a reorganization proceeding [footnote omitted], unless either or both the following conditions are established: . . .(2) a reasonable prospect that the *public need for preserving the debtor's railroad is such that it will be appropriated for public use, and the values inherent in its assemblage as an operating railroad will be recognized and paid for.* [citations omitted]" (JA 70-71; emphasis added).

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an equitable lien on certain properties conveyed by New Haven to Penn Central, and a constructive trust on Grand Central Terminal income, *In re New York, N.H. & H. R.R.*, 330 F. Supp. 131, 150, 331 F. Supp. 212 (D. Conn. 1971), but this judgment was reversed by the Court of Appeals, 457 F. 2d 683 (2d Cir.), *cert. denied*, 409 U.S. 890 (1972) on the jurisdictional grounds that the New Haven Reorganization Court should have deferred to the ICC as to the remand issues. The ICC has "reopened" its proceedings in the New Haven matter, and consolidated them with the Penn Central reorganization proceedings. Order dated September 13, 1973. However, no further hearings have been set by the ICC on the remand issues in spite of the New Haven Trustee's petition dated Feb. 21, 1973 which urged a prompt determination by the ICC of the remand issues. The Penn Central Reorganization Court, *In re Penn Central Transportation Co. (Order No. 546)*, 337 F. Supp. 779 (E.D. Pa. 1972), declined to adjudicate the equitable lien and constructive trust issues, but imposed a protective temporary lien "indeterminate in amount and indeterminate in priority" pending adjudication of the New Haven Trustee's proof of claim.

The RRRA violates the due process and takings clauses of the Fifth Amendment by failing to provide compensation to bondholders of Penn Central, in exchange for divestment of their liens, equal to the "highest and best use" value of their properties, whether that value be determined under either a liquidation value approach or a continued rail use approach. No case can be cited where a court has ruled that the result required by the RRRA "is fair," statements in the legislative history by Senator Hartke to the contrary notwithstanding.

As Judge Fullam observed in his *Opinion in Support of Order No. 1596*:

> "I am satisfied, therefore, that the use of common stock to pay for the rail assets conveyed pursuant to the Final System Plan cannot be justified on the basis of any constitutional doctrine yet announced by the Supreme Court. In my view, the RRRA in its present form does violence to the Constitution, whether considered as a reorganization statute, or as an eminent domain statute, or as a combination of the two." *Opinion in Support of Order No. 1596*, *supra* (JA 146).

E. A Requirement that Rail Properties of Penn Central Be Exchanged for Securities of Conrail Is a Denial of Constitutional Rights to Dismissal of the Reorganization Proceedings and Termination of Loss Operations

In the case of a railroad whose rail operations do not produce income in excess of operating expenses, and have no reasonable present prospect of doing so, the requirement of the RRRA that the railroad exchange its rail properties principally for common stock of Conrail (plus other undefined securities which "in the judgment of [USRA] will minimize any actual or potential debt burden on [Conrail]" (§206(i))) is the legal equivalent of a denial of the railroad's right to terminate service and liquidate its rail properties. Unless there is an independent constitutional basis for sustaining compulsory continuation of rail operations, it is submitted that the compulsory exchange of rail assets for common stock (plus other securities) of Conrail cannot be sustained. This aspect of the case requires a consideration of the current vitality of the *Brooks-Scanlon–Eastern Texas–Bullock* line of cases[77] in the light of this Court's recent decisions relative to the New Haven's inclusion in Penn Central.[78]

This precise issue was raised in a Penn Central context by the United States, *In re Penn Central Transportation Co. (Columbus Option Appeals), supra.* The Court of Appeals for the Third Circuit stated the government's contention as follows:

> "The government, and to a lesser extent the [Penn Central] trustees, urge that the *Brooks-Scanlon–Louisville Joint Stock Land Bank–Third Avenue–Jersey Central* learning is obsolete because in the *Penn-*

[77] *Brooks-Scanlon Co. v. Railroad Commission*, 251 U.S. 396 (1920); *Railroad Commission v. Eastern Texas Railroad*, 264 U.S. 79 (1924); *Bullock v. Florida ex rel. Railroad Commission*, 254 U.S. 513 (1921).

[78] *Penn Central Merger Cases, supra; New Haven Inclusion Cases, supra.*

Central Merger Cases and *New Haven Inclusion Cases* the Court laid down a new principle of constitutional law. That new principle, they urge, is that secured investors in a railroad enterprise take on obligations in relation to the public which makes it appropriate that they run such risk of erosion of their investment as is necessary in the public interest in order to preserve railroad service." 494 F.2d at 279.[79]

This line of argument by the United States perforce required the Third Circuit to analyze the entire New Haven reorganization as it pertained to the *Penn Central Merger Cases* and *New Haven Inclusion Cases*, 494 F.2d at 279-282.

The Third Circuit concluded as follows:

"The constitutionality of the erosion [of the New Haven Estate] which had taken place prior to the valuation date [December 31, 1966] was never presented to the court in any proceeding in which it could have passed upon that issue. The *New Haven Inclusion Cases* decide no more than that Penn Central does not have to pay for erosion which took place prior to its purchase of the assets.

* * *

"The erosion which took place in the New Haven reorganization did not occur because either the reorganization court or the Supreme Court considered that a new interpretation of the fifth amendment was being announced. Rather the reorganization court acting slowly, but with the concurrence of the bondholders, sought a purchaser which would pay creditors what *Brooks-Scanlon, Eastern Texas* and *Third Avenue* required." 494 F. 2d at 282.

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[79]The reference in the quotation to *Third Avenue* is to *In re Third Avenue Transit Corp.*, 198 F.2d 703 (2d Cir. 1952); the reference to *Jersey Central* is to *Central R.R. of New Jersey v. Manufacturers Hanover Trust Co.*, 421 F.2d 604 (3d Cir.), *cert. denied*, 398 U.S. 949 (1970).

Similarly, in the §207(b) proceedings under the RRRA before the Penn Central Reorganization Court, Judge Fullam stated the position of the Governmental Defendants:

> "The government has now argued, for the first time, that there will never be any necessity to impose a deficiency judgment against Conrail, because, as a matter of law, the value of the Debtor's rail assets equals the value of Conrail's Common Stock. . . .[I]t is significant that this new valuation argument is necessarily based upon the premise that the government can properly require railroads to operate indefinitely." *Opinion in Support of Order No. 1596, supra* (JA 142-43).

Judge Fullam concluded in his 180-day finding under the RRRA as to this issue:

> "The justification for any such thesis must be found in the public interest of avoiding the widespread dislocations which would result from termination of [Penn Central's] rail service. The issue is not where governmental action may be properly taken to avoid such dislocations, but rather whether the method selected by Congress, the RRRA, is a constitutional method of achieving that legitimate public goal. In short, the question is whether the government can avoid such disruptions by imposing the costs and risks of a possible solution upon [Penn Central's] estate. Support for an affirmative answer to that question is to be found, if at all, in the concept that the privilege of a government-protected railroad monopoly gives rise to a residual claim in the public for continuation of railroad operations, to wit, the notion of 'common carrier responsibility' which finds statutory expression in §1(18) of the Interstate Commerce Act.
>
> "The legitimacy of common carrier responsibility is, of course, not in question, but the duration of that responsibility is. Stated briefly, the issue is whether

the government may treat a common carrier whose government-sponsored monopoly is no longer profitable, as if it remained profitable." *Opinion in Support of Order No. 1596, supra* (JA 143).

In light of the Stipulation as to Factual Matters in the record now before the Court (JA 317-24), there is no question that Penn Central's rail operations are unprofitable. The New Haven Trustee's Motion under §77(g) for dismissal of the §77 proceedings, and the related petition seeking adoption of equity receivership proceedings for liquidation of Penn Central's rail properties (Doc. No. 13 in the Joint Documentary Submission), has been pending since October 9, 1973. The factual basis for the granting of the relief sought by the §77(g) Motion now exists in the findings of fact of the Penn Central Reorganization Court in its *Opinion in Support of Order No. 1543 ("120-Day" Findings under §207(b))* (E.D. Pa. May 2, 1974) (JA 84-103). These factual findings are not challenged by either the Governmental Defendants or the Penn Central Trustees.

Under these circumstances, to require Penn Central to exchange rail assets for common stock and other securities of Conrail is, in terms of its economic impact upon secured creditors and other Penn Central claimants, the practical legal equivalent to mandating continued rail operations of Penn Central in the face of hopeless deficits. As applied to Penn Central, the RRRA is unconstitutional in that it deprives the claimants to the Penn Central estate of their right to withdraw the properties subject to their liens from public service and to sell such properties for their "highest and best use value."

F. Adjudication that the Compulsory Conveyance Provisions of the Present RRRA Are Unconstitutional Can and Should Result in a Congressional Enactment Amending the RRRA to Authorize Payment as Required by the Fifth Amendment for Penn Central's Rail Properties

Congress has correctly concluded that rail operations of Penn Central can no longer be carried out by private enterprise. As above argued, Conrail is not "private enterprise." Whether Conrail is "public" or "private," claimants to the Penn Central estate cannot be constitutionally compelled to accept Conrail securities of dubious, if any, value for the Penn Central rail properties which they own or which are subject to their mortgage liens. The compulsory conveyance provisions of the RRRA are thus in irreconcilable conflict with the Fifth Amendment. The "Tucker Act remedy" does not provide a solution because substantively no cause of action exists which could be asserted in the Court of Claims and, even if one did exist, it would in any event require Congress to appropriate billions of dollars because a taking cannot be paid partly in stock and partly in cash.[80]

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[80]Congress has indicated that it presently has no intention of appropriating billions of dollars, or indeed any amount of money, for this purpose. U.S. Representative Brock Adams, one of the original draftsmen of the RRRA and one of the floor managers of the bill in the House of Representatives and a conferee in the conference between the House and Senate which produced the final version of the RRRA, filed an *amici curiae* brief (in which he was joined by twenty-nine other Congressmen) in the Special Court (No. 74-8), in which he advised that Court as follows:

> "It would seem that some creditors hope and expect that if they can destroy this statute, they will force the government to nationalize the Penn Central. They could then claim additional rights under eminent domain principles which would allow them to base their claims on *cash payment* for *highest and best use*. One of the purposes of this brief by the *amici curiae* is to indicate to the court the *strong resistance* which exists in Congress to paying *any additional amounts of government money* to these estates under any such conditions." *Amici Curiae* Brief, at p. 9 (emphasis added).

If the compulsory conveyance provisions of the RRRA are declared void on constitutional grounds, as sought by the New Haven Trustee in this cross-appeal, there is no valid reason why Congress could not amend the RRRA in the following respect to achieve the public interest objectives of the Act in a manner wholly consistent with the Constitution:

1. It could be provided that Conrail's stock would be subscribed and paid for by USRA using funds borrowed by it from the nation's private capital markets on the strength of the full faith and credit of the United States. The United States would thus assume the risk of gain or loss on the stock of Conrail during the initial period required to ascertain whether or not Conrail can surmount the problems which now beset Penn Central and the smaller railroads which may be included in the Conrail system. If Conrail proves to be a viable, profitable rail system, as contended by the Government in this case, USRA, if it desired, could in a few years turn Conrail over to the private sector by a secondary offering of its stock.[81]

2. It could be provided that Conrail will have available to it the right to take rail properties by eminent domain, and to use cash funds generated by the sale of its stock to USRA to pay just compensation as de-

[81] If the Government's theory that the stock of Conrail has "intrinsic" value is correct, after a few years USRA could make a public offering of some or all of its Conrail common stock. Compare the public sale by the United States of all of the stock of General Aniline and Film Corp. which it became free to sell as part of the settlement of the Interhandel litigation under the Trading with the Enemy Act. If Conrail stock has "intrinsic" value, under the Government theory of this case USRA should be able to recoup 100% of its cost by such public offerings, and thus repay the money lent to it by the United States Treasury or borrowed by USRA from the nation's private capital markets on the strength of the full faith and credit of the United States. If, in fact, the stock of Conrail has a market value less than the amount paid by the United States, under applicable Fifth Amendment principles this loss should be borne by the public via taxation rather than be imposed on private creditor interests.

termined by the federal courts.[82] This power of Conrail could of course be conditioned upon USRA's having approved the properties to be acquired. Possession could pass to Conrail upon its deposit in court of the amount initially determined to be a fair estimate of "just compensation" value, and litigation over valuation issues could take place subsequent to Conrail's taking possession of the designated rail properties. After judgment as to valuation, Conrail would pay the balance due, if any, and receive title to the properties free and clear of all liens.

3. The proceeds generated by the deposits and judgments referred to in Paragraph 2 above could be transmitted to the several reorganization courts, with the divested liens of secured creditors attaching to the proceeds, *cf.* §77(o), and the proceeds administered by the railroad's trustees under escrow arrangements[83] pending completion of a "plan of reorganization" by the ICC (§77(d)) and judicial review as to fairness and equity of the distributive aspects of the plan by the reorganization courts (§77(e)).

4. Pending the completion by USRA of the final system plan for Conrail's cash acquisition of rail properties, Congress could legislate that the Secretary of Transportation would make payments pursuant to §213 in such an amount that railroads subject to the new act would have net railway operating income, after all operating expenses and taxes (but before interest and leased-line rental expense) in an amount equal

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[82]Congress could vest the §209 Special Court with jurisdiction over all proceedings to condemn rail properties for Conrail. This is but one example of how the structure carefully designed by Congress in the RRRA could be adapted in the event the Act is adjudged unconstitutional.

[83]*Cf. In re Penn Central Transportation Co. (Order No. 602)*, 340 F Supp. 851 (E.D. Pa. 1972, implementing *In re Penn Central Transportation Co. (reversal of Orders Nos. 192 and 193)*, 454 F. 2d 9 (3d Cir. 1972).

to a specified return on the rate-making base[84] as fixed by the ICC and judicially approved as "fair and equitable." This decision as to the amount of §213 payments which would constitute just compensation for the interim period would supersede the limitation of $85 million now found in §213.

Penn Central is indeed an "irreplaceable national asset." Its properties constitute a complete transportation system created over more than a century by private enterprise, and should be valued by courts employing the judicial concepts developed for the situation in which the legislature determines that the public interest requires condemnation of the unique and valuable transportation properties owned by a private enterprise which finds itself unable to continue to operate profitably. See *In re of City of New York (Fifth Avenue Coach Lines), supra; In re Port Authority Trans-Hudson Corp., supra.* Under the concepts developed by the Court of Appeals of New York, if Congress legislates that the public interest in continued rail operations requires Penn Central's unique transportation system to be acquired and operated by a publicly controlled authority, Penn Cental's claimants are entitled to have those properties (a) paid for in cash, and (b) valued at an amount which reflects substantially more than mere "scrap" or liquidation value. Valuation of properties is, of course, a judicial matter. Congress'

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[84]Cf. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944):

> ". . .the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses *but also for the capital costs of the business. These include service on the debt and dividends on the stock.* [citations omitted] By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, *should be sufficient to assure confidence in the financial integrity of the enterprise* so as to maintain its credit and to attract capital." *Id.* at 603 (emphasis added).

work ends when it passes legislation to start the judicial process of eminent domain proceedings, and appropriates the necessary funds.

This case involves the validity of a federal statute which provides for a governmentally controlled and financed corporation to acquire a unique and irreplaceable national transportation asset for consideration other than money or its equitable equivalent. Just compensation is all that the New Haven Trustee seeks from the United States. The early drafts of the RRRA would suggest that Congress might well be prepared to pay "just compensation." However, as finally enacted, the legislation which evolved as the RRRA does not ensure payment of "just compensation." Congress must now be told by the Court that its attempt, no matter how well intentioned, does not satisfy the requirements of the Fifth Amendment. Then the process of amending the RRRA to insure its constitutionality can begin.

III

THE PROCEDURES OF THE RRRA OFFEND PROCEDURAL DUE PROCESS BY MANDATING CONVEYANCE OF RAIL ASSETS PRIOR TO JUDICIAL REVIEW OF THE ADEQUACY OF THE CONSIDERATION PAID WHERE THERE IS NO POSSIBILITY THAT A COURT MAY SET ASIDE THE CONVEYANCES

In refusing on grounds of prematurity to grant so much of the New Haven Trustee's motion for summary judgment as sought an adjudication that the compulsory conveyance provisions of the RRRA are unconstitutional, a majority of the Court below failed to reach the claim that the RRRA deprives creditor claimants of Penn Central of procedural due process.

The RRRA itself clearly provides for no voting by classes of creditors as to whether the Congressionally conceived "plan of reorganization" of Penn Central is in their best interests. Nor does it provide any judicial review as to whether the impact of this plan will accord them fairness and equity in an eventual §77(d) and (e) plan which would necessarily have to follow, rather than precede, conveyance of rail properties to Conrail under §303(b), and valuation of those properties and the securities and common stock of Conrail under §303(c). This aspect of the RRRA calls for the exploration of an issue which was raised but not decided in the New Haven's own §77 proceedings, namely the procedural validity, under the due process clause, of a two-step plan of reorganization, with both voting of creditor claimants and judicial review of the their rights and the distributive provisions of the plan deferred to the second step.[85]

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[85] *In re New York, N.H. & H. R. R.*, 378 F. 2d 635 (2d Cir. 1967). The issue arose in the context of a petition of the New Haven Trustees seek-

(footnote continued on next page)

It was argued by creditors in the New Haven reorganization that such a "two-step plan" would, by itself, violate §77(e) and procedural due process guaranteed by the Fifth Amendment. However, since the New Haven creditors voluntarily decided to support inclusion of the New Haven in Penn Central, and by the time of conveyance a complete plan, including the distributive provisions, had been certified to the New Haven Reorganization Court, the issue was not subsequently squarely raised before either the ICC or the reviewing courts. In any event, it appears that this Court has never before considered a case where a *statute* enacted by Congress made a two-step decision as to reorganization mandatory, and gave dissenting creditors and stockholders no day in court on the issue of whether or not their objections to the first step were reasonably justified in the light of the respective rights and interests of those rejecting it *and all the relevant facts.*[86]

(footnote continued from prior page)

ing authority of the reorganization court to expend money of the estate for the purpose of presenting Step I of a plan (inclusion in Penn Central by sale of assets) to the ICC. Judge Friendly ruled that the expenditure could be approved whether or not a two-step plan was valid under §77(e); however he indicated that he considered a two-step plan with voting deferred of doubtful validity:

> "A complete plan would permit a vote to be taken, surely a desirable thing even if, *as we rather doubt*, the Trustees are right in saying that it is not requisite. . . ." *Id.*, at 640 (emphasis added).

[86]The text of the "cram down" clause of §77(e) reads in pertinent part:

> "*Provided*, that, if the plan has not been so accepted by the creditors [after vote] and stockholders [after vote if they have an equity], the judge may nevertheless confirm the plan if he is satisfied and finds, *after hearing*, that it makes adequate provision for fair and equitable treatment for the interests or claims of those [creditors and stockholders who voted] rejecting it; *that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts*; and that the plan conforms to the requirements of Clauses (1) to (3), inclusive, of the first paragraph of this subsection (e)." (Emphasis added).

The RRRA is deficient precisely in providing no judicial proceedings in which a court determines "that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts." *Denver & Rio Grande, supra,* stands only for the proposition that §77(e) affords procedural due process.

As Judge Fullam noted in his concurring opinion below:

> ". . .at least until now, a decision that a stock distribution was fair and equitable has always required *contemporaneous* comparisons between the value of the creditors' and stockholders' claims and the value of the stock, a weighing of entrepreneurial risks against the prospects for growth. And merely because it is constitutionally permissible for a reorganization court to authorize sales of assets free and clear of liens, it does not follow that such sales may be approved without knowledge of the purchase price, and without a simultaneous transfer of existing liens to proceeds having value equivalent to the assets conveyed. And, of course, the magnitude of the public interest in continued rail service cannot justify treating these rail properties as if they were already public property." (JA 78-79; emphasis added).

Judge Fullam observed that the §207(b) judicial proceedings come at a time when the court simply lacks the factual basis for making findings analogous to §77(e) determinations:

> "Under the provisions of the Act, the only judicial determinations which can have a significant effect in protecting the rights of the railroad estates and their creditors must be made at a time when substantially all of the information pertinent to those judicial decisions is unknown and unknowable." *Opinion in Support of Order No. 1596, supra* (JA 150-51).

In this cross-appeal from the district court's partial denial of the New Haven Trustee's summary judgment motion, the issue is *not* whether the creditors and stockholders who attack the constitutionality of the RRRA are being "reasonable" in rejecting the RRRA, nor even whether a truly viable alternative exists under which the rights of creditors and stockholders will demonstrably be better protected. The issue is that the RRRA does not allow any court possessed of the requisite factual record on which it could make §77(e) cramdown findings to hold a hearing and decide whether or not Penn Central's properties should or should not be conveyed to Conrail. In what appears to be almost a parody of §77(e), §303(c) provides for the Special Court to make "fair and equitable" findings on the basis of an evidentiary record *after* the Penn Central's rail properties have been conveyed to Conrail. But if the Special Court finds at that stage that "fair and equitable" findings can not be made, it will be without jurisdiction to enforce that finding by any kind of meaningful judicial decree. At that stage, neither this Court, nor the Penn Central Reorganization Court, nor the Special Court could remedy the Congressional disregard of the procedural due process rights of creditors and stockholders.

As Judge Fullam observed in his *Opinion in Support of Order No. 1596*:

> "But the Final System Plan also represents a preliminary determination of the values of the properties to be conveyed, and of the values attributable to the consideration to be paid. Under normal concepts of due process in the administrative field, one would expect to find some opportunity for obtaining and considering the views of the affected property owners in advance of such value determinations." *Opinion in Support of Order No. 1596, supra* (JA 135).

Although Judge Fullam suggested that this problem might be mitigated in its procedural due process aspects by the Special Court giving less or no weight to USRA's initial value determinations, he found that:

> "A more serious, or at least more noticeable, problem stems from the fact that the conveyance and transfers pursuant to the Final System Plan are mandated to occur in advance of any judicial scrutiny and in the absence of any judicial determination as to the fairness and equity of the proposed exchanges. Arguably, even this defect might be remedied if the Special Court were empowered to set aside the conveyances if it should find unfairness or inequity. *But it is clear that the Act does not permit any such curative action by the Special Court.*" *Opinion in Support of Order No. 1596, supra* (JA 136; emphasis added).

In an attempt to avoid a holding that the RRRA offends procedural due process, the United States and USRA have now recommended to the Special Court that it "construe" the following language of §303(b)(1) of the RRRA:

> "(b) CONVEYANCE OF RAIL PROPERTIES.—(1) The special court *shall*, within 10 days after the deposit under subsection (a) of this section of the securities of the Corporation...order the trustee or trustees of each railroad in reorganization in the region *to convey forthwith* to the Corporation. . . ." (emphasis added)

as if the word "shall" read "may," and the words "to convey forthwith" read "to convey after completing a judicial determination of fairness and equity."[87]

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[87]Brief of Appellants United States, USRA and the ICC in appeals from Order No. 1596, Special Court (No. 74-8), p. 124:

> "If this [Special] Court concludes that the Tucker Act has been repealed *pro tanto*, we submit that it should read Section 303(b) in a manner that will save its constitutionality. . . . The Court can accomplish that by interpreting section 303(b) to permit the Court to decline to order the transfers. . . ."

Such a construction of the RRRA would amount to a bald judicial rewrite. Congress has legislated that the Special Court must order the conveyances within 10 days after receipt of the consideration (§303(a)) called for by a final system plan which has been certified to it (§209(c)) after approval by Congress (§208). While the Special Court would be bound by *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), to refuse to carry out a congressional directive that offends the Fifth Amendment rights of creditor claimants, that does not warrant a judicial rewrite of §303(b)(1). Rather, it constitutes an acknowledgement by the Governmental Defendants that §303(b)(1) is facially defective under the due process clause, at least in the absence of any Tucker Act remedy. The New Haven Trustee's motion for summary judgment, seeking to enjoin enforcement of the compulsory conveyance provisions of the RRRA on that ground, should have been granted.

IV

TO THE EXTENT THAT THE RRRA AMENDS THE SUBSTANTIVE AND PROCEDURAL PROVISIONS OF §77 OF THE BANKRUPTCY ACT, THE RRRA IS A "LAW ON THE SUBJECT OF BANKRUPTCIES" AND IS VOID FOR WANT OF GEOGRAPHICAL UNIFORMITY

A. The RRRA Is an Invalid Non-Uniform Statute as Applied to Penn Central, and Creditors of Penn Central Have Standing to Challenge the Lack of Geographical Uniformity

The RRRA provides, in §§206(c) and 206(d), for a "final system plan" which shall designate which rail properties of railroads in reorganization *in the region* shall be transferred to Conrail or other transferees specified in §206(c) for the consideration specified in §206(d). The term "region" is defined in §102(13) of the RRRA to mean seventeen designated States, the District of Columbia, and "portions of contiguous States in which are located rail properties owned or operated by railroads doing business primarily in the aforementioned jurisdictions (as determined by the Commission by order)." The provisions of the RRRA do not apply to railroads which have filed, or may hereafter file, petitions for reorganization if such railroads do business primarily in the thirty-three State area not covered by the definition of "region".[88]

The RRRA purports at the same time to override inconsistent provisions of the Bankruptcy Act (§601

[88]The RRRA also apparently does not apply to any railroad *within* the geographic region of the 17 states which files a petition for reorganization under §77 *after* July 1, 1974, the last day upon which the "180-day" findings mandated by §207(b) can be made. While there does not appear to be any such railroad now, such a situation may arise during the course of proceedings under the RRRA.

(b)), and in various sections purports to characterize the processes of the RRRA as a form of "reorganization." Thus, for example, §207(b) provides in its third sentence:

> ". . .each such court shall order that the reorganization be proceeded with pursuant to this Act unless. . ."

The fourth sentence of §207(b) provides:

> "If a court does not enter an order or make a finding as required by this subsection, the reorganization shall be proceeded with pursuant to this Act."

The clearest indication that the RRRA purports to be a law "on the subject of bankruptcies" appears in §209(b), wherein it is provided:

> "The special court is authorized to exercise the powers of a district judge in any judicial district with respect to such proceedings and such powers shall include those of a reorganization court."

The powers of a reorganization court under §77 of the Bankruptcy Act are, therefore, subsumed in the powers of the Special Court. Accordingly, if the RRRA is to be sustained constitutionally, it must be on the basis that Congress was exercising the power vested in it by Art. I, Sec. 8, Cl. 4:

> "To establish. . .uniform Laws on the subject of Bankruptcies throughout the United States."

This provision precludes Congress from passing a law on the subject of bankruptcies applicable to any geographic area which is less than the entire United States. This Court has stated:

> "The laws passed on the subject [of bankruptcies] must, however, be uniform throughout the United States, but that uniformity is geographical. . ."

Hanover National Bank v. Moyses, 186 U.S. 181, 188 (1902).

A majority of the court below (Judges Fullam and Bechtle) ruled that the RRRA, insofar as it purports to be a law on the subject of bankruptcies, is void on its face for violation of the geographical uniformity requirement of Art. I, Sec. 8, Cl. 4 of the Constitution.

Judge Fullam, after citing the *Hanover Bank* case, and Justice Frankfurter's observation that the uniformity requirement

> ". . .is wholly satisfied when existing obligations of a debtor are treated alike by the bankruptcy administration throughout the country, regardless of the state in which the bankruptcy court sits."[89]

reasoned that the geographical uniformity required by Art. I., Sec. 8, Cl. 4 requires bankruptcy legislation to apply uniformly to debtors engaged in the same business throughout the United States.

Indeed, the United States and the other governmental defendants do not seriously contend that the RRRA meets the uniformity requirement; rather, they rely primarily on the contention that creditors of a railroad do not have standing to question the application of an admittedly non-uniform statute to them. The Government urges that only railroads outside the region have standing to assert that they are being deprived of the *benefits* of the RRRA.[90]

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[89] *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 172 (1946).

[90] Judge Aldisert, dissenting on this point, reasoned that the plaintiffs lacked standing under the rule of *United States v. Raines*, 362 U.S. 17, 21 (1960) that "one to whom application of the statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." With all due respect, Judge Aldisert seems to have misunderstood the argument of the plaintiffs below.

Judge Fullam (joined by Judge Bechtle) answered this contention as follows:

> "I cannot accept the notion that only those debtors not affected by the statute can have standing to challenge the lack of geographical uniformity. In my view, every railroad subject to the statute has standing to make that challenge, and so do creditors of such railroads. The Penn Central interests are not complaining that the Act is validly applied to others and not to Penn Central; the contention is that an invalid, non-uniform statute is being applied to Penn Central.
>
> "Neither do I accept the government defendants' argument that the statute is in fact uniform because all Class I railroads now in reorganization are located in the region defined in the statute." (JA 62-63).

Judge Fullam's analysis of the standing issue is correct as to all aspects of the RRRA that constitute an exercise of Congress' Bankruptcy Clause powers.[91] We now turn to the issue of which of the RRRA's provisions depend on Congress' Bankruptcy Clause powers.

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[91]It is not contended that the provisions of the RRRA providing, for example, for governmental financial assistance (*e.g.*, §§210, 213 and 215; Title IV; Title V) are anything except an exercise of Congress' Commerce Clause powers combined with its powers to appropriate money for the common good. The New Haven Trustee does not argue that railroads outside the region are being unfairly discriminated against if they are denied access to governmental financial assistance.

B. The Court Below Was in Error in Concluding that the RRRA's Defect as Non-Uniform Legislation on the Subject of Bankruptcies Taints Only the Provision Requiring Mandatory Dismissal of §77 Proceedings

A majority of the court below, having found that the RRRA is invalid, non-uniform legislation on the subject of bankruptcies and that plaintiffs had standing to assert that constitutional defect, erred by limiting the scope of the court's holding to a single clause of a subsection of the RRRA, namely the provision requiring mandatory dismissal of §77 proceedings.[92]

The New Haven Trustee agrees with Judge Fullam that the hallmark of an exercise of Bankruptcy Clause powers is that the law "impairs the obligation of contracts." However, the RRRA's compulsory conveyance provisions (§§206, 207, 208, 209(c) and (d) and 303(b)) are constitutionally void when viewed as an exercise of Commerce Clause/eminent domain powers.[93] Therefore, if constitutional at all, these provisions must represent an exercise of the Bankruptcy Clause power.

Judge Fullam, however, reasoned that since various provisions of the RRRA considered separately have counterparts in §77, and since §77 is uniform throughout the country, it does not matter that the RRRA provisions do not apply uniformly. This reasoning, with all due respect, misses the essential point: the RRRA's provisions have combined elements found in §77 in new and different ways, and have at the same time removed safeguards that heretofore restrained the use of powers vested in bankruptcy courts by §77, and thereby maintained an approximate balance between "public interest" considerations and the property rights of secured creditors.

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[92]RRRA, §207(b), third sentence, Clause(2).

[93]See Part II-B of this Brief.

A statute must be analyzed in terms of its total effect, not just whether it is made up of elements found in another statute whose constitutionality is unchallenged.

Thus, while it is true that

> "Authority to order conveyances free and clear of liens. . . already exists under §77, and is not newly created or added by the 1973 Act" (JA 63-64),

a careful comparison of the provisions in each statute reveals these differences:

1. In §77, the "free and clear" conveyance authority, which is provided in §77(o) and in the plan provisions, §77(d), (e), and §77(b)(5), is subject to the following safeguards:

(a) A §77(o) conveyance must be a "sale," which is "in the interest of the debtor's estate and ultimate reorganization" and, most important of all, it must be determined by the railroad's trustees (charged with the fiduciary duties of the common law towards their beneficiaries) that such sale is in the interest of the debtor's estate and ultimate reorganization. Moreover, in a §77(o) transaction, the liens on the properties are transferred to the proceeds.

(b) A conveyance under a §77(d) plan containing §77(b)(5) provisions must be at a price "not less than a fair upset price" (the term is a phrase of art derived from equity receivership practice), and before the plan can be consummated it must be approved by a judge as being "fair and equitable" (another phrase derived from equity receivership practice). To be "fair and equitable," a sale under a plan must, in a conventional earnings-based reorganization, be based on an accurate appraisal of the value of the properties comprising the business as a going concern (*Consolidated*

Rock Products v. DuBois, supra; Ecker v. Western Pac. R.R., supra; Group of Institutional Investors v. Chicago, M., St. P. & Pac. R.R., supra). When §77(b)(5) is resorted to in a context where no earnings-based reorganization is possible, to be "fair and equitable" the plan must be based on an accurate appraisal of the properties being sold from the standpoint of their "highest and best value" (*New Haven Inclusion Cases*), and, to the extent that the consideration takes the form of common stock, there must be assurance by other provisions in the plan that in fact the common stock will have value equal to the monetary equivalent of the assets conveyed (*id.*).

2. In the RRRA, the authority to order conveyances free and clear of liens is set forth in §§303(b)(1) and (2), but the following safeguards are absent:

(a) Viewed by analogy to §77(o), there is no requirement that the railroad's trustees must have determined that the sale is in the best interests of the estate and of ultimate reorganization.[94] Moreover, the safeguard that the liens divested from the property attach to the proceeds is absent in §303(b)(2) of the RRRA.

(b) Viewed by analogy to a §§77(d) and (e) plan containing §77(b)(5) provisions, the safeguard of "fair upset price" and a prior judicial determination, based on valuation evidence, that the plan is "fair and equitable" is absent from §303(b) of the RRRA. While

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[94]The Penn Central Trustees have, in fact, determined that it would *not* be in the best interest of the estate to convey properties under the RRRA to Conrail for the consideration prescribed by the final system plan *unless* this Court makes a definitive determination that there is a "Tucker Act remedy" for the Trustees to sue the United States in the Court of Claims. See Trustees' Report dated April 3, 1974 (Doc. No. 10 in the Joint Documentary Submission).

there is a requirement of a "fair and equitable" determination in §207(b), third sentence, clause (2), it is not possible at the time of the §207(b) determination for the court or parties to know what the "plan" is or the value of the properties or the nature, amount or value of the securities to be issued for such properties; indeed the United States insisted that *no* valuation evidence should have been considered by the Penn Central Reorganization Court in connection with the 180-day decision under §207(b). Obviously, a *post facto* determination of "fair and equitable" under §303(c), whatever its status under the due process clause of the Fifth Amendment (see Part III of this Brief), is not the same thing as a "fair and equitable" determination as to a reorganization plan prior to the conveyance.

Thus, it cannot be said that the RRRA, considered in its total impact,

> "adds *nothing*, in that respect, to the powers already granted to reorganization courts under the geographically uniform and admittedly valid provisions of §77 of the Bankruptcy Act." (JA 63; emphasis added).

It is reasonably certain that the RRRA adds *something* to the ways in which contracts of secured creditors of railroads can be impaired. Indeed, it is reasonably obvious that if Congress had intended to add *nothing* to the powers which reorganization courts now have under §77 of the Bankruptcy Act, then no amendment of §77 would have been required. If Congress had intended merely to create USRA as a planning and financing agency, and Conrail as a corporation which would receive governmental financial aid in order to acquire rail properties under §77(o) or §77(b)(5), all that would have been necessary would have been for Congress to pass a law containing the

following portions of the RRRA: Title I; Title II, §§201 to 205, §§210 to 215; Title III, §§301 and 302; Title IV; Title V; Title VI.

These portions contain the provisions of the RRRA that can be implemented without amending §77 or otherwise impairing contracts in ways not heretofore authorized by §77. The balance of the RRRA should be declared void as a non-uniform law on the subject of bankruptcies.

CONCLUSION

The New Haven Trustee agrees with those portions of the Order dated June 25, 1974:

> which enjoin defendant USRA from certifying a final system plan to the Special Court pursuant to §209(c) of the RRRA;
>
> which enjoin defendants from taking any action to enforce §304(f) of the RRRA; and
>
> which adjudicated that §303, §304(f) and a portion of §207(b) are unconstitutional.

The New Haven Trustee, however, urges that for the reasons hereinabove set forth, the Order below should be reversed and remanded for entry of an order:

(a) Enjoining defendant USRA, Secretary of Transportation Brinegar, and the ICC[95] from taking any action to implement or enforce the following sections of the RRRA:

> §206, subsections (c), (d), (f) and (i);

---

[95]In accordance with 28 USC §2322, the United States has been named as a party defendant in *Smith v. United States* insofar as this action seeks to set aside one or more orders of the ICC under the purported authority of the RRRA.

§207, in its entirety;

§208, in its entirety;

§209(c) and (d);

§302(a);

§303(b) and (c);

§304, to the extent that it purports to amend the laws applicable to abandonments and discontinuances of railroad service by railroad reorganization under §77 pursuant to §77(o) or otherwise, and by railroads operating under equity receiverships pursuant to §77(i) following dismissal of reorganization proceedings pursuant to §77(g).

(b) Adjudging the above enumerated portions of the RRRA null and void as violative of the Fifth Amendment of the United States Constitution to the extent that such portions would require railroads in reorganization or in equity receivership to convey their rail properties or designated portions thereof to Conrail in exchange for its securities and common stock, obligations of USRA, and "other benefits" referred to in the RRRA; and to the extent that such portions fail to provide compensation for interim erosion of the estates of railroads in reorganization by virtue of deficits from rail operations required by statute irrespective of the lack of any prospect for an earnings-based reorganization under §77 of the Bankruptcy Act.

(c) Adjudging that the above-enumerated portions of the RRRA are null and void as a law on the subject of bankruptcies because the RRRA is not geographically uniform throughout the United States, in violation of Article I, Section 8, Clause 4 of the Constitution of the United States, and enjoining enforcement thereof on that ground insofar as such

portions amend applicable provisions of §77 of the Bankruptcy Act.

(d) Adjudging that the motion of the New Haven Trustee for partial summary judgment is granted in full.

(e) Adjudging that defendants' motions for summary judgment are denied.

(f) In the event that the Special Court, Regional Rail Reorganization Act, shall have entered any order pursuant to its consideration of the appeals from Order No. 1596 of the Penn Central Reorganization Court under §207(b) of the RRRA deciding that Penn Central shall be reorganized by means of transferring some of its properties to Conrail, directing the Governmental Defendants and the Penn Central Trustees to petition said Special Court for appropriate modification of its order in the light of this Court's opinion.

August 28, 1974

Respectfully submitted,

Of Counsel:

MORRIS RAKER
CHARLES W. MORSE, JR.

SULLIVAN & WORCESTER
225 Franklin Street
Boston, Massachusetts
02110

JOSEPH AUERBACH
225 Franklin Street
Boston, Massachusetts
02110

JAMES WM. MOORE
54 Meadow Street
New Haven, Connecticut
06506

Attorneys for Appellant
Richard Joyce Smith, Trustee
of the Property of The New
York, New Haven and Hartford
Railroad Company, Debtor

APPENDIX TO CROSS-APPELLANT'S BRIEF

In accordance with Rule 40(c) of the Revised Rules of the Supreme Court of the United States, there is set forth below the text of pertinent provisions of the Constitution of the United States and Statutes involved in this case, in addition to the text of the Regional Rail Reorganization Act of 1973, which is set forth at JA 391 *et seq.*

CONSTITUTION OF THE UNITED STATES

Article I, Section 8, Clauses 3 and 4:

"Section 8. The Congress shall have Power

* * *

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

"To establish. . .uniform Laws on the subject of Bankruptcies throughout the United States;"

Article I, Section 9, Clause 7:

"No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law; . . ."

Amendment V

"No person. . .shall be. . .deprived of. . .property, without due process or law; nor shall private property be taken for public use, without just compensation."

STATUTES OF THE UNITED STATES

Section 77 of the Bankruptcy Act, 11 U.S.C. §205

"Section 77. Reorganization of Railroads Engaged in Interstate Commerce.—(a) Any railroad cor-

poration may file a petition stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization.

* * *

"(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor

with another corporation or corporations, the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, the amendment of the charter of the debtor, and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section."

* * *

"(d) The debtor, after a petition is filed as provided in subsection (a), shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, or if heretofore approved, then within six months of the effective date of this Act, and not thereafter unless such time is extended by the judge from time to time for cause shown, no single extension at any one time to be for more than six months. Such plan shall also be filed with the Commission at the same time. Such plans may likewise be filed at any time before, or with the

consent of the Commission during, the hearings hereinafter provided for, by the trustee or trustees, or by or on behalf of the creditors being not less than 10 per centum in amount of any class of creditors, or by or on behalf of any class of stockholders being not less than 10 per centum in amount of any such class, or with the consent of the Commission by any party in interest. After the filing of such a plan, the Commission, unless such plan shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

The Commission may thereafter, upon petition for good cause shown filed within sixty days of the date of its order, and upon further hearings if the Commission shall deem necessary, in a supplemental report and order modify any plan which it has approved, stating the reasons for such modification. The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court."

"(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment,

and the judge is hereby given power to approve the same.

"If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) hereof. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) hereof, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: *Provided*, That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such

class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: *Provided further*, That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, is a creditor or stockholder, the interests of claims thereof shall be deemed to be affected by the plan, and the President of the United States, or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation. The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate. The Commission shall certify to the judge the results of such submission.

"Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-

thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided*, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e). *Provided further*, That if, in any reorganization proceeding under this section, the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against, the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance, certified to the court, of a lesser amount by the President of the United States or the officer or agency designated by him pursuant to the provisions of the preceding paragraph hereof: *Provided further*, That if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed. If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion,

with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

"If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts."

"(f) Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it. Upon

confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case."

* * *

"(g) If in the light of all the existing circumstances there is undue delay in a reasonably expeditious reorganization of the debtor, the judge, in his discretion, shall, on motion of any party in interest or on his own motion, after hearing and after consideration of the recommendation of the Commission, dismiss the pro-

ceedings. Upon the filing of such an order of dismissal, all right, title, or interest of the trustee or trustees shall vest by operation of law in the debtor unless otherwise provided by such order."

* * *

"(i)...upon the dismissal of such proceeding under this section, the judge may include in the order of dismissal appropriate provisions directing the trustee or trustees, or the debtor if no trustee has been appointed, at the time of such order of dismissal, to transfer possession of the debtor's property within the territorial jurisdiction of such Federal or State court to the prior receiver or trustee, if a prior receiver or trustee has been so appointed by such Federal or State court, or to a receiver or trustee appointed by such Federal or State court, upon such terms as the court in the proceeding under this section may deem equitable for the protection of the obligations incurred by any trustee or trustees appointed under this section and for the payment of administrative expenses and allowances in the proceeding hereunder. Upon the filing of such order of dismissal all title to the property in the trust estate shall vest as therein provided."

* * *

"(j) In addition to the provisions of Section 11 of this Act for the staying of pending suits against the debtor, the judge may enjoin or stay the commencement or continuation of suits against the debtor until after final decree; and may, upon notice and for cause shown, enjoin or stay the commencement or continuance of any judicial proceeding to enforce any lien upon the estate until after final decree:. . ."

* * *

"(o) The trustee or trustees, from time to time, shall determine what lines or portions of lines of rail-

road and what other property of the debtor, if any, should be abandoned or sold during the pendency of the proceedings in the interest of the debtor's estate and of ultimate reorganization but without unduly or adversely affecting the public interest, and shall present to the judge petitions, in which other parties in interest may join, for authority to abandon or to sell any such property; and upon order of the judge made after a hearing pursuant to such reasonable notice by publication or otherwise as the judge may direct to parties in interest, authorizing any such abandonment or sale, but only with the approval and authorization of the Commission when required by the Interstate Commerce Act as amended February 28, 1920, or as it may be hereafter amended, the trustee or trustees shall take all steps and carry out all proceedings necessary for the consummation of any such abandonment or sale in accordance with the order of the judge. Any such order of the judge shall be a final order for the purposes of appeal. The judge may order and decree any sale of property, whether or not incident to an abandonment, under this subsection at public or private sale and subject to or free from liens. The proceeds derived from any such sales shall be received by the trustee or trustees subject, in case the property was sold free from lien, to any liens thereon at the time of sale, and shall be applied or disposed of in such manner as the judge by further order shall direct. The expense of such sale shall be borne in such manner as the judge may determine to be equitable. The judge may order the trustee or trustees of the debtor to deposit such proceeds with any mortgage trustee entitled thereto, to be applied in payment of all or part of such mortgage."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-187

UNITED STATES RAILWAY ASSOCIATION,
Appellant,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, *et al.*,
Appellees.

On Appeal from the District Court for the Eastern District of Pennsylvania

BRIEF OF APPELLANT UNITED STATES RAILWAY ASSOCIATION

LLOYD N. CUTLER
WILLIAM R. PERLIK
LOUIS R. COHEN

Attorneys for the United States Railway Association

Of Counsel:

BARRY E. CARTER
PAUL C. HUDSON
WILLIAM T. LAKE
J. B. STEPHENS
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

JORDAN JAY HILLMAN
Senior Legal Consultant
United States Railway Association
2100 Second Street, S.W.
Washington, D.C. 20590

August 28, 1974

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	IV
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
QUESTIONS PRESENTED	4
STATEMENT OF THE CASE	5
The Rail Act Reorganization Process	6
Reorganization Court Proceedings	8
Proceedings Below	11
SUMMARY OF ARGUMENT	14
ARGUMENT	23
Introduction: The Rail Crisis and the Rail Act	23
A. The Rail Act Is Designed To Provide New Solutions to New Problems that Created the Rail Crisis	24
1. The Rail Act Provides a Thorough Planning and Review Process	25
2. The Rail Act Provides Resources Not Available in Section 77 Reorganizations	27
B. The Rail Act Provides Solutions to the Problems that Have Made It Impossible To Reorganize the Penn Central Under Section 77	30
1. Elimination of Excess Capacity	32
2. Elimination of Unnecessary Labor Expense	37

TABLE OF CONTENTS—Continued

Page

3. Elimination of Uncompensated Passenger Service 37

4. Increased Revenues Through Application of New Financing 38

I. The Court Below Should Have Denied Equitable Relief and Dismissed the Complaints as to the "Taking" Issues on the Ground that Plaintiffs Have an Adequate Remedy at Law Under the Tucker Act 40

A. Repeal of the Jurisdiction of the Court of Claims Under the Tucker Act To Award Just Compensation for Any Taking of Private Property for Public Use May Not Be Inferred from Later Statutes that Do Not Expressly Repeal or Modify that Act and Do Not Provide an Equivalent Remedy 43

B. The Rail Act Does Not Show an Intent To Deprive the Court of Claims of Its Tucker Act Jurisdiction To Hear Any Case Claiming Just Compensation 48

C. The Legislative History Does Not Show an Intent To Deprive the Court of Claims of its Tucker Act Jurisdiction To Hear Any Case Claiming Just Compensation 53

D. The Tucker Act Remedy Is Adequate 58

II. Even in the Absence of a Tucker Act Remedy the Court Below Should Not Have Enjoined the Operation of the Rail Act 60

A. The Court Below Misconstrued Section 304 (f) of the Rail Act 61

B. The 304(f) Injunction Was Unwarranted and Erroneous 66

TABLE OF CONTENTS—Continued

Page

C. It Was Error To Declare Section 303 of the Rail Act Partially Unconstitutional on Its Face 68

D. The District Court Should Not Have Enjoined Certification of a Final System Plan Under Section 209(c) 73

III. There Is No Factual or Legal Basis for Concluding that the Rail Act Will Cause an "Erosion Taking" of Private Property for Which Just Compensation Will Be Due 75

A. Plaintiffs Have Not Shown that Any Erosion Will Occur 79

B. Railroad Creditors and Shareholders Do Not Have a Constitutional Right To Be Held Harmless from Erosion During the Period Reasonably Necessary To Reorganize and Save the Railroad 82

1. The Earliest Decisions Under Section 77 Established that Some Erosion Is Permissible Pending Reorganization 84

2. This Court Reviewed and Reconfirmed this Rule in the *New Haven* litigation 87

3. External, as Well as Internal, Sources of Aid Must Be Considered in Assessing the Penn Central's Future Prospects 94

4. The Public Interest in Implementing the Act Clearly Outweighs Any Forseeable Burden on Investors 95

CONCLUSION 98

TABLE OF AUTHORITIES

CASES:

	Page
Amell v. *United States*, 384 U.S. 158 (1966)	48
American Communications Association, CIO v. *Douds*, 339 U.S. 382 (1950)	48
American Power & Light Co. v. *SEC*, 329 U.S. 90 (1946)	65
Armstrong v. *United States*, 364 U.S. 40 (1960)	45
Brooks-Scanlon Co. v. *Railroad Commission*, 251 U.S. 396 (1920)	70, 78, 83, 94, 97
Bullock v. *Railroad Commission*, 254 U.S. 513 (1921)	78
Clement v. *United States*, 140 F. Supp. 573 (Ct. Cl. 1956)	51
Communist Party v. *Subversive Activities Control Board*, 367 U.S. 1 (1961)	63-64
Continental Bank v. *Chicago, Rock Island & P. Ry.*, 294 U.S. 648 (1935)	22, 78-79, 84-85, 93
Crowell v. *Benson*, 285 U.S. 22 (1932)	65
Eastern Railroad Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)	65-66
Eastport Steamship Corp. v. *United States*, 372 F.2d 1002 (Ct. Cl. 1967)	43
Eccles v. *Peoples Bank*, 333 U.S. 426 (1948)	63
Electric Bond & Share Co. v. *SEC*, 303 U.S. 419 (1938)	64
Fawcett v. *C.I.R.*, 149 F.2d 433 (2d Cir. 1945)	48
Federal Sugar Refining Co. v. *United States*, 30 F.2d 254 (2d Cir. 1929), rev'd on other grounds sub nom. *Johnson* v. *United States Shipping Board Emergency Fleet Corp.*, 280 U.S. 320 (1930)	46
FTC v. *A.P.W. Paper Co.*, 328 U.S. 193 (1946)	48
Fleming v. *Rhodes*, 331 U.S. 100 (1947)	3
Flemming v. *Nestor*, 363 U.S. 603 (1960)	65
Fletcher v. *Peck*, 10 U.S. (6 Cranch) 87 (1810)	65
Fort Berthold Reservation v. *United States*, 390 F.2d 686 (Ct. Cl. 1968)	47, 52
Gibson v. *United States*, 166 U.S. 269 (1897)	84
Glidden Co. v. *Zdanok*, 370 U.S. 530 (1962)	60

TABLE OF AUTHORITIES—Continued

	Page
Gould v. *United States*, 301 F.2d 557 (D.C. Cir. 1962)	59
H. E. Hele v. *United States*, 100 Ct. Cl. 289 (1943)	47
Hadacheck v. *Sebastian*, 239 U.S. 394 (1915)	83
Harlem Valley Transportation Association v. *Stafford*, 360 F.Supp. 1057 (S.D.N.Y. 1973), aff'd, No. 73-2496 (2d Cir., June 18, 1974)	34
Hooe v. *United States*, 218 U.S. 322 (1910)	46
Hurley v. *Kincaid*, 285 U.S. 95 (1932)	41, 44-45, 59, 60, 69
In re Boston & Maine Corp., 484 F.2d 369 (1st Cir. 1973)	79, 93
In re Florida East Coast Ry., 137 F.Supp. 693 (S.D. Fla.), aff'd per curiam, 227 F.2d 518 (5th Cir. 1955)	36
In re New York, N.H. & H.R.R., 378 F.2d 635 (2d Cir. 1967)	63, 88
In re New York, N.H. & H.R.R., 281 F.Supp. 65 (D. Conn. 1968)	89-90
In re New York, N.H. & H.R.R., 289 F.Supp. 451 (D. Conn. 1968)	87, 90-92, 94, 95
In re New York, N.H. & H.R.R., 304 F.Supp. 793 (D. Conn. 1969)	88, 94
In re New York, N.H. & H.R.R., 304 F.Supp. 1121 (D. Conn. 1969)	82
In re Penn Central Transportation Co., 494 F.2d 270 (3d Cir.), petition for cert. filed, 42 U.S.L.W. 3633 (U.S. May 8, 1974) (No. 73-1672)	85
In re Penn Central Transportation Co., Bky. No. 70-347, Order No. 1 (E.D. Pa., June 21, 1970)	67-68
In the Matter of Reading Co., Bky. No. 71-828 (E.D. Pa., July 1, 1974), appeal pending, No. 74-7 (Spec. Ct. R.R.R.A., filed Aug. 20, 1974)	79-80
International Longshoremen's & Warehousemen's Union, Local 37 v. *Boyd*, 347 U.S. 222 (1954)	64
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TABLE OF AUTHORITIES—Continued

	Page
Jacobs v. *United States*, 290 U.S. 13 (1933)	43, 45
Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U.S. 123 (1951)	63
Kennedy v. *Silas Mason Co.*, 334 U.S. 249 (1948)	63
Kent v. *Dulles*, 357 U.S. 116 (1958)	66
Malone v. *Bowdoin*, 369 U.S. 643 (1962)	45
Marine Insurance Co. v. *United States*, 410 F.2d 764 (Ct. Cl. 1969)	51
Mercantile National Bank v. *Langdeau*, 371 U.S. 555 (1963)	48
Nagano v. *McGrath*, 187 F.2d 759 (7th Cir. 1951), aff'd, 342 U.S. 916 (1952)	48
New Haven Inclusion Cases, 399 U.S. 392 (1970)	22, 57, 59, 63, 70, 79, 88, 92-93
New York, N.H. & H.R.R. Bondholders v. *United States*, 289 F.Supp. 418 (S.D.N.Y. 1968)	88, 92
Penn-Central Merger Cases, 389 U.S. 486 (1968)	22, 84, 88-89
Phelps v. *United States*, 274 U.S. 341 (1927)	59
Phillips v. *Commissioner*, 283 U.S. 589 (1931)	59
Poe v. *Ullman*, 367 U.S. 497 (1961)	63
Portsmouth Harbor Land & Hotel Co. v. *United States*, 260 U.S. 327 (1922)	45
Public Affairs Press v. *Rickover*, 369 U.S. 111 (1962)	63
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Richard v. *United States* v. *Stone Corral Irrigation Dist.*, 282 F.2d 901 (Ct. Cl. 1960)	45
Richmond Screw Anchor Co. v. *United States*, 275 U.S. 331 (1928)	65
St. Joe Paper Co. v. *Atlantic Coast Line R.R.*, 347 U.S. 298 (1954)	28, 35-36, 95
Shapiro v. *Thompson*, 394 U.S. 618 (1969)	3

TABLE OF AUTHORITIES—Continued

	Page
Simon v. *United States*, 113 Ct. Cl. 182 (1949)	43
Steel Hill Development, Inc. v. *Sanborton*, 469 F.2d 956 (1st Cir. 1972)	84
Tempel v. *United States*, 248 U.S. 121 (1918)	46
Twenty Per Cent Cases, 87 U.S. 179 (1873)	48
United States v. *Babcock*, 250 U.S. 328 (1919)	47
United States v. *Causby*, 328 U.S. 256 (1946)	45-46
United States v. *Darby*, 312 U.S. 100 (1941)	96
United States v. *Dickinson*, 331 U.S. 745 (1947)	45
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United States v. *National Dairy Products Corp.*, 372 U.S. 29 (1963)	64-65
United States v. *Pfitsch*, 256 U.S. 547 (1921)	47
United States v. *Raines*, 362 U.S. 17 (1960)	3
United States v. *Thayer-West Point Hotel Co.*, 329 U.S. 585 (1947)	59
United States v. *Thirty-Seven (37) Photographs*, 402 U.S. 363 (1971)	65
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United States Civil Service Commission v. *National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548 (1973)	48, 65
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West Coast Hotel Co. v. *Parrish*, 300 U.S. 379 (1937)	96
Wright v. *Vinton Branch of the Mountain Trust Bank*, 300 U.S. 440 (1937)	48
Yearsley v. *W.A. Ross Construction Co.*, 309 U.S. 18 (1940)	43-44, 45, 60
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952)	46, 96

CONSTITUTIONAL PROVISIONS AND STATUTES:

U.S. Constitution:

Art. I, § 8, cl. 3 (Commerce Clause)	3

TABLE OF AUTHORITIES—Continued

Page

Art. I, § 8, cl. 4 (Bankruptcy Clause) 3, 14, 62
Amend. I 48, 66
Amend. V ..... 3, *passim*

Admiralty Act of 1920:

46 U.S.C. §§ 741 *et seq.* 46-47

Bankruptcy Act:

Section 77, 11 U.S.C. § 205 ..... 5, *passim*

Interstate Commerce Act:

Section 1, 49 U.S.C. § 1 ..... 49, 61
Section 5, 49 U.S.C. § 5 ..... 28, 35

Judicial Code:

28 U.S.C. §§ 1252 3
1253 3
1331(a) 2
1337 2
2201 2
2202 2
2282 2
2284 2
2516 59

National Environmental Policy Act of 1969:

42 U.S.C. §§ 4321, 4331-35 ..... 34, 49

Rail Passenger Service Act of 1970, as amended:

45 U.S.C. §§ 501 *et seq.* 38

Regional Rail Reorganization Act of 1973:

Pub. L. 93-236, 87 Stat. 985, 45 U.S.C. §§ 701-93 ..... 1, *passim*

Tucker Act:

28 U.S.C. § 1491 ..... 3, *passim*

TABLE OF AUTHORITIES—Continued

Other Statutes: Page

Pub. L. 65-182, 40 Stat. 704, 705 (July 1, 1918), as amended 28 U.S.C. § 1498 65
Pub. L. 93-5, 87 Stat. 5 (Feb. 9, 1973) 31
Pub. L. 93-240, 87 Stat. 1048 (Jan. 2, 1974) 28, 47
Pub. L. 93-305, 88 Stat. 195 (June 8, 1974) 28, 47

ADMINISTRATIVE PROCEEDINGS:

ICC Order, *Ex Parte No. 293* (Jan. 14, 1974) 23
Penn Central Transportation Co. Reorganization, Corp. Reorg. Rep. (Penn Central), Document No. 95, at 1102:86 (ICC Finance Docket No. 26241, Sept. 28, 1973) 35, 37

LEGISLATIVE MATERIALS:

Conference Report, H.R. Rep. No. 93-744, 93d Cong., 1st Sess. (1973) 27, 32
H.R. Rep. No. 93-620, 93d Cong., 1st Sess. (1973) .. 24, *passim*
S. Rep. No. 93-601, 93d Cong., 1st Sess. (1973) 24, 30, 31, 53

119 Cong. Rec.

H9731-32 (daily ed. Nov. 8, 1973) 54, 57
H9742 (daily ed. Nov. 8, 1973) 54
H9743 (daily ed. Nov. 8, 1973) 53
H9756 (daily ed. Nov. 8, 1973) 56
H11,876 (daily ed. Dec. 20, 1973) 52, 56
S22,483 (daily ed. Dec. 11, 1973) 34
S22,485 (daily ed. Dec. 11, 1973) 53, 56
S22,820 (daily ed. Dec. 13, 1973) 56
S23,778 (daily ed. Dec. 21, 1973) 53
S23,780 (daily ed. Dec. 21, 1973) 50-51
S23,782-4 (daily ed. Dec. 21, 1973) 34, 53, 55

Hearings on H.R. 6591, H.R. 4897, H.R. 5822, H.R. 5385, H.R. 6880, H.R. 7373 and H.J. Res. 50 before the House Comm. on Interstate and Foreign Commerce, 93d Cong., 1st Sess. (1973) 31

TABLE OF AUTHORITIES—Continued

	Page
Hearings on S. 1031, S. 2188 and H.R. 9142 before the Senate Comm. on Commerce, 93d Cong., 1st Sess. (1973)	31
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MISCELLANEOUS:	
Coleman, *Is Railroad Accounting Off the Track?,* 130 J. Accountancy 64 (Oct. 1970)	77
3A Collier on Bankruptcy ¶ 63.16 (14th ed. rev. J. Moore)	82
5 Collier on Bankruptcy ¶ 77.20 (14th ed. rev. J. Moore)	82
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Iron Age, June 25, 1970	81
Iron Age, July 22, 1974	81
Note, *Takings and the Public Interest in Railroad Reorganization,* 82 Yale L.J. 1004 (1973)	85
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10 Presidential Documents: Richard Nixon 8 (Jan. 2, 1974)	34
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-167

UNITED STATES RAILWAY ASSOCIATION,

Appellant,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, *et al.*,

Appellees.

On Appeal from the District Court for the Eastern District of Pennsylvania

BRIEF OF APPELLANT UNITED STATES RAILWAY ASSOCIATION

This is an appeal from the decision of a three-judge United States District Court sitting in the Eastern District of Pennsylvania, which held unconstitutional certain sections of the Regional Rail Reorganization Act of 1973, Public Law 93-236, 45 U.S.C. §§ 701-93 (the "Rail Act" or "Act"). Appellant is the United States Railway Association ("USRA" or the "Association"), a

"government corporation" formed pursuant to Section 201 of the Rail Act.

OPINIONS BELOW

The opinion and concurring opinion in the district court and its order of June 25, 1974, are reprinted in the Joint Appendix ("JA")* at JA 9-83. The opinions are not yet officially reported.

JURISDICTION

These cases were brought pursuant to 28 U.S.C. §§ 1331 (a), 1337, 2201 and 2202, seeking a declaratory judgment that the Rail Act is void for repugnance to the United States Constitution and seeking an injunction against the enforcement, operation and execution of the Rail Act. Three-judge courts were convened pursuant to 28 U.S.C. §§ 2282 and 2284. By consent of the parties, two of the actions originally brought in the District of Columbia were transferred to and consolidated for disposition before the three-judge court in the Eastern District of Pennsylvania.

The order appealed from, declaring certain provisions of the Rail Act null and void as violative of provisions of the Constitution and enjoining Appellant from taking certain actions pursuant to the Rail Act, was entered on June 25, 1974 in all of the cases. No order has been issued respecting a rehearing. Notice of Appeal to this Court was filed in the United States District Court for the Eastern District of Pennsylvania on July 17, 1974. JA 386. Appellant's Jurisdictional Statement was filed

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* A Joint Documentary Submission ("J. Doc.") has also been filed with this Court.

on August 23, 1974. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1252 and 1253. See *Shapiro* v. *Thompson*, 394 U.S. 618, 625 (1969); *United States* v. *Raines*, 362 U.S. 17, 20 (1960); *Fleming* v. *Rhodes*, 331 U.S. 100, 102-04 (1947).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, Clauses 3 and 4 of the United States Constitution provide:

> "The Congress shall have Power . . .
>
> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
>
> "To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States, ..."

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Regional Rail Reorganization Act of 1973, Pub. L. 93-236, 87 Stat. 985, 45 U.S.C. §§ 701-93, is set forth at JA 391-431.

The Tucker Act, as amended, 28 U.S.C. § 1491, provides in pertinent part:

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied con-

tract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . ."

QUESTIONS PRESENTED

1. Whether the court below erred in granting injunctive relief on Plaintiffs' claims that the Rail Act may effect a taking of their property without just compensation, when Plaintiffs have adequate remedies at law including a suit in the Court of Claims under the Tucker Act, 28 U.S.C. § 1491.

2. Whether the court below breached its duty to construe statutes so as to save their constitutionality when it construed the Rail Act, despite its silence on the subject, as amending the Tucker Act by implication so as to bar any suit in the Court of Claims to recover any difference between the consideration provided in the Rail Act and the "constitutional minimum" expressly recognized in the Rail Act—a construction of the Rail Act which led the court to declare certain provisions of the Rail Act unconstitutional.

3. Whether the court breached its duty to construe statutes so as to save their constitutionality when, after holding that the Rail Act impliedly amended the Tucker Act to bar a remedy for constitutional claims of the rail estates, the court

(a) construed Section 304(f) of the Rail Act to authorize USRA to forbid discontinuance of rail service or abandonment of rail properties even if the "erosion" of the railroad estate should pass the limits beyond which operations can no longer be constitutionally required without compensation—a construction of Section 304(f) which led the court to hold Section 304(f) unconstitutional; and

(b) construed Section 303 of the Rail Act, which expressly requires a "constitutional minimum" consideration for transfers of rail property, to exclude consideration for erosion beyond constitutional limits —a construction of Section 303 which led the court to hold Section 303 unconstitutional.

4. Whether the court below erred in first enjoining all Defendants from taking any action under Section 304(f) to require continuation of rail service that would result in "erosion" beyond constitutional limits and thereafter nullifying other provisions of the Rail Act solely for their failure to provide explicitly for just compensation for the very "erosion" beyond constitutional limits that the court had already enjoined Defendants from causing.

5. Whether, in any event, an injunction unconditionally prohibiting USRA from certifying any Final System Plan for reorganized rail service to a federal court was a necessary or appropriate remedy to prevent the possibility of erosion beyond constitutional limits that the court had already enjoined USRA and all other Defendants from causing.

STATEMENT OF THE CASE

Eight major railroads operating in the Northeast/Midwest region of the United States are now in reorganization proceedings pursuant to Section 77 of the Bankruptcy Act, 11 U.S.C. § 205. Because of the serious threat that this rail crisis presented to the welfare of the region and of the United States, and because of the inability of the procedures and resources of Section 77 to resolve the underlying problems of these railroads, Congress enacted the Regional Rail Reorganization Act of 1973, which became law on January 2, 1974.

Plaintiffs below are creditors and the sole shareholder of the largest of the railroads now in reorganization, Penn Central Transportation Company ("Penn Central"). They brought these actions seeking declaratory judgments that the entire Rail Act is unconstitutional on its face on a large number of grounds, and further seeking injunctions against the implementation of all of its provisions. JA 161-75. The Trustees of the property of Penn Central Transportation Company, Debtor ("Penn Central Trustees") intervened as Defendants. JA 191. Both sides filed Motions for Summary Judgment. JA 221-25. This appeal is taken from a final judgment granting in part Plaintiffs' Motions for Summary Judgment and denying Defendants' Motions. JA 9-83.

The Rail Act Reorganization Process

The following five steps required by the Rail Act are essential to an understanding of the proceedings below. In the Introduction to the Argument there is a fuller discussion of the statutory provisions intended by Congress to achieve "the reorganization of railroads in this region into an economically viable system capable of providing adequate and efficient rail service to the region." Section 101(b)(2).

(1) Each United States district court having jurisdiction of a railroad in the region in reorganization under Section 77 ("Reorganization Court") was required to determine within 180 days of enactment whether its railroad should be reorganized pursuant to the Rail Act. Section 207(b). Such determinations (which are described below under the heading "Reorganization Court Proceedings") have been made and are now under review by a special United States district court of three judges ("Special Court") which was authorized by the Rail Act, Section 209(b), and which has been formed in the District of Columbia.

(2) A new government corporation, Appellant USRA, is required to prepare a "Final System Plan" for restructuring the rail properties of the railroads being reorganized pursuant to the Rail Act into a "financially self-sustaining rail service system." Sections 201, 202, 204-06. A central feature of the Final System Plan will be the transfer of designated rail properties to a new, for-profit corporation called Consolidated Rail Corporation ("Conrail") in exchange for all the securities of Conrail, plus up to $500 million of USRA obligations guaranteed by the United States. Sections 206(d)(1), 210.

(3) USRA is required to submit a proposed Final System Plan to Congress within 450 days of enactment (*i.e.*, by March 28, 1975). Section 208(a). The Plan becomes "effective" if neither House of Congress disapproves it within sixty continuous session days after submission. Section 208. The Plan is then transmitted by USRA, within 90 days after its effective date, to the Special Court, which has exclusive jurisdiction of all "proceedings with respect to the Final System Plan." Section 209. The Special Court is then directed to order the trustees of each railroad in reorganization to transfer to Conrail all right, title and interest in the rail properties designated in the Final System Plan. Section 303(b).

(4) The Special Court is directed then to determine whether the exchange of rail properties for Conrail securities, USRA obligations and such "other benefits" as the Rail Act provides, is fair and equitable to the estate of each railroad in reorganization. Section 303(c). If the Special Court finds that the transfer is not fair and equitable "in accordance with the standard of fairness and equity applicable to the approval of a plan of reorganization or a step in such a plan under Section 77 of the Bankruptcy Act," the Court is directed to order a reallocation of the Conrail securities, and/or to order

the issuance of additional Conrail securities and USRA obligations (subject to an overall $500 million limitation on USRA obligations used for this purpose), and/or to enter a judgment against Conrail. *Id.* Section 303 does not authorize the Special Court to enter a judgment against the United States. Section 303 does, however, recognize that the consideration to be transferred in exchange for the rail properties must equal the "constitutional minimum" and directs the Special Court to make necessary adjustments so that this "constitutional minimum" is not exceeded. The judgment of the Special Court may be appealed directly to this Court. Section 303(d).

(5) Section 304 of the Rail Act provides that railroads in reorganization subject to the Act may discontinue service over, and may "abandon"—*i.e.*, dispose of as they wish—any rail properties not designated for transfer under the Final System Plan. In the interim, however, Section 304(f) permits a railroad in reorganization to discontinue service on or to abandon lines of railroad only with the consent of USRA.

Reorganization Court Proceedings

Section 207(b) of the Rail Act required each Reorganization Court to decide, in two stages, whether its railroad should be reorganized pursuant to the Rail Act. First, each Reorganization Court was to decide, within 120 days of the Rail Act's enactment, whether (a) its railroad is reorganizable on an income basis within a reasonable time under Section 77 of the Bankruptcy Act and if so whether (b) the public interest would be better served by continuing the reorganization under Section 77 than by proceedings under the Rail Act. If a Reorganization Court made both affirmative findings, it was authorized to keep its railroad out of all subsequent Rail Act proceedings. Railroads not eliminated at the

"120-day" stage went through the second stage, or "180-day" proceeding, in which each Reorganization Court was to order that reorganization proceed under the Rail Act unless it found that the Rail Act "does not provide a process which would be fair and equitable to the estate of the railroad in reorganization."

On the date of enactment, eight major railroads were in reorganization in the region.[1] In addition, fifteen of Penn Central's railroad subsidiaries ("Secondary Debtors") were considered separately from Penn Central in distinct "120-day" and "180-day" proceedings in the Penn Central Reorganization Court. Hence, the major railroads and the Secondary Debtors required nine determinations by the Reorganization Courts under Section 207(b).

On May 1, 1974, two railroads—the Boston & Maine and the Erie Lackawanna—were kept out of the Rail Act procedures on the "120-day" grounds that they are reorganizable on an income basis under Section 77 and that the public interest would be better served by continuing under Section 77. These determinations have not been appealed. In the remaining seven cases, the railroads were not taken out of the Rail Act at the 120-day stage. In six of these cases, the Reorganization Courts found that the railroads were not reorganizable on an income basis under Section 77. Certain of the Secondary Debtors were found to be reorganizable on an income basis under Section 77 but the Court was unable to conclude that the public interest would be better

[1] They were and are the only operating railroads in reorganization in the United States, except for a tiny carrier, the Cadillac and Lake City Railroad. The Cadillac and Lake City, which is also in the region, has been excluded from further proceedings under the Act on the ground that it is separately reorganizable on an income basis under Section 77 and the public interest would be better served by continuing under Section 77.

served by reorganization under Section 77 than by proceedings under the Rail Act.

These seven cases were therefore the subject of the subsquent "180-day" proceedings in the respective Reorganization Courts. On July 1, 1974, six days after the decision of the three-judge Court below in the present case, two Reorganization Courts, having before them Reading Company and The Ann Arbor Railroad Company, ordered that their reorganizations proceed under the Rail Act. In the remaining five proceedings, which dealt with Penn Central, Secondary Debtors, Lehigh Valley Railroad Company, The Central Railroad Company of New Jersey, and The Lehigh and Hudson River Railway Company, the Reorganization Courts[2] concluded, wholly or in substantial part on the basis of the decision below in the present case, that the Rail Act does not provide a fair and equitable process and declined to order reorganization under the Rail Act.

Section 207(b) provides that appeals from Reorganization Court orders pursuant to that section shall be made to the Special Court. It further provides that there shall be no appeal from the decision of the Special Court. These seven 180-day determinations are all on appeal to the Special Court, which is required by Section 207(b) of the Rail Act to render its decision within 80 days after the appeals were taken, a period which expires on September 29, 1974.[3] Appellant USRA and other parties intend to suggest to the Special Court that it render its decision at that time but stay its mandate pending the determination by this Court of the issues on this appeal.

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[2] These five determinations were made by three courts: the Penn Central, Secondary Debtors, and Lehigh Valley reorganizations are all before Judge Fullam in the Eastern District of Pennsylvania. Judge Fullam was also a member of the court below.

[3] In the case of The Central Railroad of New Jersey, the 80-day period expires on September 26, 1974.

Proceedings Below

Plaintiffs in the court below challenged the constitutionality of the Rail Act on a number of grounds. A primary contention was that the consideration provided in the "Final System Plan" for required transfers of rail property pursuant to that Plan will or may, despite the statutory requirement that the consideration be equal to the "constitutional minimum standard of fairness and equity," fall below constitutional requirements so that the transfers will constitute a taking of Plaintiffs' property for less than just compensation in violation of the Fifth Amendment. This contention was rejected by the court below as premature. JA 9 at 23-25.

Plaintiffs also contended below that a taking of their property without just compensation will result from a combination of the allegedly required continuation of rail operations pending implementation of the Final System Plan with the alleged "erosion" beyond constitutional limits of the Penn Central estate during this period. Appellant USRA contended below that, (i) on any theory of "erosion," the record before the court below did not permit a determination of the amount of erosion suffered by any railroad estate or a determination that any railroad estate has reached the "constitutional limit" beyond which operations cannot be required to continue without an adequate remedy at law for compensation; (ii) railroad creditors and owners can constitutionally be required to sustain a reasonable burden of interim erosion while efforts are being made to restructure the railroad on a profitable basis; and (iii) in any event Plaintiffs were not entitled to an injunction or a declaratory judgment of unconstitutionality because, if it should ultimately be determined that the Rail Act had caused an erosion of their interests beyond constitutional limits, Plaintiffs would have an adequate remedy at law in the Court of Claims under the Tucker Act for any claimed shortfall in their compensation.

The court below determined that the present existence of operating losses in the Penn Central system made the erosion issue "ripe for adjudication." JA 9 at 40. The court did not define erosion, nor did it decide whether the Penn Central or any other railroad has yet reached the constitutional limit of erosion, nor did it attempt to define the constitutional limit. The court said only that,

> "we are persuaded that a significant possibility exists that a point of erosion either has been or may soon be reached so that it can be said that plaintiffs' contention of interim unconstitutional taking by continued loss operations is ripe for adjudication." *Id.*

Without resolving the factual issues further, the court then turned to the relevant statutory issues. The court apparently read Section 304(f), which requires a railroad in reorganization to obtain the approval of USRA before it discontinues rail service or abandons rail lines during the planning process, as authorizing USRA to withhold approval even if a court has determined that "erosion" has gone beyond constitutional limits and even if an adequate remedy at law for compensation is barred by the Rail Act.

The court then concluded that the Rail Act did bar an adequate remedy at law. It explicitly rejected the contention of Appellant, of the other Government Parties, and of the Penn Central Trustees that if the constitutional limit of permissible uncompensated erosion should be passed, Plaintiffs would have an adequate remedy at law in the Court of Claims under the Tucker Act for just compensation. JA 9 at 53. The court construed the Rail Act, despite its silence on the subject, as precluding the Court of Claims from taking jurisdiction of any suit for compensation for actions taken under the authority of the Rail Act. The court also apparently decided that the power of the Special Court, pursuant to Section 303,

to determine whether transfers of rail properties are fair and equitable to the estate of each railroad in reorganization and to award the "constitutional minimum," does not include the power to remedy erosion beyond constitutional limits. *Id.* at 53, 82.

Based on this analysis, the court below held Section 304(f)

> "null and void as violative of the Fifth Amendment of the United States Constitution, to the extent that it would require continued operation of rail services at a loss in violation of the constitutional rights of the owners and creditors of a railroad." *Id.* at 82-83.

The court did not define such constitutional rights, but it enjoined all Defendants,

> "from taking any action to enforce the provisions of Section 304(f) . . . with respect to any abandonment, cessation or reduction of service which has been or may hereafter be determined by a court of competent jurisdiction to be necessary for the preservation of rights guaranteed by the United States Constitution." *Id.* at 82.

Technically, this order has effect only if some other court (presumably a Reorganization Court) determines that an abandonment, cessation, or reduction of service is constitutionally required.

The court below went on to declare that Section 303 of the Rail Act, relating to transfers of rail properties pursuant to the Final System Plan, is

> "null and void as contravening the Fifth Amendment of the United States Constitution insofar as it fails to provide compensation for interim erosion pending final implementation of the Final System Plan . . . ." *Id.*

In addition, without explanation, the court enjoined USRA, unconditionally, from certifying *any* Final Sys-

tem Plan to the Special Court pursuant to Section 209 (c). *Id.*

Plaintiffs made a third challenge to the Rail Act on the ground that it is not "uniform" within the meaning of Article I, Section 8, Clause 4, of the Constitution, providing that Congress shall have the power to enact "uniform Laws on the subject of Bankruptcies throughout the United States." The court below rejected this contention except as to one sentence of Section 207(b). *Id.* at 83. That sentence provides that if any Reorganization Court determines, in the "180-day proceedings," that the Act does not provide a fair and equitable process for the reorganization of its debtor and therefore that the debtor shall not be reorganized in accordance with the Act, then the Reorganization Court shall dismiss the Section 77 proceedings. Since the court's ruling nullifying this dismissal requirement does not materially affect the administration of the Rail Act, we do not appeal from this part of the court's order.

SUMMARY OF ARGUMENT

The Rail Act provides varied and substantial new resources to meet a rail crisis that is centered in the Northeast and Midwest but threatens the welfare of the entire nation. These resources can be used to create a self-sustaining rail service system that will meet the needs of the public. The creation of that system will resolve the several present railroad reorganization proceedings and will afford fair and equitable treatment to the creditors and shareholders of the bankrupt railroads.

The Rail Act has been attacked on the ground that under some hypothetical circumstances fairness and equity to these private interests would not be assured. The Act itself, with its commitment of major new public resources, its revamping of the regulatory framework,

and its imaginative adaptation of traditional railroad reorganization procedures and principles, provides ample refutation of the Act's detractors. The short answer to their contentions, however, is that if, despite all of the resources that Congress pledged and all the care it devoted to legislating a constitutional solution to the rail crisis, the Act should require the use or transfer of rail properties for less than the "constitutional minimum" consideration that the Act expressly recognizes to be due, a suit for just compensation in the Court of Claims under the Tucker Act is an adequate and proper remedy at law, and no injunction is justified.

Tucker Act. In the court below, Plaintiffs sought (a) a declaration that the Rail Act is unconstitutional on its face and (b) an injunction against its implementation. Their primary contention was that the Rail Act will cause a "taking" of their "property" for "public use" without "just compensation" in violation of the Fifth Amendment to the Constitution of the United States. The court below should have responded to that challenge by denying the relief sought and dismissing the complaints on the ground that if Plaintiffs should ever wish to present such a claim, they will have an adequate remedy at law in the form of a suit for just compensation in the United States Court of Claims under the Tucker Act, 28 U.S.C. § 1491. Decisions of this Court have clearly established that since just compensation remains available in a suit under the Tucker Act, it is inappropriate ever to enjoin duly authorized federal action on the ground that it may constitute a taking for less than the just compensation that must be paid. The same decisions establish that this adequate legal remedy makes it unnecessary and inappropriate for a court of equity, when asked for such an injunction, even to inquire into whether a taking in fact has occurred or will occur.

The court below, however, ruled that the Rail Act bars a Tucker Act remedy for claims arising under the Rail Act. The court assumed that the existence of such a remedy depends on the intention of Congress, when it passed the Rail Act, to make a Tucker Act remedy available. Hence, the court stated the question as whether there was an "implied remedy at law," JA 9 at 41, and concluded that to "read a Tucker Act remedy into the [Rail] Act" would be "judicial legislation on a grand, if not arrogant, scale." *Id.* at 53.

In fact, the Tucker Act stands by itself as a century-old bulwark both against inadequately compensated takings of property and against unwarranted prior restraint by courts of equity against the efforts of Congress to provide for the needs of the nation. The Tucker Act, by itself, confers jurisdiction on the Court of Claims to hear money claims arising under the Constitution of the United States, including claims for just compensation for the public use of private property. This remedy is available for any claim of taking (including claim of a taking of the *use* of property) that results from authorized federal action. It is not necessary, when Congress passes later substantive legislation which someone alleges to have caused a taking, that Congress have intended a taking, or have provided a remedy, or have explicitly or implicitly preserved the availability of the Tucker Act remedy in the later legislation.

The only question properly before the court below on this issue was whether the Rail Act repealed the jurisdiction of the Court of Claims *pro tanto* as to affected rail estates. This it clearly did not do. The Rail Act nowhere mentions either the Tucker Act or the Court of Claims, although it contains thirteen separate provisions explicitly modifying or repealing other federal statutes, including an entire section entitled "Relationship to Other Laws." While it is clear from the statute and its legis-

lative history that Congress did not expect that the consideration provided under the Rail Act would be judicially determined to be less than the "constitutional minimum" that the Rail Act expressly recognizes to be due, there is nothing in the Rail Act or its legislative history to suggest that Congress intended to deny the traditional Court of Claims remedy to anyone asserting such a claim.

The questionable inference, drawn by the court below, that the Rail Act implicitly repealed a basic grant of jurisdiction to a federal court, was especially inappropriate in light of its consequences: (a) to impute to Congress a deliberate intention to act in an unconstitutional manner by requiring transfers of rail property for consideration that might judicially be determined to be less than the "constitutional minimum" Congress itself recognized and by barring any remedy to recover the shortfall, and (b) to strike down portions of a major federal statute that the Court apparently would have upheld if it had drawn the opposite inference. The action of the court below thus violated the basic precept of constitutional litigation that a statute shall be interpreted, where possible, so as to save rather than destroy its constitutionality.

Section 304(f). Apart from its rejection of the Tucker Act remedy, the district court's resolution of the merits of the "taking" allegations was also erroneous. One of Plaintiffs' allegations was that Section 304(f) of the Rail Act, which forbids railroads in reorganization from discontinuing service or abandoning rail lines during the rail planning process without the approval of USRA, has caused and/or will cause a "taking" of Plaintiffs' property in the form of "erosion" of railroad estates through continued rail operations. The court below did not decide whether "erosion" amounting to a "taking" has occurred or will occur. Indeed, the court neither de-

fined "erosion" nor specified the constitutional limits beyond which erosion becomes a taking and cannot be compelled unless an adequate remedy for just compensation is available. Instead, the court took the following extraordinary steps: (a) it decided that the constitutionality of Section 304(f) was ripe for adjudication even though the constitutional limit of erosion had not been found to have been reached and might not ever be reached; (b) it interpreted Section 304(f) as barring discontinuances and abandonments even though the result would be erosion beyond constitutional limits for which the court had ruled no adequate remedy was available; (c) it declared Section 304(f), as so construed, unconstitutional as applied to these hypothetical circumstances; (d) it enjoined USRA, now, from interfering with any discontinuance or abandonment that another court may hypothetically find constitutionally required; and (e) finally, it declared other portions of the statute unconstitutional, without explanation, because they do not specifically provide a remedy for the very erosion beyond constitutional limits that the court itself had already done more than necessary to prevent.

The court, based on its ruling that the Rail Act barred an adequate remedy at law, declared Section 304(f) "null and void as violative of the Fifth Amendment . . . to the extent that it would require continued operation of rail serivces at a loss in violation of the constitutional rights of the owners and creditors of a railroad." JA 9 at 82-83. The court then enjoined the Defendants

> "from taking any action to enforce the provisions of Section 304(f) of the Regional Rail Reorganization Act of 1973, with respect of any abandonment, cessation, or reduction of service which has been or may hereafter be determined by a court of competent jurisdiction to be necessary for the preservation of rights guaranteed by the United States Constitution." *Id* at 82.

If this were all the court below had done, its order would be merely gratuitous. The court did not need to interpret Section 304(f) as permitting USRA to ignore such constitutional rights as a later court may declare. It did not need to strike down the section, or to enjoin USRA, now, from violating constitutional rights declared by a hypothetical later court. Even if the court correctly construed the Rail Act as denying an adequate remedy at law, the entire resulting problem could have been resolved by interpreting Section 304(f) as conferring authority only within the bounds permitted by the Constitution. If, as the court below hypothesized, some later court finds that an abandonment, cessation or reduction of railroad service is required to preserve constitutional rights, there is no reason to assume now that USRA will act in violation of that hypothetical determination or that the later court would not be able itself to issue such injunctive and other orders as may be necessary to enforce the constitutional rights it has declared.

Section 303. The court below did not stop at enjoining action under Section 304(f). It also declared that Section 303 of the Rail Act, which provides for the conveyance of rail properties to Conrail pursuant to the Final System Plan and for the valuation of those properties and the consideration therefor

> "is null and void as contravening the Fifth Amendment of the United States Constitution insofar as it fails to provide compensation for interim erosion pending final implementation of the Final System Plan pursuant to the statute." JA 9 at 82.

This ruling, holding void a section of the statute that is not even discussed (save for incidental references) in the court's opinion, was wholly unnecessary and erroneous even on the court's view of the Tucker Act and erosion issues. In the first place, the court below did not de-

termine that an erosion taking, requiring just compensation, either has occurred or would occur if the process of the Act were allowed to go forward unimpeded. Consequently, even on the court's view of the facts, the erosion question may never arise.

More important, by its treatment of Section 304(f), the court below itself eliminated any possible objection to Section 303. The court enjoined all Defendants from taking action under Section 304(f) that would conflict with any future judicial determination that service should be discontinued or property abandoned in order to avoid erosion beyond constitutional limits. In fact, no Reorganization Court or other court has yet determined that the constitutional limit has been reached in the case of its railroad. If any Reorganization Court or other federal court determines that the constitutional limit has been reached, it will presumably order selective or total discontinuance of rail service or abandonments of rail lines. As noted above, (a) once the court below held that the Rail Act bars an adequate remedy at law, it should not have interpreted Section 304(f) of the Rail Act to purport to give USRA authority to prevent discontinuances or abandonments in such circumstances, (b) the Reorganization Court or other federal court making such determination would obviously have power, should it for some reason be necessary, to enjoin USRA from interfering with its orders issued on constitutional grounds, and (c) in any event, the court below itself enjoined USRA from interfering with such hypothetical future constitutionally required discontinuances or abandonments. Consequently, if there was ever any possibility that the Act would cause any railroad estate to reach the constitutional limit of erosion and yet require such railroad to continue to operate beyond that point, this defect has been anticipatorily remedied by the court below. There was no need to declare Section 303 unconstitutional for failing to provide just compensation for

an erosion taking caused by the Rail Act when the possibility of any such taking has been more than adequately eliminated.

Certification of the Final System Plan. The court below did not stop even with this second ruling. It went on to enjoin USRA from certifying *any* Final System Plan to the Special Court. There is not a single sentence in the opinions below that offers an explanation for this ruling prohibiting the central step contemplated by the Act. On the district court's own analysis, the constitutional limit of erosion may never be reached. If it is reached, it may be possible for the affected railroad, USRA, and others including Congress and the Special Court to devise a basis for continuing rail service subject to adequate compensation in the Final System Plan or otherwise. If that is not possible, the Reorganization Court (or another appropriate court) can order discontinuance or abandonment, as necessary, on constitutional grounds. If it be presumed that USRA would disregard any such order, USRA has now been enjoined from doing so. In no imaginable set of circumstances, however, could the certification of a Final System Plan by USRA to the Special Court be an unconstitutional step; nor could an injunction against this step serve in any way to remedy any defect in the Rail Act found by the court below.

Calculation of Erosion. Calculation of erosion requires a comparison between the consequences to creditors and shareholders of reorganization under the Rail Act with the consequences of some other alternative now available. The record in this case does not permit a determination of the consequences of a long and expensive liquidation proceeding commenced now, or of any other available alternative. Nothing in the record demonstrates that proceedings under the Rail Act, including the preservation of going-concern values in a railroad system suited

to the present economic environment, the ability to obtain state, local and private support for important but unprofitable rail services, the abandonment and transfer of unprofitable lines in a prompt and orderly manner, federal assumption of labor protection costs, substantial direct and indirect cash subsidies and the use of federally guaranteed debt, will yield creditors and shareholders less than they can receive from any available alternative.

Moreover, the *Rock Island*,[4] *Denver & Rio Grande*,[5] *Penn-Central Merger*[6] and *New Haven Inclusion*[7] cases make it clear that even if it could be shown that interim operations will lead to a less satisfactory result for claimants than some alternative available now, a reasonable burden of "erosion" may constitutionally be imposed while efforts are made to restructure their railroads into a viable going concern. The "property" of railroad creditors and owners is inherently subject to the right of the public to make reasonable efforts to preserve essential rail operations on a self-sustaining basis. There is no reason to assume, at this time, that the implementation of this major federal program in accordance with the very tight time schedule provided in the Act itself will subject creditors or shareholders to an unconstitutional erosion of their property.

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[4] *Continental Bank* v. *Chicago, Rock Island & P. Ry.*, 294 U.S. 648 (1935).

[5] *Reconstruction Finance Corp.* v. *Denver & Rio Grande W.R.R.*, 328 U.S. 495 (1946).

[6] *Penn-Central Merger Cases*, 389 U.S. 486 (1968).

[7] *New Haven Inclusion Cases*, 399 U.S. 392 (1970).

ARGUMENT

Introduction: The Rail Crisis and the Rail Act

Eight major railroads[8] operating in the Northeast/Midwest Region[9] of the United States are now in reorganization proceedings pursuant to Section 77 of the Bankruptcy Act, 11 U.S.C. § 205. The resulting threat to the welfare of the Region and of the United States,[10]

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[8] Seven are Class I railroads: the Penn Central, Reading, Erie Lackawanna, Central of New Jersey, Lehigh Valley, Boston & Maine, and Ann Arbor. Of these, the Erie Lackawanna and Boston & Maine were found by their Reorganization Courts to be separately reorganizable under Section 77, and consequently will not be reorganized under the Rail Act. A Class I railroad is defined by the Interstate Commerce Commission ("ICC") as a railroad with $5 million or more of annual revenue. ICC Finance Dockets show these seven to be the only Class I railroads in the nation in reorganization.

In addition to these Class I railroads, one significant Class II railroad, the Lehigh & Hudson River, is in reorganization in the Region. As noted above, a second, tiny Class II railroad, the Cadillac and Lake City, is also in reorganization in the Region but has been found to be separately reorganizable and will not be reorganized under the Rail Act. See p. 9 note 1 *supra*. The ICC Finance Dockets disclose that the only Class II railroad in reorganization outside the Region ceased all operations in 1968 and sold substantially all of its lines in 1969.

[9] The Act defines "Region" as "the States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, Ohio, Indiana, Michigan, and Illinois; the District of Columbia; and those portions of contiguous States in which are located rail properties owned or operated by railroads doing business primarily in the aforementioned jurisdictions (as determined by the [ICC] by order)." Section 102(13). ICC Order, *Ex Parte No. 293*, approved January 14, 1974, delineated areas near Louisville, Kentucky; St. Louis, Missouri; and Kewaunee and Manitowoc, Wisconsin, as included in the Region. As used herein, the term "Region" refers to the area defined in the statute and by the ICC.

[10] A 1970 Department of Transportation study concluded that within eight weeks of a complete shutdown of the Penn Central, GNP for the nation would drop by 2.7% and for the Northeast by 5.2%. Nearly two million Penn Central and other affected employees would be laid off. Statement of Secretary Brinegar in Hearings be-

coupled with the inadequacy of the procedures and resources of Section 77 to resolve it, led Congress to enact the Rail Act.

A. The Rail Act Is Designed To Provide New Solutions to New Problems that Created the Rail Crisis

The present rail crisis resulted from a number of problems that Section 77 is inadequate to correct. The number of railroads in reorganization, their concentration in a single region, and the vast extent of their operations make it clear that there is a crisis. The fact that the railroads' problems in the 1970's are not primarily problems of capital structure but arise from shifting economic trends and are in part the result of regulatory policies[11] make the limited resources of Section 77 inadequate. The Rail Act reflects Congress' recognition that some of the problems can be solved only by providing new financial and legal resources and new procedures for resolving regulatory issues. The Act also modifies existing Section 77 procedures to permit

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fore the Surface Transportation Subcomm. of the Senate Comm. on Commerce, Ser. 93-8, pt. 2, at 258 (May 30, 1973).

The area served by the Penn Central included, in 1970, 55% of the nation's manufacturing plants and 60% of its employees engaged in manufacturing. Congress was well aware of the problems that would be caused by the shutdown of a railroad carrying about 1 million tons of freight every day, carrying over its lines about 21% of all freight cars loaded in the United States, and serving exclusively 59 defense facilities. Special Staff of Senate Comm. on Commerce, 92d Cong., 2d Sess., *The Penn Central and Other Railroads, A Report to the Senate Committee on Commerce* XIX (Comm. Print 1972).

[11] See S. Rep. No. 93-601, 93d Cong., 1st Sess. ("Senate Report") 6-7 (1973). As the House Committee stated, Section 77, which "contemplates a program of restructuring capital" in response to the fact that "depression-spawned railroad bankruptcies were the product primarily of over capitalization," is not "responsive to the urgent problems confronting the railroads in the northeast today" where "insolvency is much more complex." H.R. Rep. No. 93-620, 93d Cong., 1st Sess. ("House Report") 29 (1973).

reorganization of several railroads into a single consolidated unit.

1. *The Rail Act Provides a Thorough Planning and Review Process*

In general, the Rail Act provides for the following steps to plan a restructured rail system created out of selected rail properties of railroads now in reorganization, and to review the "fairness and equity" of the Plan.

(a) USRA, with the assistance of the Secretary of Transportation ("Secretary") and the Rail Services Planning Office ("RSPO"), a new office created by the Rail Act within the ICC is to prepare a Final System Plan for restructuring the operations of the railroads in reorganization.[12] A central feature of the Final System Plan will be the transfer of designated rail properties of railroads in reorganization to Conrail, a private corporation for profit to be created, pursuant to Section 301, to own and operate the restructured system. The Final System Plan will provide for the issuance to the transferor estates of securities of Conrail, plus up to $500 million of USRA obligations guaranteed by the United States. Sections 206(d)(1), 210. It may also provide for transfer to and consideration from profitable railroads, Section 206(c)(1)(b) and 206(d)(2),[13] and may provide for additional Government obligations, subject to approval by joint resolution of Congress. Sections 206(h), (i), and 210(b).

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[12] Sections 202, 204, 205, and 206. The statutory deadlines in Sections 204 and 205(d)(1) for preliminary reports by the Secretary and RSPO have been met.

[13] These transfers are subject to expedited review by USRA and the ICC, whose rulings are not reviewable by any court. Section 206(d)(3).

(b) Following publication of and hearings on a preliminary system plan, USRA must submit a proposed Final System Plan to the ICC and Congress within 450 days after enactment (*i.e.*, by March 28, 1975). Sections 207(c), 208(a). The Plan becomes effective if neither house of Congress disapproves it within 60 continuous session days. Section 208. Within 90 days after it becomes effective, the Final System Plan is to be transmitted to the Special Court created pursuant to Section 209 of the Rail Act. Section 209(c). The Conrail securities and USRA obligations designated in the Final System Plan as consideration for rail properties to be transferred to Conrail under the Plan, and the consideration from any profitable railroad purchasing property, must be delivered to the Special Court within ten days after the Plan is transmitted. Section 303(a). Within a further ten days, the Special Court is to order the transfer of the rail properties designated in the Plan. Section 303(b).

(c) The Special Court is then to determine whether the exchange of rail properties for securities and "other benefits" is fair and equitable to the estate of each railroad in reorganization "in accordance with the standard of fairness and equity applicable to the approval of a plan of reorganization or a step in such a plan under Section 77 of the Bankruptcy Act." Section 303(c)(1)(A). Congress recognized that, for the exchange to be "fair and equitable," the value of the consideration for the transferred properties had to equal the "constitutional minimum," and directed the Special Court to make any adjustment needed so as not to exceed this "constitutional minimum." Sections 303(c)(1)(B), (c)(3). The Special Court is required, if it finds that the exchange is not fair and equitable, to order a reallocation of the Conrail securities, and/or to order the issuance of additional Conrail securities or USRA obligations, and/or to enter a judgment against Conrail. Section 303(c)(2). A finding, determination, order, or judgment of the Special

Court under Section 303 may be appealed directly to this Court. Section 303(d).

2. *The Rail Act Provides Resources Not Available in Section 77 Reorganizations*

Section 77 was designed primarily to provide a procedure for the recapitalization of a single railroad. It does not provide any means of trimming rail operations to meet changed economic and competitive conditions, or any means of compensating employees whom the railroads are obligated to employ but who are unneeded in a slimmer system. It does not provide any government financial assistance. It does not provide any specific means of transferring rail properties either to other railroads (which might put them to more profitable rail use) or to governments or other entities for rail or non-rail use. Finally, it provides no means of coordinating the reorganizations of two or more railroads in the same area.

The Rail Act was designed in part to supplement Section 77 in these respects. The center of the Rail Act is its provision for a planning process leading to a restructuring of rail operations and the abandonment of excessive facilities.[14] At the same time, the Act includes special features, funded by up to $250 million of authorized federal appropriations, to protect employees who might be adversely affected. Title V.

Four additional forms of financial support provided by the Rail Act deserve special mention:

(a) USRA is authorized to issue $1.5 billion in Government-guaranteed obligations. Of this sum, up to $1 billion may be issued to Conrail, of which not less than

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[14] The differing Senate and House approaches and their resolution are described in the Conference Report, H.R. Rep. No. 93-744, 93d Cong., 1st Sess. ("Conference Report") 61-63 (1973).

half must be used by Conrail for rail rehabilitation and modernization. Section 210(b). Additional amounts above this revolving $1.5 billion ceiling may be issued if approved by joint resolution of Congress. *Id.* The Act permits Conrail's obligations to USRA to be on terms different from the terms of USRA's government-guaranteed obligations. Thus, $1 billion in financing can be made available to Conrail on terms more favorable than are ordinarily available in the commercial market.

(b) The Secretary, with USRA's approval, is authorized to enter into agreements (involving the issuance of up to $150 million in USRA obligations) for the acquisition, maintenance, or improvement of property that will be included in the Final System Plan. Section 215.

(c) To meet emergency needs pending implementation of the Final System Plan, the Secretary is further authorized to make payments not exceeding $85 million to the trustees of railroads in reorganization. Section 213.[15]

(d) The Secretary and USRA may provide to public agencies (within a $180 million authorization) subsidies for continuing non-economic service and loans for the acquisition and modernization of rail properties. Since these funds are to be made available on a 70-30 matching basis, the assistance under these programs is actually approximately $250 million.

To overcome the difficulty of severing and transferring properties in the traditional Section 77 process,[16] Con-

[15] The court below stated, JA 9 at 32, that only $35 million of this amount had been appropriated. The current total is $74,800,000. See Foreign Assistance and Related Programs Appropriations Act of 1974, Pub. L. 93-240 (Jan. 2, 1974) ($35 million); Second Supplemental Appropriations Act, 1974, Pub. L. 93-305 (June 8, 1974) ($39.8 million).

[16] See Interstate Commerce Act § 5, 49 U.S.C. § 5; *St. Joe Paper Co.* v. *Atlantic Coast Line R.R.*, 347 U.S. 298 (1954).

gress provided that the Final System Plan could require rail properties of the railroads in reorganization to be sold for their fair value pursuant to the Final System Plan to (i) profitable railroads in the Region, (ii) the National Railroad Passenger Corporation ("Amtrak") for rail passenger service, (iii) state, regional, or local transportation authorities for commuter and intercity rail services, and (iv) various recipients for other public purposes, including highways, conservation, education, and recreation.[17] As already mentioned, railroads in reorganization will also be able, subject to USRA's approval, to dispose of unneeded rail properties for the best price under simplified abandonment and termination procedures.[18] The Act also provides for the possibility that Congress will authorize USRA to guarantee Conrail obligations, Section 206(i), or to issue obligations in excess of the $1.5 billion limit in order to implement the Final System Plan, Sections 206(h) and 210(b).

Finally, the Rail Act reflects Congress' recognition of the need to coordinate the reorganization of adjoining and competing railroads in reorganization: "[N]o one Court can restructure the entire system under Section 77." [19] Congress therefore created a new agency—USRA—to formulate "essentially a railroad reorganization plan which would consolidate parts of [the] bankrupt carriers into a new for-profit carrier," [20] and, to review and approve the Plan, it created a single new court—the Special Court—with all the powers of a Section 77 court.[21]

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[17] Section 206(c).

[18] Section 304.

[19] House Report at 29.

[20] *Id.* at 23-24.

[21] Section 209(b).

B. The Rail Act Provides Solutions to the Problems that Have Made It Impossible To Reorganize the Penn Central Under Section 77 [22]

All Plaintiffs in this case have claims against the Penn Central estate, and the Penn Central Trustees have intervened as Defendants. Consequently, although Plaintiffs challenged the Rail Act as unconstitutional on its face, the Penn Central reorganization proceeding provides an essential backdrop against which their contentions must be evaluated.

The Penn Central entered reorganization under Section 77 on June 21, 1970. During the first 30 months of reorganization, the Penn Central Trustees identified and attempted to satisfy four conditions which they judged necessary to a successful Section 77 reorganization:

(1) rationalization of the physical plant by eliminating excess capacity;

(2) elimination of unnecessary labor expense;

(3) full compensation for all passenger service; and

(4) increased freight traffic and revenues.[23]

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[22] Since the primary focus of the Act was on the Penn Central, this and the following section of this Brief present examples of how and why Congress thought the Rail Act was a reasonable approach to the Northeast/Midwest problem. Although the examples are drawn specifically from the Penn Central reorganization proceeding, it is clear that Congress considered many of the Penn Central's problems to be shared by other Northeast/Midwest railroads. See Senate Report at 6-14; House Report at 25-29.

[23] The first three conditions were identified in the Preliminary Report of Trustees Concerning Premises for a Reorganization (February 10, 1971), J. Doc. 1 at 3. As for the fourth condition, a September 1971 report concluded that a study of Penn Central's revenue-producing potential was necessary. Second Report of Trustees on Status of Reorganization Planning (September 17, 1971) ("September 1971 Report"), J. Doc. 3 at 14-18. In February 1972 the Trustees reported that a successful reorganization required, *inter alia*, attaining a certain projected volume of freight

The Penn Central Trustees reported for the first time on January 1, 1973, that they believed substantial government financial assistance was essential in order to achieve service improvements that would attract the necessary increases in freight traffic and revenues.[24] Seven days after the Penn Central Trustees' February 1973 Report quantified this needed assistance at $600-$800 million,[25] Congress passed Joint Resolution 59 directing the Secretary to submit within 45 days "a full and comprehensive plan for the preservation of essential rail transportation services in the Northeast . . . ." [26] After studying various measures to relieve the rail crisis during the remainder of 1973, Congress approved the Rail Act.[27]

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traffic and revenue increases. Report of Trustees on Reorganization Planning (February 15, 1972) ("February 1972 Report"), J. Doc. 4 at 1.

These four conditions were made especially explicit in the Penn Central Trustees' Plan for Reorganization (April 1, 1972) ("April 1972 Reorganization Plan"), J. Doc. 5 at 1, and were reiterated in, *e.g.*, Trustees' Interim Report of October 1, 1972 ("October 1972 Report"), J. Doc. 7 at 1; Trustees' Interim Report of January 1, 1973 ("January 1973 Report"), J. Doc. 8 at 1; and Trustees' Report on Reorganization Planning (April 3, 1974) ("April 1974 Report"), J. Doc. 10 at 4.

[24] Penn Central Trustees' January 1973 Report, J. Doc. 8 at 1.

[25] Penn Central Trustees' Interim Report of February 1, 1973 ("February 1973 Report"), J. Doc. 9 at 2.

[26] Pub. L. 93-5, 87 Stat. 5. The Secretary satisfied this requirement with *Northeastern Railroad Problem, A Report to the Congress*, submitted to Congress on March 26, 1973 (*"Northeastern Railroad Problem"*).

[27] On April 16 and 17, May 8, 9, 10, 21, 30, and 31, and June 6 and 7, 1973, the House Committee on Interstate and Foreign Commerce held hearings on H.R. 6591, H.R. 4897, H.R. 5822, H.R. 5385, H.R. 6880, H.R. 7373, and H.J. Res. 50. On February 28, March 2, May 30 and 31, and June 4, 15, 21, and 22, 1973, the Senate Committee on Commerce held hearings on S. 1031, and, on November 15, 16, and 19, 1973, it held hearings on S. 2188 and H.R. 9142. Out of these hearings evolved the 1973 Act. The House and Senate Reports are dated November 3 and December 6, 1973, respectively,

On May 2, 1974, the Penn Central Reorganization Court found in the 120-day proceedings provided for in the first sentence of Section 207(b) of the Rail Act that the Penn Central is "not reorganizable on an income basis within a reasonable time under § 77 of the Bankruptcy Act . . . ." [28] The Reorganization Court described the Penn Central's situation in part as follows:

> ". . . I am persuaded that reorganizability must be determined on the assumption that the existing regulatory and operational setting will continue. From the very inception of these proceedings, it has been reasonably clear that, if certain conditions could be altered, the Debtor could be made viable. The needed changes—elimination of plant redundancy, reductions in crew consists, full reimbursement for passenger service, improvement in rates and divisions, and, more recently, substantial governmental financial assistance—are not within the control of the Trustees or this Court, and have not been realized." JA 84 at 88.

The accomplishment of the very task the Penn Central Reorganization Court found impossible under Section 77 —the creation of a viable system—is described in the Rail Act as the first goal of the Final System Plan. Section 206(a)(1). To achieve this goal, the Act provides the resources and mechanisms—unavailable in Section 77—that are necessary.

1. *Elimination of Excess Capacity*

The Penn Central Trustees,[29] the Department of Trans-

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and the Conference Report is dated (in the House) December 20 and (in the Senate) December 26, 1973. Enactment occurred on January 2, 1974.

[28] *In re Penn Central Transp. Co.*, Bky. No. 70-347, Memorandum and Order No. 1543 (E.D. Pa., May 2, 1974), JA 84 at 102.

[29] The Penn Central Trustees' February 1972 Report, J. Doc. 4 at 2, proposed "(i) taking advantage of the potential for increased

portation,[30] the Penn Central Reorganization Court,[31] and Congress[32] have all recognized that the Northeast railroads, and the Penn Central in particular, are burdened by an excessive physical plant. By January 1, 1973, the Trustees had filed applications with the ICC to abandon over 3,000 miles of lines which they deemed to be uneconomic, of which the ICC had approved less than 800 miles.[33] By then the Trustees had concluded that at this rate the reduction needed to produce net income by 1976 could not be achieved. The problem of plant redundancy also includes the operation of duplicative facilities by two railroads in an area that can support only one, a problem that the Rail Act can ameliorate but Section 77 cannot.[34]

The Act offers a process of streamlining and restructuring that simply was not available to the Reorganiza-

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efficiency made possible in theory by the 1968 merger but never realized in fact, (ii) abandonment of those freight lines which have neither busines nor public service justification, and (iii) making appropriate arrangements for continuing those freight lines found to be essential to the public service but inoperable on a sound business basis." See also Trustees' January 1973 Report, J. Doc. 8; Trustees' April 1974 Report, J. Doc. 10.

[30] See *Northeastern Railroad Problem, supra* at 6. Congress obviously accepted the premise, which creditors now ask this Court to reject, that "if permitted to emerge unencumbered from the tangled web that now embraces these carriers, a new entity (or entities) would generate sufficient profits and be able to raise sufficient cash to finance operations and expansions." *Id.* See also the Secretary's Section 204 report, *Rail Service in the Midwest and Northeast Region*, February 1, 1974 (*"Secretary's Rail Service Report"*).

[31] Memorandum and Order No. 1543, *supra*, JA 84 at 88.

[32] House Report at 27.

[33] Penn Central Trustees' January 1973 Report, J. Doc. 8 at 3.

[34] *Secretary's Rail Service Report, supra* at 3, concludes that 96% of the 1972 freight carloads carried on the railroads in reorganization could have been accommodated on 75% of the 1972 route mileage.

tion Courts. In general, Section 77 makes no provision for restructuring rail operations, and discontinuance of service and abandonment of property could be accomplished only on a line-by-line basis following standard ICC procedures. The Act turns the process around by permitting USRA to select the services and properties that are to be kept in operation, with essentially automatic discontinuance and abandonment of everything else. That process goes far to explain why there is a reasonable prospect of creating a viable Conrail under the Act even though the Penn Central and other railroads now in reorganization cannot be made viable in Section 77 proceedings.

(a) *Abandonments* have been difficult, and have not been accomplished with sufficient speed, because of the need to comply with ICC and National Environmental Policy Act procedures.[35] The Act dispenses with the need for both, and permits USRA—in the absence of reasonable objection from affected state or local governments—to authorize prompt interim abandonments. Sections 304 (f) and 601(c).

A core system could not be established by the Penn Central Reorganization Court because it has no authority

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[35] See *Harlem Valley Transp. Ass'n* v. *Stafford*, 360 F. Supp. 1057 (S.D.N.Y. 1973), aff'd, No. 73-2496 (2d Cir., June 18, 1974). Between the district court's decision in that case in July 1973 and the court of appeals' affirmance in June 1974, there was a *de facto* moratorium on almost all abandonment applications pending before the ICC.

The economic burden imposed on railroads by lengthy abandonment procedures is emphasized in House Report at 27 and 55 and in the debates at 119 Cong. Rec. S22,483 (daily ed. Dec. 11, 1973) (remarks of Senator Hartke) and 119 Cong. Rec. S23,782-83 (daily ed. Dec. 21, 1973) (remarks of Senator Hartke). In addition, the advantageous procedures for abandonments contained in the Act were stressed by the President when he signed the bill into law. 10 Presidential Documents: Richard Nixon 8 (Jan. 2, 1974).

to order the restructuring of the debtor's rail operations.[36] Even a final reorganization plan under Section 77 would be dependent on piecemeal abandonments, each subject to ICC approval.[37] The Act, on the contrary, permits the selection of properties that have going-concern value and permits the prompt discontinuance of service, without ICC action, on all lines and properties not so selected.[38]

(b) *Excessive duplication of plant and service* among competing carriers could not be effectively dealt with by the Section 77 reorganization process because of the difficulty of negotiations between carriers that are in reorganization,[39] the need for ICC approval of mergers and consolidations [40] and the ICC's lack of authority under Section 77 to authorize mergers not initiated by the debtor,[41] antitrust law considerations, and, of course,

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[36] Section 77 makes no provision for a comprehensive restructuring of rail operations as part of the reorganization process. Discontinuance of service and abandonment of lines can be accomplished, during Section 77 proceedings, only by ICC proceedings on a line-by-line basis. For example, abandonments that would require the closing of some line segments which, viewed individually, appear viable, but whose continuation reduces the carrier's overall earnings from what they could be if the carrier were allowed to concentrate its traffic on fewer routes may not be possible within present ICC regulatory guidelines. Spychalski, *Imperfections in Railway Line Abandonment Regulation and Suggestions for their Correction*, 40 ICC Prac. J. 454, 456-57 (1973). No such constraints limit the broad power of USRA to exclude rail lines from the Conrail system.

[37] See *Penn Central Transportation Co. Reorganization*, Corp. Reorg. Rep. (Penn Central), Document No. 95, at 1102:86, 104 (ICC Finance Docket No. 26241, Sept. 28, 1973).

[38] Sections 304(a) and 601(b). Operations may be continued on a fully subsidized basis. See Section 304(c).

[39] See House Report at 29.

[40] Interstate Commerce Act § 5, 49 U.S.C. § 5.

[41] See *St. Joe Paper Co.* v. *Atlantic Coast Line R.R.*, 347 U.S. 298 (1954). That case states "that those who in the absence of § 77 would wield the corporate merger powers must initiate and work

each reorganization court's lack of jurisdiction over other carriers in reorganizations under the supervision of other judges. The Act offers an entirely different framework. USRA will have final control, subject only to review by Congress, over the design of the intramodal environment in which Conrail will compete.[42] USRA can encourage competition where traffic can support it, but USRA can control competition among carriers in reorganization and duplication of facilities where necessary to produce a viable system.

(c) *Transfer of the burden of uneconomic but significant lines to the states, localities, and private interests affected was difficult under Section 77 but becomes possible under the Act.* The Penn Central Trustees, as early as February 15, 1972, expressed the hope that lines that were producing losses for the Penn Central but were asserted to be important to particular localities and shippers could be continued, under contracts with those localities and shippers that would make Penn Central whole.[43] Penn Central, however, had little bargaining leverage because the alternative of selective discontinuance of service was a very remote possibility. The Department of Transportation's proposals for the Northeast rail problem included the suggestion that "states and local communities will be given the opportunity to ensure the continuation of rail service if they find it necessary and are willing to subsidize the deficits *fully*." [44] Under Sec-

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out the merger now." *Id.* at 309 n. 12. "The implication is plain: the officers and directors of the Debtor are the ones entitled to initiate and work out a merger." *In re Florida East Coast Ry.*, 137 F. Supp. 693, 694 (S.D. Fla.), aff'd per curiam, 227 F.2d 518 (5th Cir. 1955).

[42] See Sections 207 and 208.

[43] Penn Central Trustees' February 1972 Report, J. Doc. 4 at 2. See also Trustees' February 1973 Report, J. Doc. 9 at 1.

[44] *Northeastern Railroad Problem, supra* at 48 (emphasis added).

tion 304 of the Act, service on lines not included in the Final System Plan may be terminated promptly unless the service is fully subsidized or the lines are purchased and operations are provided for by the purchaser.[45]

2. *Elimination of Unnecessary Labor Expense*

The Penn Central Trustees and the Reorganization Court identified elimination of excess labor costs for railway operating personnel as another requirement for a successful reorganization.[46] This problem involves both crew size on operating lines and labor protection in connection with necessary abandonments.[47] Title V of the Rail Act offers labor protection in connection with necessary abandonments, and authorizes $250 million of federal assistance to pay the cost of this protection. Section 509.

3. *Elimination of Uncompensated Passenger Service*

The third condition for a successful reorganization of the Penn Central is the elimination of the burden of passenger service for which the railroad is not fully compensated.[48]

One of the major issues in litigation between the Penn Central and Amtrak has been whether Penn Central should receive a return on investment as part of its compensation for the use by Amtrak of its rail prop-

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[45] See Section 304(a)-(d).

[46] *E.g.*, Memorandum and Order No. 1543, *supra*, JA 84 at 88; Penn Central Trustees' February 1972 Report, J. Doc. 4 at 2; Trustees' April 1972 Reorganization Plan, J. Doc. 5 at 1; Trustees' January 1973 Report, J. Doc. 8 at 3.

[47] See, *e.g.*, *Penn Central Transportation Co. Reorganization*, *supra*, Corp. Reorg. Rep. (Penn Central) at 1102:104-06; Penn Central Trustees' January 1973 Report, J. Doc. 8 at 3; Trustees' October 1972 Report, J. Doc. 7 at 3-4.

[48] See, *e.g.*, Memorandum and Order No. 1543, *supra*, JA 84 at 88; Penn Central Trustees' February 1972 Report, J. Doc. 4 at 5.

erties in the Boston-Washington corridor. The Rail Act provides for the sale or lease to Amtrak of those rail properties. Sections 206(c)(1)(C), 601(d).[49]

As pointed out above, the Act further provides for a system of subsidies, involving matching federal grants authorized at $180 million for two years to state, local, or regional authorities, to ensure the continuation of rail services, including passenger services. Sections 401 and 402. This USRA authority should enhance the prospects that other governmental entities will subsidize uneconomic commuter passenger operations. Also, USRA can make loans to state, local, or regional transportation authorities to acquire rail properties and to modernize their properties. Section 403.

4. *Increased Revenues Through Application of New Financing*

The Penn Central Trustees have noted that the Penn Central has been caught in "a vicious circle."[50] In order to become viable it needed to increase the volume and efficiency of freight traffic and operations, but inadequate revenues and lack of borrowing capacity made unattainable the necessary substantial additions and improvements to the physical plant as well as substantial catch-up maintenance.

The Act offers a means by which Conrail can break the circle. Section 210 provides, in effect, $1 billion in federally guaranteed obligations of USRA to enable Conrail to borrow funds on the favorable interest and payment terms enjoyed by the United States. Half of this sum must be used to rehabilitate and modernize the phy-

[49] The method of compensation for services provided to Amtrak is covered by the Rail Passenger Service Act of 1970, as amended, 45 U.S.C. §§ 501 *et seq.*

[50] Penn Central Trustees' January 1973 Report, J. Doc. 8 at 2. See also Trustees' April 1974 Report, J. Doc. 10 at 3.

sical plant, and USRA may make available the remaining half, if necessary, for that purpose.[51]

The Act, clearly, is broadly responsive, and in many ways more than responsive, to the concerns expressed by the Penn Central Trustees when they first outlined their views on the necessary government financial assistance.[52] They themselves, of course, have acknowledged the soundness and responsiveness of the Act as it relates to the creation of a self-sustaining rail service system:

> "The basic concept of the Act is, in the Trustees' judgment, sound. The Act envisions the transfer to a new entity (Consolidated Rail Corporation, CRC) of those Penn Central lines, and lines of other bankrupt carriers, which, following a thorough planning process, are found to offer the prospect of a viable rail network in the Northeast. Provision is made for public support or abandonment of those lines not deemed essential in the restructuring process. Provision is also made for government-guaranteed financing of improvements to the plant being conveyed to CRC. The Act embodies a labor protection arrangement, satisfactory to both labor and industry, whereby Federal funding is available to certain employees whose services would not be required after the restructuring." [53]

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[51] In the interim period before implementation of the Final System Plan, USRA is authorized to issue up to $150 million in obligations to finance agreements with the Penn Central and other railroads in reorganization for the maintenance and improvement of rail properties. Section 215. In addition, $85 million in subsidies is authorized for the continued provision of essential transportation services. Section 213.

[52] Penn Central Trustees' February 1973 Report, J. Doc. 9 at 1-2.

[53] Penn Central Trustees' April 1974 Report, J. Doc. 10 at 4. The Penn Central Reorganization Court shares the Trustees' view that "the basic approach of the statute is fundamentally sound." Memorandum in Support of Findings and Order No. 1596, *In re Penn Central Transportation Company, Debtor* (E.D. Pa., July 2, 1974), JA 124 at 148. (*"Penn Central* '180-Day' Decision").

I. The Court Below Should Have Denied Equitable Relief and Dismissed the Complaints as to the "Taking" Issues on the Ground that Plaintiffs Have an Adequate Remedy at Law Under the Tucker Act

Plaintiffs alleged in the court below that implementation of the Rail Act would cause, or threatened to cause, a "taking" of their property for public use without just compensation, contrary to the Fifth Amendment to the Constitution. They alleged two sorts of "takings": first, they contended that there would or might be a transfer of rail properties pursuant to the Final System Plan for less than the constitutionally required consideration (alleged "permanent taking"); second, they contended that by allegedly requiring Penn Central to continue operating its railroad until the implementation of the Final System Plan, the Rail Act would or might cause an "interim" or "erosion" taking for which just compensation would be due.

Appellant believes that when the processes of the Rail Act have run their course, no such taking, of either kind, will be found to have occurred. The ultimate determination of this question, however, will depend on facts not of record in this case, events in the future including the actions of USRA and other governmental bodies, and the resolution of many large and complex statutory and constitutional issues whose exact scope will depend on the course of events.

Appellant urged the court below to follow the decisions of this Court in similar cases and decline to inquire into the merits of the taking allegations, on the ground that if future actions under the Rail Act should lay a basis for a claim to compensation beyond the consideration provided for railroad estates under the Rail Act, plaintiffs have an adequate legal remedy in the form of a suit in the Court of Claims under the Tucker Act. The rule of law for which Appellant contended can be simply

stated: an equity court may never enjoin congressionally authorized, otherwise proper federal action on the ground that it may cause a taking for which compensation may be due, because a plaintiff always has another forum, the Court of Claims, in which he can obtain just compensation if his claims are upheld. This is the teaching of *Hurley* v. *Kincaid*, 285 U.S. 95 (1932), and accounts for the fact that, so far as we are aware, no federal court has issued such an injunction between the decision in *Hurley* and the present case.

The court below did not question the principle that equitable relief should be denied, without further inquiry, when there exists an adequate remedy at law. Nor did the majority question the fact that the Tucker Act remedy, if available to railroad estates, would be an adequate remedy.[54] Rather, it ruled that the Court of Claims would not have jurisdiction over any claim for a taking allegedly caused by the Rail Act because the Rail Act does not explicitly make a Tucker Act remedy available. It said that to "read a Tucker Act remedy into the [Rail] Act" would be "judicial legislation on a grand, if not arrogant, scale." JA 9 at 53.

The court below, we respectfully submit, put the Tucker Act question the wrong way around. The century-old Tucker Act needs no supplemental implementing legislation, judicial or otherwise. The remedy is available unless later legislation repeals or modifies it. Nothing in the Rail Act repeals or modifies the Tucker Act and nothing in the Rail Act provides a basis from which repeal or modification can be inferred, especially when the consequence of the inference is to invalidate a major federal statute.

The Tucker Act is the basic jurisdictional statute for suits seeking just compensation from the United States

[54] The adequacy of the remedy is discussed below at pp. 58-60.

for takings of private property for public purposes. There is no need for Congress, every time it passes substantive legislation that might lead to a taking of private property, to make an explicit or implicit new grant of authority in order for the Court of Claims to exercise its historic jurisdiction. No court, so far as we have been able to discover, has ever required such a supplementary grant of jurisdiction, and no case suggesting such a notion was cited by the court below.

The question, properly framed, is whether Congress, in the Rail Act, took away the Court of Claims' jurisdiction with respect to claims based on actions authorized by the Rail Act. The court below found a congressional intent to bar a Tucker Act remedy, not in the words of the Rail Act, which is silent, nor even in the reports of the congressional committees, none of which discuss the point. Rather, the entire decision rests on several exchanges among individual members on the floor of the Senate and House. But these exchanges, more thoroughly discussed below, show only a congressional intent to restructure Northeast/Midwest rail services in a manner that Congress believed would not result in any taking or transfer of property for less than the "constitutional minimum" value that the Rail Act expressly recognizes to be due. There is no basis in these exchanges for concluding that Congress intended to bar the normal Tucker Act remedy if, contrary to Congress' expectation, the steps taken pursuant to the Rail Act should require transfers for a consideration that the Special Court (and this Court on review) determined to be less than the "constitutional minimum."

Nevertheless, the court below read these portions of the legislative history as showing an affirmative intent in the Rail Act to deny the constitutionally required remedy even if the consideration provided for the transfers under the Final System Plan is eventually found to be less than

the "constitutional minimum." In so doing, as we show below, that court engaged in the very type of judicial legislation from which it professed to abstain.

A. *Repeal of the Jurisdiction of the Court of Claims Under the Tucker Act To Award Just Compensation for Any Taking of Private Property for Public Use May Not Be Inferred from Later Statutes that Do Not Expressly Repeal or Modify that Act and Do Not Provide an Equivalent Remedy*

The Tucker Act, 28 U.S.C. § 1491, confers jurisdiction on the Court of Claims:

> "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

Section 1491 is the Court of Claims' "general jurisdictional statute." *Ralston Steel Corp.* v. *United States*, 340 F.2d 663, 668 n.5 (Ct. Cl.), cert. denied, 381 U.S. 950 (1965); *Simon* v. *United States*, 113 Ct. Cl. 182, 190-91 (1949); see also *Eastport Steamship Corp.* v. *United States*, 372 F.2d 1002, 1007-08 (Ct. Cl. 1967) (dictum), and *Jacobs* v. *United States*, 290 U.S. 13 (1933). One is not required to seek in any later act, no matter how significant, a renewed grant of jurisdiction to the Court of Claims to hear a suit "founded" upon the later act or upon any constitutional claim thereunder, including any claim for just compensation for an alleged taking. The Court of Claims has such jurisdiction under 28 U.S.C. § 1491 unless Congress has in the later act withdrawn it.

In *Yearsley* v. *W.A. Ross Construction Co.*, 309 U.S. 18 (1940), for example, plaintiffs sought damages against

a government contractor for land erosion alleged to have been caused by performance of a government construction contract. The statute authorizing the construction contract was silent on claims of government liability to third parties. The Court held that the defendant contractor could not be held liable for carrying out a contract authorized by Congress and found it unnecessary to determine the merits of plaintiffs' argument that they were entitled to recover compensation from the defendant for what amounted to a governmental taking of their property. If a taking had occurred, the Court said, an adequate remedy for compensation existed by way of suit in the Court of Claims, because

> "in the case of a taking by the Government of private property for public use . . . it cannot be doubted that the remedy to obtain compensation from the Government is as comprehensive as the requirement of the Constitution . . . ." *Id.* at 22 (Mr. Chief Justice Hughes).

Hurley v. *Kincaid*, 285 U.S. 95 (1932), is even more directly in point and is, we submit, dispositive of this case. *Hurley* involved a statute authorizing a flood control project and providing for condemnation of any land in the path of planned diversion channels. Plaintiff sought to enjoin work on the project, alleging that his land had not been condemned although his land was in the path of the planned diversion channels. Although the authorizing statute expressly provided that the United States shall have "[n]o liability of any kind . . . for any damage from or by floods" (*id.* at 102 n.2), a unanimous Court, speaking through Mr. Justice Brandeis, held that injunctive relief should have been denied. The Court reasoned that if the acts alleged did constitute a taking, just compensation under the Tucker Act was an available and adequate remedy at law.

Hurley shows how reluctant courts have been to infer that later statutes bar the Tucker Act remedy; the Court

found that remedy available despite a statutory provision expressly barring Government liability for flooding. *Hurley* also is living proof of Chief Justice Hughes' statement in *Yearsley* that if the Government takes property, the remedy to obtain compensation "is as comprehensive as the requirement of the Constitution . . ." (309 U.S. at 22), and demonstrates that a congressionally directed taking cannot be enjoined because a Tucker Act remedy is always available until Congress affirmatively withdraws it.

The Court of Claims' jurisdiction exists even though no taking was intended and even though, apart from the Fifth Amendment, no governmental promise to pay compensation was made at or before the time of taking. *Armstrong* v. *United States*, 364 U.S. 40, 48-49 (1960); *United States* v. *Dickinson*, 331 U.S. 745 (1947); *United States* v. *Causby*, 328 U.S. 256 (1946); *Jacobs* v. *United States*, 290 U.S. 13 (1933); *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U.S. 327, 330 (1922); *Richard* v. *United States* v. *Stone Corral Irrigation Dist.*, 282 F.2d 901, 904 (Ct. Cl. 1960). See also *Malone* v. *Bowdoin*, 369 U.S. 643, 647 n. 8 (1962) (dictum).[55] For example, in *Causby*, *supra*, this Court held that the Court of Claims could award compensation on a claim, based directly on the taking clause of the Fifth Amendment, that low and frequent flights

[55] The earlier cases, such as *Portsmouth Harbor*, reached the result on an implied contract theory. "If the acts amounted to a taking, without assertion of an adverse right, a contract would be implied whether it was thought of or not." 260 U.S. at 330. A similar rationale was used in *Yearsley*. Later cases, such as *Causby*, find the Government's promise to pay in the Constitution itself. Thus it is not necessary to find a promise to pay implied in the legislation which authorizes the taking. Nothing in these cases supports the suggestion that they are limited to situations where Congress did not attempt to prescribe any consideration for the property taken, and *Yearsley* and *Hurley* show that no such limited reading is proper.

of military aircraft took the property of the owner beneath the flight path, even though the Government's intent neither to take nor to pay was clear from its reliance in court on the Air Commerce Act of 1926 granting to the United States "complete and exclusive national sovereignty in the air space" over this country, and to the citizen "a public right of freedom of transit in air commerce through the navigable air space . . . ." [56]

Congress should not be held to have repealed or limited the basic jurisdiction of the Court of Claims without the clearest evidence of an explicit intention to do so. A repeal of the jurisdiction of any federal court may not be lightly inferred. *Federal Sugar Refining Co.* v. *United States*, 30 F.2d 254, 255 (2d Cir. 1929), rev'd on other grounds sub nom. *Johnson* v. *United States Shipping Board Emergency Fleet Corp.*, 280 U.S. 320 (1930).[57]

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[56] 328 U.S. at 260 (footnote omitted). Of course, the result is different (a) in cases in which there was a mere trespass ("sounding in tort") rather than a taking, *e.g.*, *Tempel* v. *United States*, 248 U.S. 121, 129 (1918), and (b) in cases in which the taking was by a federal officer acting outside the scope of his authority. In the latter cases, there is no taking by the United States because, as this Court put it in *Hooe* v. *United States*, 218 U.S. 322, 335 (1910), the officer does not, "in any legal or constitutional sense, represent the United States, and what he does or omits to do, without the authority of the Congress, cannot create a claim against the Government 'founded upon the Constitution.'" This latter theory accounts for the suggestion in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 585 (1952), that there was "doubt" about the ability to recover in the Court of Claims for a taking made by the Executive without statutory authority. Although both the trespass and the lack-of-authority cases sometimes involve difficult distinctions, this case is nowhere near either border because here the actions alleged to threaten a taking are expressly authorized by an act of Congress that is asserted to be unconstitutional "on its face."

[57] *Johnson* v. *United States Shipping Board Emergency Fleet Corp.*, *supra*, does not support the view that Congress intended in enacting the Rail Act to oust the Court of Claims of jurisdiction. The Admiralty Act, the statute involved in *Johnson*, explicitly created another basis for claims against the United States and pro-

With respect to the Court of Claims in particular, Congress' intent to limit its jurisdiction "must be evidenced expressly or by necessary implication." *H. E. Hele* v. *United States*, 100 Ct. Cl. 289, 294 (1943) (statute providing that reasonable value of improvements on tracts occupied by the United States "be determined by the courts of the Canal Zone" did not oust Court of Claims of jurisdiction over suit brought under predecessor of 28 U.S.C. § 1491 for breach of contract arising from failure to pay reasonable value). See also *United States* v. *Pfitsch*, 256 U.S. 547 (1921).[58]

Moreover, the fact that Congress authorized a limited amount of appropriations and made a limited amount of government-guaranteed obligations available as part of the consideration for acquisition of rail properties, in the belief that the Rail Act would not require the transfer of property for less than the "constitutional minimum," does not indicate that Congress intended to withdraw a remedy if such transfers should occur. In *Fort Berthold Reservation* v. *United States*, 390 F.2d 686 (Ct. Cl. 1968), the Court of Claims held that acquisition of Indian lands under a statute containing a provision fixing a per-acre payment was a taking, for which the Court of Claims could award compensation above the statutory

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vided a constitutionally adequate remedy by suits in admiralty. The case thus illustrates only that where the United States creates a right against itself and provides a special and constitutionally adequate remedy, it may make that remedy exclusive. See *United States* v. *Babcock*, 250 U.S. 328 (1919).

[58] The court below also relied on the facts that authorizations for emergency assistance under Section 213 of the Rail Act are limited in amount and that Congress had appropriated less than half of the authorized amount. In fact, Congress has now appropriated almost all of the authorized amount. See Foreign Assistance and Related Programs Appropriations Act, 1974, Pub. L. 93-240, 87 Stat. 1048 (Jan. 2, 1974) ($35 million); Second Supplemental Appropriations Act, 1974, Pub. L. 93-305, 88 Stat. 195 (June 8, 1974) ($39.8 million).

per-acre limit. The specification of a per-acre price by Congress was held not to oust the Court of Claims of jurisdiction to award a larger amount as just compensation.

Finally, where a statute that is claimed to repeal by implication the jurisdiction of a court is also claimed to be unconstitutional when so read, the court must adopt any reasonable construction that can save the statute's constitutionality. For more than a century this precept has been invoked to save the constitutionality of statutes where First Amendment rights are involved, *United States Civil Service Commission* v. *National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548, 571 (1973); *American Communications Association, CIO* v. *Douds*, 339 U.S. 382, 407 (1950); and to construe in a constitutional manner statutes affecting "existing contracts, rights of actions, or . . . vested rights," *Twenty Per Cent Cases*, 87 U.S. 179, 187 (1873), as well as the Bankruptcy Act itself, *Wright* v. *Vinton Branch of the Mountain Trust Bank*, 300 U.S. 440, 461 (1937).[59]

B. *The Rail Act Does Not Show an Intent To Deprive the Court of Claims of Its Tucker Act Jurisdiction To Hear Any Case Claiming Just Compensation*

When Congress intended the Rail Act to override other important federal statutes, it did not rely on judicial inference and conjecture. For example, in Section 601 of the Rail Act, entitled "Relationship to Other Laws," Congress explicitly declared the antitrust laws to be in-

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[59] The decision below also violates the rule of construction that repeal of a statute is not to be inferred unless there is no other reasonable way to construe the subsequent statute. *E.g.*, *Amell* v. *United States*, 384 U.S. 158 (1966); *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555 (1963); *FTC* v. *A.P.W. Paper Co.*, 328 U.S. 193 (1946); *Nagano* v. *McGrath*, 187 F.2d 759, 766-67 (7th Cir. 1951), aff'd by an equally divided court, 342 U.S. 916 (1952); *Fawcett* v. *C.I.R.*, 149 F.2d 433, 435 (2d Cir. 1945).

applicable to the actions taken to formulate the Final System Plan (Section 601(a)); it declared portions of the Interstate Commerce Act and the Bankruptcy Act to be inapplicable to the extent inconsistent with the Rail Act (Section 601(b)); and it declared certain provisions of the National Environmental Policy Act of 1969 inapplicable to actions authorized by the Rail Act before the effective date of the Final System Plan. Section 601(c). Congress also provided that a railroad in reorganization could discontinue service or abandon rail property only in accordance with the Rail Act, notwithstanding

> "any provision of any other Federal law, the constitution or law of any State, or decision or order of, or the pendency of any proceeding before any Federal or State court, agency, or authority." Section 304(f).

In all, the Rail Act contains no fewer than 13 provisions repealing or making inapplicable provisions of various laws or excluding the jurisdiction of federal courts on various subjects.[60]

There is, of course, no explicit provision relating to the Tucker Act. One searches the Rail Act in vain for a sentence such as "The Court of Claims shall have no jurisdiction over any action alleging that the property of any person has been taken pursuant to this Act without just compensation." The fact that Congress gave meticulous and explicit attention to modifying other laws should at least make one pause before concluding that Congress, without saying so, amended the Tucker Act and implicitly removed the traditional remedy should actions taken pursuant to the Rail Act give rise to a claim for just compensation for a taking of property.

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[60] In addition to those cited in the text, see Sections 202(a), 205(c)(2), 206(d)(3), 207(b), 209(a), 209(b), 303(b)(2), 303(d), and 304(c).

Nor do any provisions of the Rail Act imply that the Court of Claims is to be deprived of jurisdiction. The Act's statement of congressional findings and purposes emphasizes the essential nature of the rail services which the Act seeks to preserve, the immediate threat to those services, the necessity for prompt and substantial action by the federal government to protect those services, and the need to provide federal financial assistance "at the lowest possible cost to the general taxpayer." Section 101(b)(6). These goals—not the desire to deny access to the Court of Claims—explain the few provisions of the Rail Act that the court below relied on as evidence of an intent to amend the Tucker Act.

The court below apparently inferred an intent to repeal the Tucker Act from Section 209(b), providing that "all judicial proceedings with respect to the final system plan" shall be consolidated before the Special Court, and from the further provision in Section 303 (d) for appeal from the Special Court's determinations and findings directly and exclusively to this Court.[61] In the first place, as a matter of language, a suit against the United States for compensation for erosion that occurs while the Act's processes work is not, on any normal reading of the words, a "proceeding with respect to the final system plan." More fundamentally, the purposes of these provisions, as expressed by Senator Javits, have nothing to do with excluding suits against the United States:

> "Our experience in the environmental field indicated what a mess can be made of the best laid plans by a diversity of legal proceedings all over the Nation, with different theories canceling each other out very often, and not resolvable until you get to the Supreme Court, and sometimes not even then. Here, by exercising the authority we first exercised

[61] JA 9 at 46-49, 51.

> in the Judiciary Act of 1789, we have provided for consolidating these proceedings and appointing a special court for the purpose. I think it is [a] very, very gifted position, for which the Committee is entitled to great credit." 119 Cong. Rec. S23,780 (daily ed. Dec. 21, 1973).

The function of the Special Court is to prevent a multiplicity of suits in different courts on such questions as the value of the rail properties transferred to Conrail and of the consideration received by the transferors.[62] A subsequent suit against the United States in the Court of Claims would neither infringe upon the Special Court's functions nor invalidate the congressional purpose in consolidating the valuation proceedings. Indeed, if the Special Court (and the Supreme Court on review) found the values of the rail properties transferred to be greater than the values of the consideration provided therefor, so that the consideration fell below the "constitutional minimum," these values would presumably be binding on the private parties in any subsequent Court of Claims suit.[63] Whether or not these determinations were technically binding on the United States,[64] they would still be dispositive, as a practical matter, of the same issues in the Court of Claims.

The court below also referred to Section 303(c), which specifies how the Special Court shall determine "fair and equitable" compensation and states the means (not including a judgment against the United States) by which the Special Court could remedy any deficiency, as showing an intent to bar subsequent claims under the Tucker

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[62] House Report at 52.

[63] See *Marine Insurance Co.* v. *United States*, 410 F.2d 764 (Ct. Cl. 1969); *Clement* v. *United States*, 140 F.Supp. 573 (Ct. Cl. 1956).

[64] See *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940).

Act.[65] But the court below ignored the provisions of Section 303(c) that equate "fair and equitable" with "constitutional minimum." Those provisions require the Special Court to determine whether the value of the consideration to be received by each rail estate is "fair and equitable" and whether it is "more fair and equitable than is required as a constitutional minimum," in which event Section 303(c)(3) instructs the court to adjust the consideration down to that level.

The quoted language and the entire structure of Section 303(c) show beyond doubt that Congress intended to provide compensation out of the means provided by that section that would equal the "constitutional minimum"—no more and no less. It cannot be fairly construed to mean that Congress intended to provide *less* than the "constitutional minimum." Accordingly, it cannot be construed to mean that if the Special Court (and the Supreme Court on review) should ultimately find that the value of the consideration available for award under Section 303(c) to any rail estate is less than the "constitutional minimum," Congress intended to deny the traditional Tucker Act remedy for the difference. Compare *Fort Berthold Reservation* v. *United States*, *supra*, holding that a statutory per-acre price for transferred lands did not bar the Court of Claims from awarding compensation above the statutory price. To infer here that the statutory consideration is exclusive even if below the "constitutional minimum" recognized in the statute is to suggest that Congress deliberately intended to act in an unconstitutional manner.[66]

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[65] JA 9 at 50-51.

[66] Such an inference would contradict the flat statement of Representative Adams, for example, that consideration other than Conrail common stock was to be "at the lowest possible limit to meet the constitutional guarantees." 119 Cong. Rec. H11,876 (daily ed. Dec. 20, 1973).

C. *The Legislative History Does Not Show an Intent To Deprive the Court of Claims of Its Tucker Act Jurisdiction To Hear Any Case Claiming Just Compensation*

The most plausible reading of the Act and its legislative history is that Congress believed that Conrail would be a viable and profitable entity [67] and that as a result Conrail's securities plus government-guaranteed USRA obligations, deficiency judgments against Conrail, if necessary, and "other benefits" would have a value equal to the consideration due to the railroad estates—the "constitutional minimum." The House Report expressly declared the belief that stock in the reorganized system plus other securities and consideration would in fact prove constitutionally adequate:

> "The Committee intends that the valuation of the common stock be based on the intrinsic value of that stock, taking into account the full benefits to be realized from the reorganized rail system embodied in the Final System Plan. The Committee expects that the intrinsic value of the stock of [the] new Corporation will be found to be at least equal to the fair and equitable value [*i.e.*, the "constitutional minimum" referred to in Section 303(c)] of the rail properties conveyed in exchange." [68]

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[67] See, *e.g.*, Senate Report at 18; House Report at 54; 119 Cong. Rec. S23,783 (daily ed. Dec. 21, 1973) (remarks of Senator Hartke); *id.* at S23,778 (remarks of Senator Beall); 119 Cong. Rec. S22,485 (daily ed. Dec. 11, 1973) (remarks of Senator Hartke); 119 Cong. Rec. H9743 (daily ed. Nov. 8, 1973) (remarks of Representative Kuykendall).

[68] House Report at 54. The intent to act constitutionally appears as well from other passages in the House Report, such as:

> "The Committee feels that this legislation is the most preferable alternative for a solution to the crises in the Northeast. It feels that this legislation takes into account the many Constitutional problems interwoven into the various bankruptcies involved." *Id.* at 29; see *id.* at 47.

[Footnote continued on page 54]

The House Report also stated at 55:

> "The Committee is of the opinion that provisions of this title of the Act, and especially the provision for deficiency judgment and payment of obligations of the Association provided in the preceding subsection, are more than adequate to guarantee that the creditors of the bankrupt railroad will receive all that they may Constitutionally claim." [69]

Congress plainly intended to provide constitutionally adequate compensation to the owners of the rail properties transferred to Conrail. Whether the consideration specifically provided in the Act will be adequate for that purpose is both premature and, for the purpose of this argument, beside the point. There is nothing in the legislative history to support the view that *if* the consideration is eventually found by the Special Court (and by this Court on review) to be less than "fair and equitable"—*i.e.*, less than the "constitutional minimum"—Congress intended to foreclose a Court of Claims remedy for the difference.

The few statements on the floor of the Senate and House quoted by the court below to show that Congress intended to bar subsequent claims under the Tucker Act prove no such thing.[70] They reinforce the view that Con-

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[68] [Continued]
See also 119 Cong. Rec. H9731-32 (daily ed. Nov. 8, 1973) (remarks of Representative Adams); *id.* at H9742 (remarks of Representative Kuykendall).

[69] In both of the above quotations, as Section 303(c) clearly shows, the Committee regarded "fair and equitable" as effectively synonymous with the "constitutional minimum." See also House Report at 2, 31, 43.

[70] The majority opinion below professed to be guided in construing the Rail Act by Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947). Mr. Justice Frankfurter's reflections included the following at 543:

[Footnote continued on page 55]

gress thought it was providing constitutionally adequate consideration under the Act. They indicate nothing about the intention of Congress in the event that the consideration provided under the Act should be found by the Special Court to be less than the "constitutional minimum."

On the Senate Floor, in commenting on the Conference Report, Senator Hartke stated:

> "If we did nothing while continuing to mandate rail service, there is the distinct possibility in view of the prior action of Congress that a number of these people could make a claim against the Government which could be sustained in the Court of Claims." 119 Cong. Rec. S23,783-84 (daily ed. Dec. 21, 1973).

The Senator's speech does not support the inference apparently drawn by the court below (JA 9 at 48-51) that should the Special Court find the value of the consideration paid to a rail estate to be less than "fair and equitable" and therefore less than the "constitutional minimum," Congress intended to deny a remedy under the Tucker Act and thereby to effect a "taking" for less than just compensation. Indeed, Senator Hartke's words can fairly be read to recognize the continuing availability of a suit in the Court of Claims, and merely to predict that the public funding, the plan of reorganization and consolidation, and the forms of consideration provided

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[70] [Continued]

> "[Statements] made impromptu in the heat of debate, less informing in cold type than when heard on the floor, will hardly be accorded the weight of an encyclical.
>
> "Spurious use of legislative history must not swallow the legislation so as to give point to the quip that only when legislative history is doubtful do you go to the statute."

This is not to suggest that the statements under discussion were not well considered. On the contrary, they were carefully addressed to a different point from the one that concerned the court below.

under the Act would be sufficient[71] to prevent such a claim from being "*sustained* in the Court of Claims." (Emphasis added.)

No different light on what Congress meant is cast by the portion of House debate set forth in the opinion below at JA 9 at 49. The dialogue focuses on "the deficiency judgment" and whether Section 303 would keep "the Federal court," *i.e.*, the Special Court, from having "the key to the Treasury" in "the court proceedings."[72] Because the context of this dialogue was not brought to the attention of the court below, that court may have gravely misconstrued its meaning. Neither the Senate nor the House bill contained a counterpart to Section 303(c)(2)(C), providing for a deficiency judgment in money against Conrail.[73] This provision was added in conference; the subsequent House discussion seems clearly intended to explain it and to assure members that any such money judgment against Conrail would not be a judgment against the United States. Representative Kuykendall's several references to "the Federal Court" and "the court proceedings" are, we submit, clearly references to the Special Court and its authority added in Section 303(c)(2)(C). Representative Adams' careful response that there was a limit to authorizations "under the bill" was entirely correct. As we read the dialogue, he was not asked and did not volunteer a view as to whether there could be liability of the United States otherwise than "under the bill"

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[71] Senator Hartke expected Conrail to be profitable, as is demonstrated by his comments cited at p. 53 note 67 *supra*.

[72] 119 Cong. Rec. H11,876 (daily ed. Dec. 20, 1973).

[73] See Section 303(c)(2) of the Senate bill, 119 Cong. Rec. S22,820 (daily ed. Dec. 13, 1973) and Section 502(d) of the House bill, 119 Cong. Rec. H9756 (daily ed. Nov. 8, 1973). Both versions authorized the Special Court to award additional Conrail or USRA securities to railroads in reorganization, but neither authorized the entry of a money judgment against either.

if, despite Congress' expectation to the contrary, the consideration available under Section 303(c) were judicially determined to be less than the "constitutional minimum." Indeed, the dialogue itself stressed Mr. Adams' concern that any amount other than Conrail securities "was to be at the lowest possible limit *to meet the constitutional guarantees.*" (Emphasis added.)

Earlier Mr. Adams had stated his view that the constitutional minimum in a reorganization is liquidation value, and asserted that "we have done everything possible in the legislative history . . . to make certain that no more than the *constitutional minimum* for liquidation as defined by the Supreme Court will be paid by the new corporation . . . ."[74] Mr. Adams, we submit, was contrasting a congressional commitment to consideration equal to liquidation value for non-rail purposes—which he regarded as constitutionally necessary and was willing to support—with an open-ended commitment estimated at up to $15 billion as the cost of "nationalizing" the properties, as some members of Congress had urged.[75]

We do not believe that this Court can fairly read the language in the dialogue about keeping "the Federal Court" from having "the key to the Treasury" as referring to claims against the Government for the amount, if any, by which the value of the consideration trans-

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[74] 119 Cong. Rec. H9732 (daily ed. Nov. 8, 1973) (emphasis added). Appellant does not accept the view that liquidation value is the constitutional minimum. Creditors and shareholders would appear to be entitled to liquidation value only if they have an underlying constitutional right to liquidate. Whether there is a constitutional right to liquidate an essential railroad that is, or can be made, viable has never been decided. The issue was expressly reserved by this Court in *New Haven Inclusion Cases*, 399 U.S. 392, 489-490 (1970).

[75] *Id.* at H9731.

ferred under the Act might some day be found by the Special Court (and on appeal by this Court) to fall below the "constitutional minimum." The inference that Congress intended to bar a claim under the Tucker Act for this difference does not square with its express recognition in Section 303(c) of the need to provide the "constitutional minimum."

To summarize, there are two possible ways to read the Rail Act in relationship to the Tucker Act. One is to agree with the court below that even if the Special Court should ultimately find the consideration available to be paid for rail properties under the Act to be less than the "constitutional minimum," Congress intended to bar a Tucker Act claim for the difference. A second is to conclude that Congress, believing that the value of the consideration available under Section 303 would in fact equal the "constitutional minimum," never addressed itself in the Rail Act to the question of what would happen if the Special Court found to the contrary.

We respectfully submit that the first reading, if it is possible, is not plausible since it requires the conclusion that Congress, in a statute expressly and repeatedly recognizing the existence of a "constitutional minimum," also decided to bar a claim to obtain that minimum. We further submit that under the second reading, the Tucker Act remedy must be found to remain available, and the Rail Act must be found constitutional.

D. *The Tucker Act Remedy Is Adequate*

Having concluded that Congress meant to repeal or modify the Tucker Act, the majority of the court below did not examine the adequacy of the Tucker Act remedy. However, the concurring judge questioned the due process adequacy of relegating claimants to the "lengthy and complex" procedures of the Rail Act and then, if there

should remain a basis for a claim against the United States, to the Court of Claims.[76] No rule of due process holds that a process that results in full and complete compensation is unconstitutional merely because it may be lengthy and complex.[77]

Three points deserve mention. First, even in a condemnation case, which reorganization under the Rail Act is not, it is unquestionably constitutional to complete a "taking" before a judicial determination of the required amount of compensation.[78] Second, a Court of Claims award of compensation for an inadequately compenstated taking under the Rail Act would be a "perfect" remedy: although interest is not generally recoverable against the United States in the absence of a statute or contract expressly authorizing it,[79] interest on a just compensation award runs from the date of the taking.[80] Third, as we have noted above, a Tucker Act suit after the Special Court (and the Supreme Court on review) had

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[76] JA 9 at 81. These doubts were not so serious as to prevent the same judge from concluding in the *Penn Central* "180-Day" Decision at JA 124 at 148 that:

> "I agree with the Trustees that the basic approach of the statute is fundamentally sound. If I were persuaded that Congress had intended to permit recourse to a Tucker Act remedy in the event that implementation of the RRRA [Regional Rail Reorganization Act] proved violative of constitutional rights, an affirmative § 207(b) finding might be permissible."

[77] See *Phillips* v. *Commissioner*, 283 U.S. 589, 596-99 (1931).

[78] *Hurley* v. *Kincaid*, 285 U.S. 95 (1932). Moreover, as indicated in the discussion below of the *New Haven Inclusion* litigation, there is precedent in the reorganization field for transfer before valuation or payment.

[79] 28 U.S.C. § 2516; *United States* v. *Goltra*, 312 U.S. 203, 207-08 (1941); *Gould* v. *United States*, 301 F.2d 557, 558-59 (D.C. Cir. 1962).

[80] *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 588 (1947); *Phelps* v. *United States*, 274 U.S. 341, 344 (1927).

found the relevant values would not, as a practical matter, require retrial of these issues.[81]

II. Even in the Absence of a Tucker Act Remedy the Court Below Should Not Have Enjoined the Operation of the Rail Act

Even if the court below correctly construed the Rail Act to bar a Tucker Act remedy for erosion beyond constitutional limits, each element of its order was erroneous. The order rested on other misconstructions of the statute. It anticipated problems that may not arise and can be remedied at the time if they do. Moreover, even on the district court's stated view of both the law and the facts, the relief it granted, relief whose most crucial features were wholly unexplained, was superfluous.

The court below held that the erosion issue was "ripe for adjudication," but it did not in fact decide whether or to what extent the asset values available to satisfy pre-reorganization creditors have declined during the Penn Central reorganization or will decline in the future. Nor did the court decide the extent to which pre-reorganization creditors may be required to accept such "erosion" during the reorganization process, on account of the public interest in continued rail service, where, as here, there is a reasonable prospect of reorganizing the railroad on a self-sustaining basis. We argue, in Part III below, that the extent of any erosion problem cannot

[81] Concerns that Congress might not appropriate funds to pay a judgment do not vitiate the adequacy of a Tucker Act suit. No such concern was mentioned in *Yearsley* and *Hurley*, *supra*. Moreover, in concluding that the Court of Claims is an Article III court, Mr. Justice Harlan rejected an argument to the contrary based on that court's inability to enforce its judgments, saying "there seems to be no sound reason why the Court of Claims may not rely on the good faith of the United States," *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 571 (1962). None of the other opinions in that case challenged his view.

be determined on the present record and without reference to the benefits of reorganization under the Rail Act, and that in any event a reasonable erosion burden may be imposed on persons who invest in a railroad while prompt and substantial public efforts are made to create a "self-sustaining rail service system." Our argument here is that even if it is assumed that the constitutional limit of erosion—the point beyond which service may not be required without an adequate remedy at law for compensation—may be reached before implementation of the Final System Plan, and even assuming that the court below correctly read the Rail Act to bar an adequate remedy at law, the orders issued by the court below were nevertheless unwarranted and erroneous.

A. *The Court Below Misconstrued Section 304(f) of the Rail Act*

Before passage of the Rail Act, Section 1(18) of the Interstate Commerce Act[82] required any railroad (whether or not in reorganization) to obtain ICC approval for discontinuance of rail service on any line of track, or for the abandonment of such rail properties. This procedure was replaced, with respect to railroads in reorganization in the Region, by Section 304 of the Rail Act. Section 304, whose primary purpose is to provide a more efficient means for a substantial reduction and streamlining of the Northeast/Midwest rail system, permits the Region's railroads, without the approval of any governmental entity, to discontinue service over and to abandon (*i.e.*, liquidate as they wish) all rail properties

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[82] 49 U.S.C. § 1(18) provides in pertinent part:

"[N]o carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

not designated for transfer pursuant to the Final System Plan.

In order, however, to facilitate a planning process that is required to be completed within 450 days after enactment, Section 304(f) provides as follows:

> "After the date of enactment of this Act, no railroad in reorganization may discontinue service or abandon any line of railroad other than in accordance with the provisions of this Act, unless it is authorized to do so by the Association and unless no affected State or local or regional transportation authority reasonably opposes such action, notwithstanding any provision of any other Federal law, the constitution or law of any State, or decision or order of, or the pendency of any proceeding before any Federal or State court, agency, or authority."

As we read the opinions and order of the court below, all of the court's objections to the Rail Act (except one minor point)[83] flow from its interpretation of that Section.

The district court interpreted Section 304(f) as authorizing the required continuation of rail operations after the (hypothetical) point has been reached at which continuation of service can no longer be constitutionally required without compensation. Having construed the section to authorize an unconstitutional action in a hypothetical situation, the court declared the section to that extent unconstitutional on its face.

In the first place, the court reached its troublesome construction prematurely. Having concluded that the

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[83] The one exception is the court's holding that the requirement, in Section 207(b), that Section 77 proceedings be dismissed in the case of certain railroads not being reorganized under the Rail Act, violates the requirement of Article I, Section 8, Clause 4, of the Constitution that bankruptcy laws shall be uniform throughout the United States. USRA does not agree with this ruling but, in view of the fact that the ruling has no material effect on USRA's planning process, USRA has not appealed on this question.

erosion issue was "ripe for adjudication," the court proceeded not to adjudicate whether the constitutional limit of erosion had been or would be reached, nor to define the limit. Instead, the district court proceeded as if the erosion limit had in fact passed, when in fact it remains possible that the issue will never arise.

The objections to premature decision of hypothetical legal issues, particularly on an incomplete factual record, are too familiar to be repeated at length here.[84] The district court itself recognized the dangers in another context. JA 9 at 23. Suffice it to say that the objections to premature decision are especially forceful where there is a major question of statutory construction which relates directly to the constitutionality of the statute and the decision is adverse to constitutionality. *E.g.*, *Poe* v. *Ullman*, 367 U.S. 497, 502-03 (1961); *Communist Party*

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[84] "Courts do not review issues, especially constitutional issues, until they have to." *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123, 154-55 (1951) (Frankfurter, J., concurring). A court should stay its hand when the injurious impact of the challenged condition depends on the "concurrence of . . . contingent events . . . too speculative to warrant anticipatory judicial determinations," *Eccles* v. *Peoples Bank*, 333 U.S. 426, 432 (1948). Courts, moreover, do not adjudicate "matters of serious public concern" on a record that is not "adequate and full-bodied." *Public Affairs Press* v. *Rickover*, 369 U.S. 111, 112-13 (1962). *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256 (1948).

The courts reviewing the inclusion of the New Haven in the merged Penn Central illustrated these rules by refusing to decide issues that were premature or where the factual record was incomplete. *E.g.*, *In re New York, N.H. & H.R.R.*, 378 F.2d 635, 640 (2d Cir. 1967):

> "Since we thus are by no means certain the plan the Commission and the court will approve . . . will contain the features to which appellants object, we think it improper to pass upon their objections at this time.
>
> ". . . [T]here was no occasion to involve Judge Anderson or us in an advisory opinion to the Commission on legal issues that may never arise."

See also *New Haven Inclusion Cases*, 399 U.S. 392, 447 n. 65 (1970).

v. *Subversive Activities Control Board*, 367 U.S. 1, 81 (1961); *International Longshoremen's & Warehousemen's Union, Local 37* v. *Boyd*, 347 U.S. 222 (1954); *Electric Bond & Share Co.* v. *SEC*, 303 U.S. 419 (1938).

Having decided to reach the erosion issue, the district court then took a second headlong leap into the path of a constitutional problem. Although it had construed the Rail Act to bar a Tucker Act remedy for erosion past constitutional limits, the court decided to construe Section 304(f) as purporting to confer authority to require continuation of rail service even where discontinuance is required to protect constitutional rights. This construction was wholly unwarranted. In the assumed absence of a remedy at law, Section 304(f) could and should have been construed to confer approval power only within constitutional limits as the courts may declare them. A statute cast in general terms need not recite the constitutional limits on its reach in order to avoid being declared unconstitutional on its face. If it is inferred that Congress barred suits in the Court of Claims for required erosion beyond constitutional limits, the entire statutory scheme could nevertheless function as fairly (though possibly less successfully) if it were also inferred that Congress intended to require continued operations only within constitutional limits.[85]

No rule of construction is more well established than the rule that federal courts should accord acts of Congress a "strong presumptive validity" and seek an "interpretation which supports the constitutionality of legislation." *United States* v. *National Dairy Products Corp.*,

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[85] There are, of course, substantial problems in determining, in any actual case, whether discontinuances or abandonments are constitutionally required. The resolution of that problem in individual cases, however, is no easier after the decision below than it was before, since the court offered no guidance on either the substance or procedures involved in that determination.

372 U.S. 29, 32 (1963).[86] There are numerous cases in which federal courts have gone to considerable lengths to construe statutes to uphold their constitutionality. The case of *Richmond Screw Anchor Co.* v. *United States*, 275 U.S. 331 (1928), is a good illustration.[87] As the law stood immediately before July 1, 1918, the owner of a patent infringed by a government contractor could ordinarily sue either the contractor or the United States. If the owner were an assignee, however, his suit against the United States would be barred by the general statute prohibiting assignment of unliquidated claims against the United States. On July 1, 1918, Congress passed a new statute depriving a patent owner of a suit against a government contractor and limiting him to his remedy against the United States. The 1918 statute, together with the general anti-assignment statute, thus appeared to prevent an assignee from suing either the contractor or the government. The Court, noting that this result "would seem to raise a serious question as to the constitutionality of the Act of 1918 under the Fifth Amendment," *id.* at 345, and stating that "[i]t is our duty in the interpretation of federal statutes to reach a conclusion which will avoid serious doubt of their constitutionality," *id.* at 346, interpreted the 1918 statute as making the general anti-assignment statute inapplicable to patent rights covered by the 1918 statute, so that the assignee could sue the United States in the Court of Claims.

In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), a unanimous Court held that the Sherman Act does not prohibit a

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[86] *Accord, e.g., United States Civil Service Commission* v. *National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548, 571 (1973); *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960); *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932); *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 128 (1810).

[87] See also *United States* v. *Thirty-Seven (37) Photographs*, 402 U.S. 363 (1971); *American Power & Light Co.* v. *SEC*, 329 U.S. 90 (1946).

conspiracy or combination to influence the passage of legislation or the enforcement of the laws, even where the objective is to harm competition and the means used are deceptive. The Court reached its construction of the statute by considering policies underlying the First Amendment and, in part, because a contrary construction "would raise important constitutional questions." *Id.* at 138. Similarly, in *Kent* v. *Dulles*, 357 U.S. 116 (1958), when faced with a constitutional challenge to regulations of the Secretary of State governing the issuance of passports, the Court decided that the statutory power of the Secretary, though "expressed in broad terms," *id.* at 127, should be construed more narrowly so as to avoid constitutional questions. This case is a good example of the rule that a delegation in broad terms should be narrowly construed to avoid constitutional questions rather than broadly construed and then struck down.[88]

B. *The 304(f) Injunction Was Unwarranted and Erroneous*

The court below then enjoined USRA from

> "taking any action to enforce the provisions of Section 304(f) of the Regional Rail Reorganization Act of 1973, with respect to any abandonment, cessation, or reduction of service which has been or may hereafter be determined by a court of competent jurisdiction to be necessary for the preservation of rights guaranteed by the United States Constitution." JA 9 at 82.

This injunction against a federal agency just starting, in good faith, on the Herculean task Congress assigned it was unwarranted and erroneous.

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[88] The *Kent* case divided the Court 5-4 on the statutory issues, and neither the majority nor the dissent reached the constitutional issues. There is no suggestion, however, that the dissenters disagreed with the general principle of using narrow construction to avoid constitutional issues.

As we read the injunction, it applies only after and to the extent that some federal court (presumably a Reorganization Court) has declared that an abandonment, cessation or reduction of service is constitutionally necessary.[89] If that is what the district court meant, USRA, had it been asked, would have assured the district court, and now assures this Court, that it has no intention of violating any constitutional rights so declared. In any event, there was no reason why the federal court making the hypothetical constitutional determination could not have been left the task of issuing appropriate orders to enforce it. Reorganization Courts, which under the Rail Act retain their present jurisdiction over the railroad estates and their interim operations, have amply broad powers to provide injunctive protection of the estates over which they have jurisdiction.[90] A Reorganization Court

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[89] We assume that the court did not mean to prohibit USRA, should an appropriate occasion arise, from seeking review of any such determination, and we therefore assume that the court was speaking of a final and unreviewable constitutional determination by a federal court.

[90] Compare, for example, Paragraph 9 of Order No. 1, issued June 21, 1970 in *In re Penn Central Transp. Co.*, Bky. No. 70-347 (E.D. Pa.):

> "9. All persons and all firms and corporations, whatsoever and wheresoever situated, located or domiciled, hereby are restrained and enjoined from interfering with, seizing, converting, appropriating, attaching, garnisheeing, levying upon, or enforcing liens upon, or in any manner whatsoever disturbing any portion of the assets, goods, money, deposit balances, credits, choses in action, interests, railroads, properties or premises belonging to, or in the possession of the Debtor as owner, lessee or otherwise, or from taking possesion of or from entering upon, or in any way interfering with the same, or any part thereof, or from interfering in any manner with the operation of said railroads, properties or premises or the carrying on of its business by the Debtor under the order of this Court and from commencing or continuing any proceeding against the Debtor, whether for obtaining or for the enforcement of any judgment or decree or for any other purpose, provided that suits or claims for damages caused by the opera-

finding it constitutionally necessary to order a discontinuance of service or abandonment of properties would have as much power both to make this finding and to have the resulting orders carried out without the injunction issued by the district court as it has in light of the injunction.

C. *It Was Error To Declare Section 303 of the Rail Act Partially Unconstitutional on Its Face*

Section 303 of the Rail Act provides generally that the Special Court shall order transfers of rail properties in accordance with the Final System Plan, and shall then order the distribution of the consideration provided therefor after determining that the exchanges are

> "in the public interest and are fair and equitable to the estate of each railroad in reorganization in accordance with the standard of fairness and equity applicable to the approval of a plan of reorganization or a step in such a plan under Section 77 of the Bankrupty Act . . . ."

and that the exchanges are not "more fair and equitable than is required as a constitutional minimum."

In context, it is clear that Congress meant the term "fair and equitable" to refer to an exchange in which each estate receives the "constitutional minimum" consideration—no more and no less. Congress thus exhibited its concern, throughout Section 303, that each railroad estate receive the constitutionally required consideration for its properties.

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tion of trains, buses, or other means of transportation may be filed and prosecuted to judgment in any Court of competent jurisdiction, and provided, further, that the title of any owner, whether as trustee or otherwise, to rolling stock equipment leased or conditionally sold to the Debtor, and any right of such owner to take possession of such property in compliance with the provisions of any such lease or conditional sale contract, shall not be affected by the provisions of this order."

Plaintiffs challenged the Rail Act on the ground that the total consideration available under the Act cannot or may not be sufficient to achieve the congressional objective of providing each estate the "constitutional minimum" consideration, and on the ground that in any event the processes of the Act do not adequately assure that this stated objective will be achieved. The court below put aside these challenges as premature.[91]

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[91] Appellant's position is that since Plaintiffs were alleging only a taking or threatened taking of their property without just compensation, and since the Tucker Act provides an adequate legal remedy should any such taking result from the processes of the Rail Act, the court below should have followed the decision of this Court in *Hurley* v. *Kincaid, supra,* and avoided the difficult statutory and constitutional issues by leaving Plaintiffs to their plain and adequate remedy at law. See Part I, *supra.*

On the assumption that the court below correctly construed the Rail Act to bar a Tucker Act remedy, we agree that the question whether the consideration available under the express terms of the Rail Act itself will meet the constitutional minimum is premature: (a) It is impossible to determine at this time the value to which the estates will be entitled; among many other difficulties, the properties to be included in the Final System Plan have not been identified. (b) It should be assumed that the procedures carefully designed after long study by Congress will be able to achieve the statutory goal of a "self-sustaining rail service system" and that the rail properties transferred to Conrail will therefore have substantial going-concern value; the dollar amount of this value, however, is obviously incalculable today. (c) If, after the Final System Plan has become effective, there are grounds for contending (in the assumed absence of a Tucker Act remedy) that its implementation will cause a taking of private property for less than just compensation, these grounds can be urged upon the Special Court during the period of up to 110 days between the effective date of the Final System Plan and the date on which the Special Court is directed to order the transfer of rail properties; if these grounds appear substantial, the Special Court may then decide that it cannot constitutionally order the transfer until the constitutional issue has been resolved; this theoretical possibility does not make it necessary to resolve the series of complex statutory and constitutional issues involved until there is some basis for concluding that the processes of the Rail Act have failed to provide the "constitutional minimum" consideration that Congress commanded.

Nevertheless, the court below declared that

> "Section 303 of the Regional Rail Reorganization Act of 1973 is null and void as contravening the Fifth Amendment of the United States Constitution insofar as it fails to provide compensation for interim erosion pending final implementation of the Final System Plan pursuant to the statute." JA 9 at 82.

Reading that part of the court's order, one might assume that the court below concluded that *all* such "interim erosion" is compensable under the Fifth Amendment. We argue in Part III, *infra*, that any such conclusion would be erroneous. In fact, the court below reached no such conclusion. On the contrary, the court did not define "erosion" or its constitutional limits, and did not determine that the point has been or will necessarily be reached at which erosion becomes compensable. The closest the court below came to stating its view of the law of erosion was in footnote 23, JA 9 at 41, where it quoted as follows:

> "'[T]here are limits beyond which . . . [the] public interest cannot be served without violating the constitutional prohibition against appropriation of private property for public use without just compensation. New Haven Inclusion Cases, 399 U.S. 392, 90 S.Ct. 2054, 26 L.Ed.2d 691 (1971); *cf.* Brooks-Scanlon Co. v. Railroad Commission of Louisiana, 251 U.S. 396, 40 S.Ct. 183, 64 L.Ed. 323 (1920). These limitations are measured both in terms of the amount of erosion of the Debtor's estate which can be permitted to occur before impairing liquidation value, and in terms of the length of time that is reasonable for assessing the ultimate prospects of achieving sufficient profitability to support a valid recapitalization of the enterprise.' *In Re Penn Central Transportation Company*, 347 F.Supp. 1346, 1366 (E.D. Pa. 1972)."

We read the court's order, therefore, as declaring Section 303 unconstitutional only insofar as it fails to provide compensation for erosion that is determined to exceed constitutional limits unless an adequate remedy at law for compensation is provided. This part of the order, so read, parallels the court's Section 304(f) injunction in which the court left the determination of the actual limit to a future court.

So read, the court's Section 303 order is premature for the same reasons as its Section 304(f) injunction; it deals with a situation that has not arisen and may not arise. There are, however, even more fundamental objections: the court's reading of Section 303 was erroneous and the court's order, on its own view of the issues, was superfluous.

In the first place, there was no reason to read Section 303, with its repeated emphasis on fairness, equity, and the "constitutional minimum" consideration, as deliberately excluding one element of that consideration, that the court below thought might turn out to be constitutionally required. On the contrary, if it is later determined that the constitutional limit of erosion has been reached, and if the Act is construed to require rail operations to continue beyond that point, then this must be taken into account when the Special Court measures the "fairness and equity" of the exchanges. Rather than presume, in the face of clear congressional concern for constitutionality, that Congress deliberately intended an unconstitutional result in the hypothetical situation the court itself constructed, the court below could have solved its own problem by construing Section 303's "constitutional minimum" to include all constitutionally required consideration.[92]

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[92] As a practical matter, there would be no insurmountable difficulty if the Special Court ruled, for example, that the "constitu-

There is, however, an even more obvious point. Rail estates in reorganization are entitled to compensation for erosion only to the extent that the United States requires them to continue rail operations or preserve their properties beyond the point at which uncompensated erosion can no longer be required. The only section of the Rail Act that could conceivably impose such a requirement is Section 304(f). We have argued above, in Part II(A), that the court below could and should, in the assumed absence of a Tucker Act remedy, have construed Section 304(f) as not imposing any such requirement. Instead, the court below construed Section 304(f) as imposing such a requirement but then declared the Section *pro tanto* unconstitutional and enjoined the enforcement of the objectionable requirement. At that point, the court had achieved by constitutional adjudication what it could have achieved by construction: it eliminated any requirement in the Rail Act that rail estates suffer any erosion for which an adequate remedy for compensation would be constitutionally required. In so doing, it eliminated any possible claim to compensation.

Once any Reorganization Court has determined that discontinuance of service or abandonment is constitutionally required in the absence of compensation, USRA (and the other Defendants) will be powerless to interfere and, unless provision is made for compensation satisfactory to the Reorganization Court, the discontinuance or abandonment will occur. Under these circumstances, there was no basis for invalidating Section 303 for an imputed failure to provide compensation for an "erosion taking" that cannot lawfully occur.

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tional minimum" is the amount necessary to place the Penn Central estate in the position it would have been in had the transfer occurred on some earlier date determined by the Special Court to be appropriate.

D. *The District Court Should Not Have Enjoined Certification of a Final System Plan Under Section 209(c)*

Section 209(c) of the Rail Act provides that after the Final System Plan has been prepared and reviewed by Congress and has become effective, USRA shall "deliver a certified copy of the final system plan to the special court" and shall certify to the Special Court, among other things, that the Plan is in the public interest and is fair and equitable. This step is obviously central to the processes of the Act. The court below, however, enjoined USRA from "certifying a Final System Plan to the Special Court pursuant to Section 209 (c)." JA 9 at 82. The injunction appears to be unqualified and unconditional.

While this part of the court's order presents the most significant obstacle to USRA's discharge of its statutory responsibilities, USRA is somewhat at a loss to respond to it because the court below offered no explanation whatsoever of the reason for this particular order. Section 209(c) is mentioned only twice in the court's opinion, once at JA 9 at 16 where its existence and text are recited without comment as part of a general summary of the Rail Act, and once in the second-to-last paragraph of the principal opinion, which, immediately after discussion of the Tuck Act question, reads in its entirety as follows:

> "Accordingly, we hold that Section 304(f), in requiring mandatory interim operations without providing a legal remedy to furnish fair and just compensation for an erosion of property beyond constitutional limits, offends the Fifth Amendment; that Section 303, the only provision of the Act pertaining to valuation of the railroad estate, in failing to provide a remedy for any unconstitutional erosion caused by mandatory interim operations under Sec-

tion 304(f), is also defective; that because the effect of Section 207(b) precludes a form of liquidation under Section 77 of the Bankruptcy Act, it is constitutionally defective as set forth in Part II of the separate opinion of Judge Fullam; and that because of these conclusions the United States Railway Association must be enjoined from certifying a Final System Plan to the Special Court pursuant to Section 209(c)." JA 9 at 53.

It is unclear what evil the court thought it was remedying with this order.[93] The only conceivably relevant constitutional objection to the Rail Act is the assumed failure of the Act to deal with the possible problem of erosion beyond constitutional limits. As discussed above, this problem may never arise in fact. Moreover, any possibility of its arising could have been avoided by a construction of Section 304(f) that would not allow USRA to require continued operations after the point of unconstitutional erosion has been reached, or by a construction which presumes that the Special Court will take such operations into account when determining the consideration under the Act necessary to satisfy the "constitutional minimum." In any event, the court below has more than adequately eliminated any possible problem by prohibiting the application of Section 304(f) to require erosion beyond constitutional limits. Finally, there was no reason for an unconditional order prohibiting the certification of *any* final system plan, even one that makes full and adequate provision for all constitutional rights of the private parties.

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[93] One thing that seems clear is that the 209(c) order to which we are now objecting has nothing to do with the 207(b) problem referred to in the quoted paragraph, from which no appeal is taken. The 207(b) problem, as described in Judge Fullam's separate opinion, relates only to the question whether Section 77 proceedings should be dismissed in the case of railroads that are *not* to be reorganized under the Act.

III. There Is No Factual or Legal Basis for Concluding that the Rail Act Will Cause an "Erosion Taking" of Private Property for Which Just Compensation Will Be Due

We have presented two reasons why it was unnecessary for the court below even to reach the constitutional merits of Plaintiffs' claims that the Rail Act will cause a taking of their property through erosion: First, Plaintiffs have an adequate remedy at law under the Tucker Act, which precludes their obtaining injunctive relief against the implementation of the Rail Act. Second, in the absence of the Tucker Act remedy, the Rail Act should not have been construed to require rail operations beyond the point at which compulsory operations become compensable. The court below failed to adopt either of those propositions, but proceeded to decide that the danger of an erosion taking justified its enjoining the implementation of key provisions of the Act. Having erred in dealing with the Tucker Act and statutory construction issues, that court committed further error, we submit, in its handling of the erosion contentions.

The court below decided that the erosion issue is "ripe for adjudication"—meaning, apparently, that available statistics indicate that Plaintiffs' fears that the value of their claims will decline between now and the effective date of the Final System Plan (as early as 510 days from enactment) cannot be dismissed as far-fetched. The court then proceeded, however, to grant broad injunctive relief without ever facing the questions that must be decided to adjudicate the erosion issue. Should this Court conclude that it is necessary to reach that issue, we submit that there are two controlling reasons why it was error for the court below to grant injunctive relief on the ground that erosion pending implementation of the Rail Act might exceed constitutional limits.

In the first place, the record in this case does not establish that any injury at all will result to Plaintiffs from the implementation of the Rail Act. In order to determine whether the value of Plaintiffs' claims will in fact be eroded—that is, whether Plaintiffs will, on balance, suffer economic injury—through the implementation of the Act, a court would have to make a comparison between Plaintiffs' present situation and the consequences of implementing the Act. Only if Plaintiffs have available to them some currently feasible course of action that would produce greater value for the estates than can be realized through reorganization pursuant to the Act will Plaintiffs be harmed by continued proceedings under the Act.[94]

Plaintiffs have not established a record that permits such a comparison to be made. It is not clear what feasible course of action the Penn Central (or any other) railroad estate would follow if it were permitted to proceed on the premise that the Rail Act did not exist, and it is wholly unclear what the dollar consequences

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[94] The court below noted that Plaintiffs included secured creditors, unsecured creditors, and shareholders. That fact, however, does not eliminate the differences between classes or remove the necessity for a comparison between the consequences of Rail Act procedures and the consequences of some feasible alternative. Even if the value of the Penn Central estate is declining, it is quite possible that each and every class will be as well or better off under the Act as under a liquidation beginning now.

For example, the massive labor claims that would arise on liquidation would have priority over at least the stockholders. A comparison of the results of the Rail Act with the results of liquidation from the point of view of the stockholders would have to take into account these claims and the $250,000,000 in labor protection funds provided by the Act but unavailable in liquidation. On the other hand, in the absence of evidence, it is unknown whether more senior classes of claimants, whose claims may be amply covered, would be injured at all by a decline in values between now and the implementation of the Final System Plan.

Needless to say, the presence as Plaintiffs of persons in all classes does not itself establish that any class is being injured.

of any such course of action would be. On the other hand, it is obviously impossible to determine now the dollar consequences of reorganization pursuant to the Act.

Plaintiffs seek to suggest, and the court below apparently concluded, that the only facts of record—recent income-statement losses, together with the continuing increase in administration claims—demonstrate that some unspecified present alternative must necessarily be better than proceeding under the Rail Act. The only alternative that suggests itself is to begin liquidation of the Penn Central estate for non-rail purposes, with its attendant uncertainties, expenses, and delays. The facts of record fail wholly to support the court's apparent conclusion that such a course would yield greater value than reorganization under the Act, for several reasons: First, income-statement losses, computed in accordance with ICC accounting procedures and including as expense items (for example) track replacement costs that may even increase the value of the Penn Central estate[95] and depreciation, do not establish that the value of the assets is declining; second, even if liquidation value were demonstrably declining, the essential comparison is between the value of the Penn Central now, in liquidation, and the going-concern value of the Penn Central estate's share of a revitalized system that has received substantial federal support; and third, it is by no means clear that a liquidation commenced today or any other alternative action would stop the losses and solve the creditors' problems more quickly than proceedings under the Act.

There is a second and more fundamental point. The central premise of Plaintiffs' erosion argument is their contention that they have a constitutional right to terminate rail service and liquidate the Penn Central estate

[95] This accounting treatment was criticized as unrealistic in Coleman, *Is Railroad Accounting Off the Track?*, 130 J. Accountancy 64, 66-68 (Oct. 1970).

now. They contend that consequently they are entitled to a present assurance that they will ultimately receive the current liquidation value of the estate plus the amount of priority administration claims accruing between now and the time they receive that value. We believe that Plaintiffs' central premise is wrong as a matter of law. Plaintiffs do not have a right to liquidate or be compensated for not doing so. As we have repeatedly stressed, the Rail Act makes adequate provision for payment of whatever "constitutional minimum" Plaintiffs are ultimately adjudged entitled to receive. However, we reject Plaintiffs' views about the measure of that constitutional minimum.

Plaintiffs assert that their right to liquidate is established by three cases decided in the early 1920's holding that owners could not be compelled to continue to operate tiny, hopelessly unprofitable railroads when it was clear that there was no way of restoring them to profitability.[96] Since the enactment of Section 77, however, it has been clear (and has been established by repeated decisions of this Court) that if a railroad is important and reorganizable, the rights of its creditors and owners are inherently subject to the right of the public to keep it running while reasonably prompt efforts are made to reorganize it on a self-sustaining basis.

When this Court upheld the constitutionality of Section 77, it held that such a deferral of remedies was justified in view of Congress' determination that the "continuous, uninterrupted operation [of railroads] is

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[96] *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396 (1920), involved a narrow gauge railroad between Kentwood and Hackley, Louisiana, which was "primarily a logging road" but which the Court "assumed" to have done business as a common carrier. *Bullock* v. *Railroad Commission*, 254 U.S. 513 (1921), involved a "logging road" for which one suggested total purchase price was $200,000. *Railroad Commission* v. *Eastern Texas R.R.*, 264 U.S. 79 (1924), involved a railroad 30.3 miles long which had been built to carry timber, whose supply had been exhausted.

necessary in the public interest." *Continental Bank* v. *Chicago, Rock Island & P. Ry.*, 294 U.S. 648, 671 (1935). As the Court observed, "without the maintenance of the *status quo* for a reasonable length of time no satisfactory plan could be worked out." *Id.* at 679.[97] Consequently, the contention of Plaintiffs here that they have a right to be assured of full compensation for their cooperation with the effort to save Penn Central is without legal basis.

A. *Plaintiffs Have Not Shown that Any Erosion Will Occur*

This Court discussed the erosion issue in the *New Haven Inclusion Cases*, 399 U.S. 392, 489-93 (1970). The Court made clear that the essence of erosion is a net reduction in the amount available to satisfy pre-bankruptcy claimants. The Court stressed that there are two factors that may reduce the size of the "pot" available to pay pre-bankruptcy claims: a decline in the total value of the assets of the estate, and an accumulation of priority administration claims. Consistent with this Court's analysis in that case, other courts have pointed out that market appreciation in asset values during reorganization tends to increase the amount realized by pre-bankruptcy claimants, offsetting other factors, such as operating losses, which tend to reduce the realizable value. See *In re Boston & Maine Corp.*, 484 F.2d 369, 373 n.5 (1st Cir. 1973). In fact, in the Reading Railroad "180-day" proceedings, where the Court held in favor

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[97] "[A] proceeding under § 77 is not an ordinary proceeding in bankruptcy. It is a special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is to defeat the very end the accomplishment of which was the sole aim of the section, and thereby to render its provisions futile." *Id.* at 676.

of reorganization under the Rail Act,[98] the Reading Trustees presented evidence to show that the value of the estate would *increase* over time despite rail operating losses.

As we have previously noted, the court below recited the stipulated fact that the Penn Central income statements for the reorganization period show $851 million in losses, concluded that this made the erosion issue ripe for adjudication, but then failed actually to adjudicate it. It is worth reemphasizing that the record in this case is devoid of any direct evidence about the value of the Penn Central estate on *any* basis (except book)[99] at any time, past, present or future. The ability of the estate today to pay the creditors' claims by liquidating its assets, the amount that would be left over for shareholders, and how these items would change if liquidation began a year hence instead of today, are all matters on which the record is grossly deficient.

In failing to inquire into these matters, the court below seems to have assumed that the income-statement losses are necessarily producing a net reduction in the ability of the Penn Central estate to pay its debts (whatever that ability may now be). Income statements, however, do not necessarily show even that. For one thing, as noted above, they leave out of account changes in asset values, which are essential to any comparison of

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[98] *In the Matter of Reading Co.*, Bky. No. 71-828 (E.D. Pa., July 1, 1974), *appeal pending*, No. 74-7 (Spec. Ct. R.R.R.A., filed Aug. 20, 1974).

[99] The court below recited a book value of $4,419,917,759 for Penn Central's assets at the end of 1971, and total (unadjudicated) claims, both secured and unsecured, of $3,348,620,840, on which the Trustees had estimated an actual liabiilty of $1,583,076,820. JA 9 at 38.

liquidation values at different times.[100] For another, they reflect items having no direct relation to value.

For example, the $851 million in income-statement losses of Penn Central reflect "expenses" of $313 million in depreciation; $358 million in track replacement required by the ICC to be charged to current income; $100 million in deferred leased-line rentals; and $250 million in deferred interest on debt. Depreciation, however, is an arbitrary charge not involving the expenditure of cash and not necessarily reflecting any decline in recoverable value. Track replacement, while an "expense" according to ICC conventions, presumably does not reduce liquidation value and may actually increase it. It is stipulated that Penn Central's actual liability on leased-line rentals is unknown.[101] Finally, less than half of the deferred interest is on debt that purports to be secured, and unsecured debt is not entitled to receive post-bankruptcy interest as an allowable claim in re-

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[100] For example, the trade publication Iron Age indicates that the market value of heavy melting scrap (such as scrapped steel rails) has dramatically increased since June 21, 1970:

MARKET PRICES FOR NO. 1 HEAVY MELTING SCRAP AT SELECTED LOCATIONS ($/TON)

	Prices On June 22, 1970*	Prices On July 15, 1974**
Chicago	$43-44	$137-138
Pitsburgh	42-43	129-130
Philadelphia	43-44	118-120

* Iron Age, June 25, 1970, at 94.
** Iron Age, July 22, 1974, at 64.

[101] Stipulation of Facts, ¶ 13 (JA 203 at 208). The point is that the figure charged to Penn Central's income is the total stated lease obligations, but if any leases are disaffirmed, the Trustees will have an offset in the amount of any losses incurred for the account of the lessor. See Section 77(c)(6) of the Bankruptcy Act, 11 U.S.C. § 205(c)(6).

organization.[102] These four items alone thus raise more than $1 billion worth of doubt about the impact of an $851 million loss.

Moreover, even if creditors were entitled to receive present liquidation value, the comparison necessary to determine whether they will be injured by actions taken under the Rail Act would not be between liquidation values now and in the future but between liquidation value now and the going concern value of the Penn Central estate's share of the reorganized rail system, represented by Conrail securities and USRA obligations, plus other benefits provided by the Rail Act and the value of all assets not transferred under the Act. It is hardly necessary to point out that the record here does not permit even a guess at the results of such a comparison.

B. *Railroad Creditors and Shareholders Do Not Have a Constitutional Right To Be Held Harmless from Erosion During the Period Reasonably Necessary To Reorganize and Save the Railroad*

Plaintiffs have contended, and the court below may have assumed, that the claimants against the Penn Central estate are constitutionally entitled to receive at least the present liquidation value of the estate's assets. Therefore, they reason, any erosion caused by implementation of the Rail Act entitles Plaintiffs to compensation. That reasoning is based on the premise that the *Brooks-Scanlon* line of cases, *supra*, gives railroad investors a constitutional right to cease operations and realize net liquidation value if the railroad has no reasonable prospect of future profitability. Since the Penn Central cannot be separately reorganized on an income basis, Plain-

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[102] *In re New York, N.H. & H.R.R.*, 304 F.Supp. 1121, 1129-34 (D. Conn. 1969). *Cf.* 3A Collier on Bankruptcy ¶ 63.16, at 1858 (14th ed. rev. J. Moore); 5 *id.* ¶ 77.20, at 562-63 n.6.

tiffs characterize it as "hopelessly losing" within the meaning of *Brooks-Scanlon* and invoke the protection of that decision.

We submit that *Brooks-Scanlon* has no applicability to the situation of the Penn Central or the other estates subject to the Rail Act. The *Brooks-Scanlon* line of cases was premised on the absence of any means, internal or external, of continuing rail operations on a self-sustaining basis. Since those cases were decided, this Court has confirmed beyond doubt that investors who have dedicated their property to railroad use in the public interest have no right to withdraw that dedication as long as a reasonable prospect exists that the railroad's operations can be made self-sustaining. Whether the prospect of future profitability arises internally—as in a traditional Section 77 reorganization—or externally—as in the case of the Rail Act—it justifies requiring continued rail operations without compensation for a period reasonably necessary to complete efforts to save the railroad's operations.

To subject railroad investors to some economic burden in such circumstances does not involve a deprivation of their "property" rights.[103] It involves merely a recogni-

[103] It is far too late in our constitutional history to suggest that any governmental action that impairs property rights or reduces property values creates a right in the owner to compensation. Federal, state, and local governments daily undertake myriad actions that affect the use or value of private property.

"It goes without saying that the courts have never construed the 'just compensation' clause of a federal or state constitution as requiring payment for all injuries imposed upon persons or property by acts of government. Any such requirement would make government itself impossible. No legislature can enact an important statute which does not directly or indirectly impose a material loss on some property owners." L. Orgel, Valuation Under the Law of Eminent Domain § 1, at 5 (2d ed. 1953).

See, *e.g.*, *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915) (zoning ordinance preventing continuation of an existing commercial use of real property did not constitute a taking); *Jackson* v. *United*

tion that the property rights of railroad investors are inherently subject to the public's right to make reasonable efforts to save the common carrier rail operations to which the owners dedicated their properties. So long as reasonable efforts are being made to preserve an important rail transportation system, the rights of creditors command neither "Procrustean measures" [104] nor compensation for failure to take them.

1. *The Earliest Decisions Under Section 77 Established that Some Erosion Is Permissible Pending Reorganization*

In contending that they have a constitutional right to be compensated for any erosion of their interests during the period necessary to reorganize their railroad, Plaintiffs seek to overturn an unbroken line of Supreme Court decisions under Section 77. The question whether claimants against a debtor railroad may constitutionally be required, without compensation, to suffer a decline in their positions during the period reasonably needed to reorganize the railroad was answered when Section 77 first reached this Court in the *Rock Island* case.[105] In that case, holders of "collateral notes" issued by the debtor challenged an order of the reorganization court which barred them from foreclosing on their collateral. The Court responded as follows:

States, 230 U.S. 1 (1913) (flood control improvements which injured private property by overflow or erosion did not constitute a taking); *Gibson* v. *United States*, 166 U.S. 269 (1897) (Government actions to improve navigation which impaired riparian rights of waterfront owner did not constitute a taking); *Steel Hill Development, Inc.* v. *Sanborton*, 469 F.2d 956 (1st Cir. 1972) (three-acre and six-acre minimum lot requirements imposed to preserve environmental values did not constitute a taking).

[104] *Penn-Central Merger Cases*, 389 U.S. 486, 511 (1968).

[105] *Continental Bank* v. *Chicago, Rock Island & P. Ry.*, 294 U.S. 648 (1935).

"It may be, as suggested, that during the period of restraint the collateral will decline in value; but the same may be said in respect of an injunction against the sale of real estate upon foreclosure of a mortgage; and such an injunction may issue in an ordinary proceeding in bankruptcy. . . . A claim that injurious consequences will result to the pledgee or the mortgagee may not, of course, be disregarded by the district court; *but it presents a question addressed not to the power of the court but to its discretion*—a matter not subject to the interference of an appellate court unless such discretion be improvidently exercised." 294 U.S. at 677 (emphasis added).[106]

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[106] It has sometimes been suggested that the *Rock Island* case can be distinguished on the ground that the holders of the collateral notes had ample security. *E.g.*, Note, *Takings and the Public Interest in Railroad Reorganization*, 82 Yale L.J. 1004, 1112 (1973). See also *In re Penn Central Transp. Co.*, 494 F.2d 270 (3d Cir.), petition for cert. filed, 42 U.S.L.W. 3633 (U.S. May 8, 1974) (No. 73-1672) ("*Columbus Option Appeals*").

The purported distinction evidences a clear misreading of the *Rock Island* opinion. The notes involved were secured by mortgage bonds of the debtor and its affiliates, which were in turn secured by rail properties. It is true that the face amount of the mortgage bonds exceeded the face amount of the collateral notes and that the debtor alleged that the value of the bonds exceeded the face amount of the notes. However, no court either found, assumed, or even inquired whether the notes were in fact adequately secured.

This Court did note that the face amount of the bonds exceeded the face amount of the notes, but for an entirely different reason and in a separate part of its opinion. In foreclosure of the notes the trustees for the noteholders would have sold the bonds securing the notes, thus rendering the bonds outstanding against the debtor, and "the capitalization outstanding in the hands of the public would to that extent be expanded." 294 U.S. at 661. Thus it was necessary to restrain foreclosure of the notes in order to facilitate the development of a reorganization plan. See *id.* at 678. While the Court never did discuss the value of the mortgage bonds, it may be presumed to have been aware that the face amount of bonds of a railroad in reorganization is not indicative of the value of the bonds.

It is clear from the opinion that the statement quoted in the text was not based in any way on the assumption that the creditors

The extent to which creditors' interests may constitutionally be eroded during the reorganization of a salvageable railroad was vividly demonstrated a decade later in *Reconstruction Finance Corp.* v. *Denver & Rio Grande W.R.R.*, 328 U.S. 495 (1946). In that case the Court upheld a plan of reorganization over the objections of secured creditors whose claims had lost 90 percent of their value during the ten years required for adoption of the plan. When the railroad had filed its petition under Section 77, its properties had been worth more than enough to pay all pre-bankruptcy debts. During the ten intervening years the railroad had produced some income, but the income was used for improvements [107] rather than to pay interest on the bonds. The unpaid interest on senior debts accumulated to the point that, when the process was completed, the value remaining for the junior class of bondholders was only 10 percent of their claims.[108] Although about 80 percent of the junior bondholders voted to reject the plan, the reorganization court confirmed it under the "cramdown provision" of Section 77(e). Affirming that action, the Supreme Court said that railroad creditors

> "cannot be called upon to sacrifice their property so that a depression-proof railroad system might be created. But they invested their capital in a public utility that does owe an obligation to the public. . . . [B]y their entry into a railroad enterprise, [they] assumed the risk that in any depression or any reorganization the interests of the public would be considered as well as theirs." *Id.* at 535-36.

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were fully protected; on the contrary, the Court held that the secured creditors could be forced to take their chances if necessary to permit the reorganization to carry on.

[107] Sequestration of this income was refused in favor of making improvements. *Van Schaick* v. *McCarthy*, 116 F.2d 987, 993 (10th Cir. 1941).

[108] 328 U.S. at 537-39, 542-45 (Frankfurter, J., dissenting).

2. *This Court Reviewed and Reconfirmed this Rule in the New Haven Litigation*

More recently, in the *New Haven* litigation, the courts again confirmed that creditors can be forced to accept a substantial and uncompensated erosion loss because of the public interest in finding a way to keep the railroad running. Every court that considered this question in the *New Haven* context held that such a burden was permissible if necessary to provide a reasonable time to find and implement a means of preserving the New Haven's operations.

To appreciate the importance of the *New Haven* litigation to the questions presented here, it is necessary to review the history of that case in some detail. The New Haven entered reorganization on July 7, 1961. It was suffering continual operating losses and cash outflows. By late 1963, it was clear that the railroad was in a hopelessly losing posture and that the only possibility for salvaging its operations was inclusion in the then proposed merger of the Pennsylvania and New York Central railroads.[109] Negotiations between the New Haven Trustees and the two larger railroads, encouraged by the ICC and the reorganization court, led to an agreement that the New Haven assets would be included in the Penn Central merger and that the New Haven estate would be paid the liquidation value of its assets of December 31, 1966. The merger was consummated in January 1968 and the inclusion of the New Haven took place on December 31, 1968.

The New Haven reorganization court noted in 1969 that six years earlier, in 1963, there had been two choices, either pursuing the possibility of inclusion or undertaking immediate liquidation; that the former course

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[109] See *In re New York, N.H. & H.R.R.*, 289 F.Supp. 451, 456-57 (D. Conn. 1968).

had been chosen; and that " 'losses as are reasonably incident to working out the solution most consistent with the public interest' eroded the debtor's estate in excess of $60 million." [110] This erosion can be divided into two categories. First, there was a decline in the net worth of the New Haven estate between 1961 and December 31, 1966, the date on which the assets were valued for purposes of inclusion. Second, and more important, there was a logically certain diminution of the recoveries of pre-bankruptcy creditors because of the accumulation of priority claims between the December 31, 1966 valuation date (as of which the total compensation became fixed) and the inclusion two years later. Full compensation was not awarded for either category of losses, even though the equity, the unsecured creditors' claims, and some secured creditors' claims had become worthless by the time of inclusion.[111] In particular, although the Penn Central was required to assume part of the continuing burden after 1966, the formula used made it clear that this would cover only a fraction of the erosion loss.

Each of the series of decisions dealing with this erosion problem recognized and upheld the imposition of an economic burden on the New Haven creditors. In *Penn-Central Merger Cases, supra*, the Supreme Court rejected the argument of some New Haven bondholders that, "because continued operation of the New Haven at a loss involves progressive erosion of the bondholders' security," immediate inclusion of the New Haven in the

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[110] *In re New York, N.H. & H.R.R.*, 304 F.Supp. 793, 800 (D. Conn. 1969), quoting *New York, N.H. & H.R.R. Bondholders* v. *United States*, 289 F.Supp. 418, 444 (S.D.N.Y. 1968).

[111] See *New Haven Inclusion Cases, supra*, 399 U.S. at 490 n.82; *New York, N.H. & H.R.R. Bondholders* v. *United States, supra*, 289 F.Supp. at 442 n.18; *cf. In re New York, N.H. & H.R.R.*, 378 F.2d 635, 640 (2d Cir. 1967).

merged Penn Central was required. 389 U.S. at 509. In rejecting this argument the Court held:

> "Continuation of the operations of the NH, which the Commission has found to be essential, can be assured only upon and after effectuation of the merger of the Penn-Central. The bondholders agree that to delay the Penn-Central merger until all proceedings necessary to include the NH have taken place may well mean the end of NH operations. The only realistic way to avoid this is to permit prompt consummation of the Penn-Central merger subject to appropriate conditions respecting the New Haven which Penn-Central will perforce accept by its act of merger. While the rights of the bondholders are entitled to respect, they do not command Procrustean measures. They certainly do not dictate that rail operations vital to the Nation be jettisoned despite the availability of a feasible alternative. The public interest is not merely a pawn to be sacrificed for the strategic purposes or protection of a class of security holders whose interests may or may not be served by the destructive move." *Id.* at 510-11.

The bondholders subsequently renewed earlier efforts to obtain dismissal of the New Haven reorganization. The New Haven reorganization court denied their request, noting that

> "[t]he claims of the bondholders and their fears for the diminishing value of the New Haven's assets through continued deficit operations was [sic] expressly noted and considered [by the Supreme Court in the *Penn-Central Merger Cases*]." *In re New York, N.H. & H.R.R.*, 281 F. Supp. 65, 68 (D. Conn. 1968).

The court further declared that:

> "To jettison everything achieved and turn back just as a glimmer of light begins to show at the end of a

long dark tunnel not only carries with it an aura of unreality but borders on the fantastic." *Id.*

The predicament of the New Haven bondholders at that time was far more compelling than the present situation of the Penn Central creditors.[112] The New Haven had been in reorganization for seven years, suffering continuous losses. The equity and unsecured debt had become worthless. For more than four years, it had been clear that the railroad could not be made viable without external assistance. The only solution, inclusion in the Penn Central, was still some time away and was beyond the control of the reorganization court. Although the exact amount of compensation to be paid to the New Haven had not been calculated, the upper limit had been fixed in principle, at least by the ICC, at net liquidation value on December 31, 1966, a basic limit the reorganization court and the Supreme Court were later to accept. Against this fixed total of compensation to the estate, the accumulation of additional administration claims, reducing the eventual recovery by secured creditors, was clear and certain. When the reorganization court rejected the petition to dismiss as "unreal" and bordering on the "fantastic," it did so in the face of certainty that a further economic burden would be imposed on secured creditors.

The New Haven reorganization court did, of course, conclude on August 13, 1968—seven years after the New Haven filed under Section 77—that the reorganization could not continue after the end of that year unless inclusion took place. 289 F.Supp. at 459. Even so, the court clearly recognized that the question was one of *balancing* the interests of creditors against the public interest, and it struck the balance in favor of the creditors

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[112] The record in this case would not support a finding that the net liquidation value of the Penn Central estate will be insufficient to cover the claims of the secured creditors. See pp. 75-82 *supra*.

only when no significant public interest in further delay was perceivable. The decision was made in four steps:

First, the court noted that it "was clear that the liquidation value of the New Haven . . . was being chiseled down day after day by the operating losses . . . ." *Id.* at 457.

Second, the court described the constitutional rights of bondholders as follows:

> "Both the Commission and the courts, however, have reiterated in this and in related proceedings that as bondholders of a railroad their interests are subject to such invasion as may be essential to continue the operation of the railroad for a reasonable period of time to provide an opportunity to work out a permanent plan or means of continuing the operation, if possible, to the extent that it is required by the public interest." *Id.* at 455.
>
> "As investors in railroad bonds, the petitioners were required in the public interest to suffer the burden of keeping the Railroad operational for a reasonable period to permit this [inclusion] to be accomplished." *Id.* at 457.

Third, the court recognized that the total amount to be paid to the New Haven estate had been fixed in principle (although not yet calculated in detail), that the question was therefore how much of this fixed amount could be used up in the public interest at the expense of the bondholders, and that this was essentially a question of balancing:

> "The extent to which the constitutional minimum of value of property rights to which the bondholders are entitled (in this case the liquidation value as of December 31, 1966) may properly be invaded in the public interest to keep railroad operations going pending a solution of the problem of reorganization, is hardly a matter which can be determined with

mathematical precision. It involves a consideration of the amount and nature of the Railroad's obligations, the seriousness of adverse consequences to the public if service were terminated, the rate of losses and the feasibility of possible solutions." *Id.* at 459.

Fourth, the court recognized that there was no longer any significant public interest to be taken into account because there was no reason why inclusion could not take place immediately:

> "There is presently no reason why the Penn-Central should not take over the New Haven at the beginning of 1969. The record of the merger and inclusion cases make it abundantly clear that the inclusion of the New Haven was an absolute and unequivocal condition of the approval of the merger of the Pennsylvania and New York Central Railroads, from the order of the Commision through the decision of the Supreme Court." *Id.* at 460.

This decision of the New Haven reorganization court was never appealed.[113]

This Court, when it ultimately reviewed the New Haven plan of reorganization, confirmed this view. *New Haven Inclusion Cases, supra*, 399 U.S. at 490-93. The Court said it had no doubt that the time elapsed in the proceedings "has imposed a substantial loss upon the bondholders."[114] *Id.* at 491. However, the Court stated that

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[113] A three-judge district court, reviewing the terms of New Haven's inclusion in the Penn Central merger, made the same point:

> "Although we agree that by investing in a railroad the bondholders did not surrender their constitutional right not to be required to operate the property at a perpetual loss, they did subject themselves to such interim losses as are reasonably incident to working out the solution most consistent with the public interest." *New York, N.H. & H.R.R. Bondholders* v. *United States, supra*, 289 F. Supp. at 444.

[114] The Court noted the ICC's finding that the debtor's estate had amassed more than $70 million in administrative and pre-

this presented a question addressed to the discretion of the reorganization court, citing *Rock Island*, and it repeated its earlier statement in *Denver & Rio Grande* that

> "'[b]y their entry into a railroad enterprise, [the bondholders] assumed the risk that in any depression or any reorganization the interests of the public would be considered as well as theirs.'" [115]

The Court did note that "the failure of the bondholders to press for early liquidation of the New Haven meant that their initial application for a dismissal of the reorganization proceedings came just as the objective of salvaging the New Haven appeared possible to achieve." *Id.* at 493. That comment cannot be read to suggest that the bondholders lost some constitutional rights by sitting on them. The Court's opinion makes it perfectly clear that the bondholders were seeking compensation for losses incurred in several periods, including the period after they filed their dismissal petition, and that all of their claims were rejected on the merits—on the ground that their property rights were inherently limited by the public right to make reasonable efforts to keep the railroad operating.[116]

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bankruptcy claims between 1961 and 1968. *Id.* at 490. It did not specifically review the accuracy of that figure.

[115] *Id.* at 492, quoting *Reconstruction Finance Corp.* v. *Denver & Rio Grande W.R.R., supra,* 328 U.S. at 536.

[116] This interpretation of the decisions from *Rock Island* through *New Haven Inclusion Cases* was adopted in *In re Boston & Maine Corp.*, 484 F.2d 369, 374-75 (1st Cir. 1973), where the First Circuit rejected the argument of creditors of the Boston & Maine Railroad that its reorganization proceeding should be dismissed because the continuation was eroding the estate.

3. *External, as Well as Internal, Sources of Aid Must Be Considered in Assessing the Penn Central's Future Prospects*

The court below may have implicitly assumed that any possible means of saving a railroad which are beyond the direct control of the Reorganization Court, the ICC, or the trustees need not be considered in determining whether the condition of the railroad is so hopeless that there is a right to liquidate. However, there is no reason to wear blinders of that sort in applying the Fifth Amendment. No court decision has given railroad investors a constitutional right to have the condition of their railroad evaluated without reference to external sources of help. In fact, the *New Haven* litigation puts to rest any doubt that external help, when available, must be taken into account.

The one fact that was never questioned in the *New Haven* litigation was that the New Haven Railroad, taken by itself, was a "hopelessly losing" venture in the *Brooks-Scanlon* sense. Although this became clear "[b]y about 1963," [117] the New Haven was kept operating, through six more years of continuing losses, because the possibility of including it in a merged Penn Central system offered a way of saving it as a going concern.[118] Yet the reorganization court never had the power to order inclusion. The only possibility of saving the New Haven's operations hinged on a number of external factors beyond the reorganization court's control.

Inclusion of the New Haven in the merged Penn Central was ultimately dependent on the ability of the Pennsylvania and New York Central Railroads to merge, on their willingness to merge on the conditions set by the

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[117] *In re New York, N.H. & H.R.R.*, 289 F.Supp. 451, 456 (D. Conn. 1968).

[118] See, *e.g.*, *In re New York, N.H. & H.R.R.*, 304 F.Supp. 1121, 1133-34 (D. Conn. 1969).

ICC,[119] and on actions of the ICC which the reorganization court had no power to direct. Nowhere in the *New Haven* litigation was it suggested that the bondholders' rights under the Fifth Amendment should be measured *without regard* to the inclusion possibility. The history of that litigation shows clearly that investors' rights to compensation are not triggered merely because the railroad is in a "hopelessly losing" posture without reference to external help.

4. *The Public Interest in Implementing the Act Clearly Outweighs Any Foreseeable Burden on Investors*

To determine whether the burden that may be imposed on creditors under the Rail Act is reasonable requires a balancing process similar to that performed in the *New Haven* litigation. We believe that, when the public interest in preserving Northeast rail operations[120] is balanced against any burden on investors, it is clear that Plaintiffs' effort to have the proceedings under the Act abandoned at the outset "borders on the fantastic."

In measuring the public's side of the balance, it is appropriate for this Court to take into account "the seriousness of adverse consequences to the public if service were terminated . . . and the feasibility of possible solutions."[121] The Act embodies Congress' judgment on these matters, a judgment entitled to substantial defer-

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[119] The ICC had the power to impose conditions on the merger, but it had no statutory power to compel a merger. *St. Joe Paper Co.* v. *Atlantic Coast Line R.R.*, 347 U.S. 298, 305-06 (1954).

[120] For a discussion of the elements of that public interest and an exposition of the strenuous attempt of Congress to protect it, see Introduction.

[121] *In re New York, N.H. & H.R.R., supra,* 289 F.Supp. at 459 (D. Conn. 1968).

ence.[122] The public importance of maintaining these massive rail operations is substantially greater than the public interest present in the *New Haven* case. The ultimate success of the proposed solution—reorganization under the Act—obviously cannot finally be determined at this time. It cannot be presumed, however, that the procedure carefully designed by Congress will not work. Even in the case of Penn Central it is clear, in view of the complexity of the problem, the inability of the Trustees to determine until 1973 that a conventional reorganization was not feasible without government assistance and the speed and scope of Congress' response, that the public's right to insist on continuous efforts to save rail operations has not been exhausted.

Turning to the other side of the balance, the record entirely fails to establish that proceedings under the Act will impose an economic burden on the creditors and owners. It is altogether possible that reorganization under the Act will permit a greater recovery by the claimants than any other feasible alternative, and it is not clear that continuation of any of these reorganization proceedings is now imposing any net burden. By contrast, in the *New Haven* case, it was clear after December 31, 1966 that creditors' recoveries must diminish as the reorganization continued, because liquidation value on that date set a limit to the compensation to be paid to the estate. The record here wholly fails to establish that continuation in reorganization for another 12 months will increase rather than decrease the burden of the situation in which the investors now find themselves.

At bottom, the alleged constitutional right to be compensated for erosion depends on the right to liquidate at

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[122] See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 609-10 (Frankfurter, J., concurring); *United States* v. *Darby*, 312 U.S. 100, 115-17 (1941); *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 400 (1937).

will. The only authority for that right is the *Brooks-Scanlon* line of cases, *supra*. The distinction is that *Brooks-Scanlon* does not give owners and creditors a right to liquidate a railroad that is profitable, or that can be made self-sustaining and profitable by a bankruptcy reorganization, merely because the owners and creditors want to transfer their investment into a different and more profitable enterprise. This Court's decisions under Section 77 establish that, if future profitability is reasonably possible, then creditors can be required to suffer erosion during a reasonable reorganization period and ultimately to accept going-concern value. Any other result would place the nation's need for rail service at the whim of owners and creditors. The *Brooks-Scanlon* line of cases, which involved railroads that there was no discernible public interest in saving [123] and in which the impossibility of salvage was assumed at the outset, is not to the contrary.

Because the Rail Act is available, the position of the Penn Central is far from hopeless. To paraphrase Judge Anderson's metaphor, more than a "glimmer of light" is "beginning to show," and the tunnel is not as "long" or as "dark" as it was in the case of the New Haven. Under the balancing test applied in the *New Haven* litigation, the public interest clearly justifies exposing the claimants to some possible economic burden while the process of the Act is allowed to work.

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[123] The closest thing to a mention of the public interest is the hypothetical statement in *Brooks-Scanlon* that "[i]f the plaintiff be taken to have granted to the public an interest in the use of the railroad it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss." 251 U.S. at 399. In the context of a logging railroad that the Court merely "assumed" to have done business for third persons as a common carrier, *id.* at 398, this remark adds nothing to the bare holding that an unsalvageable railroad may be abandoned.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed (except as to paragraph 3 of the District Court's order and so much of the paragraph as denies in part Plaintiffs' motions for summary judgment).

Respectfully submitted,

LLOYD N. CUTLER

WILLIAM R. PERLIK

LOUIS R. COHEN

Attorneys for the United States Railway Association

Of Counsel:

BARRY E. CARTER
PAUL C. HUDSON
WILLIAM T. LAKE
J. B. STEPHENS
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

JORDAN JAY HILLMAN
Senior Legal Consultant
United States Railway Association
2100 Second Street, S.W.
Washington, D.C. 20590

August 28, 1974

Nos. 74-165, 74-167 and 74-168

SEP 25 1974
MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

October Term, 1974

UNITED STATES OF AMERICA, et al.,
Appellants in No. 74-168,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, PENN CENTRAL COMPANY, et al.,
Appellees.

UNITED STATES RAILWAY ASSOCIATION,
Appellant in No. 74-167,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, PENN CENTRAL COMPANY, et al.,
Appellees.

ROBERT W. BLANCHETTE, RICHARD C. BOND AND JOHN H. McARTHUR AS TRUSTEE OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR,
Appellants in No. 74-165,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, PENN CENTRAL COMPANY, et al.,
Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

BRIEF FOR APPELLEE PENN CENTRAL COMPANY.

DAVID BERGER,
GERALD J. RODOS,
PAUL J. McMAHON,
EDWARD H. RUBENSTONE,
1622 Locust Street,
Philadelphia, Pennsylvania,
Attorneys for Appellee Penn Central Company.

Of Counsel:
DAVID BERGER, P. A.,
Attorneys-at-Law.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711



TABLE OF CONTENTS.

	Page
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	9
I. The Interim Erosion of Penn Central's Assets Caused by the Operation of § 304(f) of the Act Violates Plaintiff's Fifth Amendment Rights	9
A. The Legal Background of the Fifth Amendment as It Affects Property Rights and Its Application by the Court Below	9
B. The Act Unconstitutionally Takes Plaintiff's Property Without Any Provision for Just Compensation	16
II. The Final Taking of Property Pursuant to the Act Violates Penn Central Company's Fifth Amendment Rights	36
A. The Compulsory Conveyance Features of the Act Are Ripe for Adjudication	37
B. The Act Ultimately Results in a Taking of Appellee's Property Within the Meaning of the Fifth Amendment	51
C. The Method and Procedure of Taking Prescribed by the Act Is Unconstitutional	52
1. The Act Violates the Fifth Amendment in That It Does Not Provide for Payment in Legal Tender and Limits the Amount to Be Paid	53
2. The Act Is Unconstitutional Because It Proscribes the Judiciary's Constitutional Function to Determine the Amount Payable as Compensation	56

TABLE OF CONTENTS (Continued).

	Page
III. The Tucker Act Remedy	58
A. The Act's Language and Legislative History Show That Congress Intended That a Tucker Act Remedy Is Not Available; It Certainly Is Not Adequate	58
B. The Subsequent Legislative History of the Act Reinforces the Conclusion That Congress Intended to Bar a Tucker Act Remedy	67
C. The Regional Rail Reorganization Act Provides a Specific Remedy and Therefore Excludes the General Tucker Act Remedy	72
IV. The Act Is a Non-Uniform Law on the Subject of Bankruptcy and Is Therefore Unconstitutional	75
A. Decision of the Three-Judge Court as to Uniformity	75
B. The Act Is Not a Uniform Law on the Subject of Bankruptcy	77
1. The Act Fails This Court's Definition of Geographical Uniformity	77
2. This Non-Uniform Act Is a Law on the Subject of Bankruptcies and Penn Central Company Has Standing to Attack It	82
C. This Non-Uniform Law on the Subject of Bankruptcy Can Not Be Upheld Under the Commerce Clause	84
D. Other Sections of the Act in Addition to 207(b) Are Derived From Congress' Bankruptcy Powers	87
CONCLUSION	88

TABLE OF CASES CITED.

Page

A. S. Abell Co. v. Chell, 412 F. 2d 712 (4th Cir. 1969) 47, 48

Aetna Life Ins. Co. of Hartford, Conn. v. Hayworth, 300 U. S. 227 (1937) 37, 38

Albertson v. Subversive Activities Board, 382 U. S. 70 (1965) 50

Almota Farmers Elev. & Whse. Co. v. United States, 409 U. S. 470 (1973) 11, 52, 54, 67

American Machine and Metals v. DeBothezat Impeller Co., 166 F. 2d 535 (2nd Cir. 1948) 47, 48

Armstrong v. United States, 364 U. S. 40 (1960) 36

Brooks-Scanlon Co. v. Railroad Commission of Louisiana, 251 U. S. 396 (1920) 17, 18, 21, 33

Bullock v. State of Florida, 254 U. S. 513 (1921) 18, 21, 33

Bulova Watch Co. v. United States, 365 U. S. 753 (1961) ... 72

Carter v. Carter Coal Co., 298 U. S. 238 (1936) 45

Central Railroad Co. of New Jersey v. Manufacturers Hanover Trust Co., 421 F. 2d 604 (3d Cir. 1970), cert. denied 398 U. S. 949 (1970) 21, 23, 25

Communist Party of United States v. Subversive Activities Control Board, 367 U. S. 1 (1961) 50

Continental Illinois Nat. Bank & T. Co. v. Chicago, Rock Island & Pacific Ry. Co., 294 U. S. 648 (1935) 15, 83

Cook v. United States, 115 F. 2d 463 (5th Cir. 1940) 74

Delaney v. Carter Oil Co., 174 F. 2d 314 (10th Cir. 1949) ... 47

Eyherabide v. United States, 345 F. 2d 565 (Ct. of Cl. 1965) 10, 11, 51

Feres v. United States, 340 U. S. 135 (1950) 72

Fourco Glass Co. v. Transmirra Products Corp., 353 U. S. 222, 77 S. Ct. 787 (1957) 86

Ginsberg & Sons Inc. v. Popkin, 285 U. S. 204, 52 S. Ct. 322 (1932) 86

Hanover National Bank v. Moyses, 186 U. S. 181 (1902) ... 78

Hurley v. Kincaid, 285 U. S. 95, 52 S. Ct. 267 (1932) 66

In re Baltimore & O. R. Co., 29 F. Supp. 608 (D. Md. 1939), cert. denied, 309 U. S. 654 (1940) 78, 79, 82

In re Boston & Maine Corp., 484 F. 2d 369 (1st Cir. 1973) .. 33

TABLE OF CASES CITED (Continued).

	Page
In re Chicago, R. I. & P. Ry. Co., 72 F. 2d 443 (7th Cir. 1934)	78
In re Davis, 13 F. Supp. 221 (E. D. N. Y. 1936)	78
In re New York, N. H. & H. R. Co., 16 F. Supp. 504 (D. Conn. 1936)	78
In re Penn Central Transportation Company, 494 F. 2d 270 (3rd Cir., 1974)	21, 33, 34, 41
In re Reichert, 13 F. Supp. 1 (W. D. Ky. 1936)	78
In re Third Avenue Transit Corp., 198 F. 2d 703 (2d Cir. 1952)	21, 23, 25
In re Sink, 27 F. 2d 361 (W. D. Va. 1928)	86
In the Matter of the Central Railroad Company of New Jersey, (Bky. No. B401-67, 3d Cir., Aug. 27, 1973)	21
Izaak Walton League of America v. St. Clair, 313 F. Supp. 1312 (D. Minn. 1970)	47
Johnson v. United States Shipping Board Emergency Fleet Corp., 280 U. S. 320 (1930)	72, 74
Joslin Manufacturing Co. v. Providence, 262 U. S. 668 (1923)	52
Local Loan Co. v. Hunt, 292 U. S. 234 (1934)	83
Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555 (1935)	21, 36, 78
Lucas v. Forty-Fourth General Assembly, 377 U. S. 713, 84 S. Ct. 1459, 12 L. Ed. 2d 632 (1964)	35
Maryland Casualty Co. v. Pacific Coal and Oil Co., 312 U. S. 270 (1941)	38
Miller v. Schoene, 276 U. S. 272 (1928)	34, 55
Mississippi R. R. Commission v. Mobile & Ohio R. R. Co., 244 U. S. 388 (1917)	33
Monongahela Navigation Co. v. United States, 148 U. S. 312 (1893)	54, 58
Munn v. Illinois, 94 U. S. 113 (1876)	32
New Haven Inclusion Cases, 399 U. S. 392 (1970)	21, 22, 28, 29, 33
Olson v. United States, 292 U. S. 246 (1934)	11, 52, 55, 56
Pennsylvania v. West Virgina, 262 U. S. 553 (1922)	43

TABLE OF CASES CITED (Continued).

Page

Pennsylvania Casualty Co. v. Upchurch, 139 F. 2d 892 (5th Cir. 1943) 47, 48

Penn Central Merger Cases, 389 U. S. 486 (1968) 21

Pennsylvania Coal Company v. Mahon, 260 U. S. 393 (1922) 9, 10, 11, 34, 51

Pierce v. Society of the Sisters of the Holy Name of Jesus and Mary, 268 U. S. 510 (1925) 45

Poe v. Ullman, 367 U. S. 497 (1961) 38

Portsmouth Harbor L. & H. Company v. United States, 260 U. S. 327 (1922) 10

Public Affairs Associates, Inc. v. Rickover, 369 U. S. 111 (1962) 39

Railroad Commission of Texas v. Eastern Texas R. Co., 264 U. S. 79 (1924) 19, 21, 33

Richfield Oil Corp. v. State Board of Equalization, 329 U. S. 69, 67 S. Ct. 156 (1946) 85

Rock Island & Pacific Ry. Co., 294 U. S. 648 (1935) 29

Reconstruction Finance Corp. v. Denver & Rio Grande Western Ry. Co., 328 U. S. 495 (1946) 29

Reitman v. Mulkey, 387 U. S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967) 34

Sayre v. United States, 282 F. Supp. 175 (N. D. Ohio 1967) 10

Seguros Tepeyac, S. A. Compania Mexicana v. Jernigan, 410 F. 2d 718 (5th Cir. 1969) 47

Stellwagen v. Clum, 245 U. S. 605 (1918) 78

Swift and Co. v. United States, 276 U. S. 311 (1928) 46

Townsend v. Little, 109 U. S. 504, 3 S. Ct. 357 (1883) 86

United States v. Causby, 328 U. S. 256 (1946) 10, 11, 51

United States v. General Motors Corporation, 323 U. S. 373 (1945) 51

United States v. Finn, 127 F. Supp. 158 (D. Cal. 1954), modified on other grounds, 239 F. 2d 679 (9th Cir. 1956) ... 10, 16

United States v. Lee, 106 U. S. 196 (1882) 10

United States v. Miller, 317 U. S. 369 (1943) 11, 52, 54, 55

TABLE OF CASES CITED (Continued).

Page

United States v. Pewee Coal Co., 341 U. S. 114 (1951) 36
United States v. Reynolds, 397 U. S. 14 (1970) 11, 54, 55
United States v. Willow River Power Co., 324 U. S. 499 (1945) 10
United States v. 2715.98 Acres of Land, More or Less, in Jefferson County, Washington, 44 F. Supp. 683 (W. D. Wash. 1942) 57
United States v. 60,000 Square Feet of Land and 8-Story Hotel Thereon, Known as Oakland Hotel, 53 F. Supp. 767 (N. D. Cal. 1943) 57
United States v. 677.50 Acres of Land in Marion County, Kansas, 239 F. Supp. 318 (D. Kan. 1965) 57
United States v. 9.94 Acres of Land in City of Charlestown, 51 F. Supp. 478 (E. D. S. C. 1973) 57
U. S. National Bank of Omaha v. Pamp, 83 F. 2d 493 (8th Cir. 1936) 81
Vanhorne's Lessee v. Dorrance, 2 Dall. 304 (Cir. Ct., Pa. Dist. 1795) 11, 12, 53
Warren v. Palmer, 310 U. S. 132 (1940) 83
Wright v. Vinton Branch of Mountain Trust Bank, 85 F. 2d 973 (4th Cir. 1936) 81
Wright v. Vinton Branch of Mountain Trust Bank, 300 U. S. 440 (1937) 81
Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579, 72 S. Ct. 863 (1952) 75

STATUTES.

Page

Bankruptcy Act, Section 77, 11 U. S. C. § 205 ....3, 6, 8, 12, 26, 27, 28, 29, 30, 40, 76, 83, 84, 87

Interstate Commerce Act, § 1(18) 32, 33

Oregon's Compulsory Education Act of 1922 46

Regional Rail Reorganization Act of 1973, 45 U. S. C. §§ 701-793:

Section 101 77

Section 101(a)(1) 77, 82, 83

Section 101(b)(2) 77, 82

Section 102 77

Section 102(13) 77, 82

Section 202 40

Section 202(b)(1) 83

Section 202(b)(2) 83

Section 202(b)(3) 83

Section 202(b)(5) 83

Section 204(a) 83

Section 205(d)(1) 83

Section 205(d)(3) 83

Section 206 .....5, 40, 77, 83

Section 206(c)(1)(a) 40

Section 206(d) 53

Section 206(d)(1) 40

Section 206(f) 40

Section 206(i) 65

Section 207 ..... 5, 40

Section 207(b) 3, 8, 31, 40, 41, 42, 49, 75, 76, 84, 87

Section 207(c) 41

Section 208 ..... 5, 41

Section 208(a) 41, 48

Section 208(b) 41

Section 209(a) 83

Section 209(b) 84

STATUTES (Continued).

	Page
Section 209(c)	3, 76, 83
Section 210	57
Section 210(b)	53, 64
Section 213	6, 30
Section 213(b)	58
Section 214	58
Section 215	6, 30, 31
Section 301	83
Section 301(e)	83
Section 302	83
Section 302(a)	83
Section 302(b)	83
Section 302(c)	83
Section 302(d)	83
Section 303	3, 31, 83, 87
Section 303(b)	41, 48
Section 303(b)(2)	41
Section 303(c)	41, 43, 57, 61
Section 303(c)(1)(A)	60
Section 303(c)(2)	55
Section 303(c)(2)(A)	60
Section 303(c)(2)(B)	60
Section 303(c)(2)(C)	61, 69
Section 303(d)	61
Section 304(f)	1, 3, 5, 12, 16, 30, 76
Section 601(b)	84
Tucker Act, 28 U. S. C. § 1491	58, 68, 70, 71, 72
11 U. S. C. § 205	83
11 U. S. C. §§ 1200-1255	79
11 U. S. C. § 203(s)	80
11 U. S. C. § 203(s)(6)	80, 81
28 U. S. C. § 1346(b)	72
28 U. S. C. § 2517	67

STATUTES (Continued).

	Page
28 U. S. C. § 2674	72
31 U. S. C. § 724a	67
46 U. S. C. § 741	74
United States Constitution:	
Article I, Section 8, Clause 2	66
Article I, Section 8, Clause 4	1, 3, 5, 8, 75, 81, 84, 85, 86, 87
Article I, Section 10, Clause 2	85
Fifth Amendment	1, 2, 6, 9, 10, 36, 40, 50, 51, 52, 55, 57

AUTHORITIES.

	Page
Charington, The Regulation of Railroad Abandonments, 17-25 (Harv. 1948)	33
Nicholas, Eminent Domain, § 8-2 (3d Rev. ed. 1970)	12
Story, Commentaries on the Constitution of the United States, Volume 2 § 1970	52

QUESTIONS PRESENTED.

1. Whether the Court abused its discretion in finding that Section 304(f) of the Regional Rail Reorganization Act of 1933 which mandates continuing operations of the Penn Central rail operations pending implementation of a Final System Plan effects a taking of plaintiff's property without payment of just compensation in violation of the Fifth Amendment of the United States Constitution when concededly there is no reasonable likelihood of a successful reorganization.

2. Whether, despite the language of the Act and the legislative history surrounding its enactment evidencing Congress' determination that no Court of Claims remedy was to be available, a Court of Claims action will lie to recover just compensation for the government's interim taking of plaintiff's property mandated by Section 304(f) of the Act and whether the mere possibility that any such action could be brought would render reversibly erroneous the decision below.

3. Whether the Order of the Court prohibiting certification of the Final System Plan should be sustained for the reason that the final conveyances of rail property mandated by the Act result in a taking of plaintiff's property without the payment of just compensation required by the Fifth Amendment of the Constitution.

4. Whether the Order of the Court prohibiting certification of the Final System Plan should be sustained for the reason that the Act is a non-uniform law on the subject of bankruptcies and therefore violates Article I, Section 8, Clause 4 of the Constitution.

STATEMENT OF THE CASE.

Penn Central Company is the parent holding company of Penn Central Transportation Company owning 100% of the Transportation Company's stock.[1] The Transportation Company is the successor corporation to the Pennsylvania Railroad Company and the New York Central Railroad Company whose merger became effective on February 1, 1968. Penn Central Company is also an unsecured creditor of the Transportation Company in the approximate amount of $41.8 million.[2]

The stock of Penn Central Company is owned by over 150,000 members of the public and the Company has represented the interests of these public shareholders throughout the reorganization proceedings of the Transportation Company beginning on June 21, 1970. Penn Central Company appeared before the Interstate Commerce Commission during the summer of 1973 and presented its Plan of Reorganization for the railroad while opposing the Plan submitted by the Trustees of the Transportation Company. The Interstate Commerce Commission in its Report of September 28, 1973 rejected all plans submitted to it.

On January 2, 1974, the Regional Rail Reorganization Act (the "Act") became law. Penn Central Company thereupon filed on January 29, 1974, an action in the United States District Court for the District of Columbia attacking the constitutionality of the Act on the grounds *inter alia* that the Act results in a taking of property without the adequate compensation required by the Fifth Amendment,

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1. See Stipulation of Plaintiff and Defendants as to Factual Matters, Joint Appendix p. 370. Hereinafter, the Joint Appendix will be referred to as J. A.

2. See Stipulation of Plaintiff and Defendants as to Factual Matters (J. A. p. 370).

and that the Act was non-uniform in violation of Article I, Section 8, Clause 4.[3]

The Penn Central Company action was transferred to the Eastern District of Pennsylvania and consolidated with similar actions brought by the New Haven Trustees and certain secured creditors: *Smith v. United States, et al.*, and *Connecticut General Insurance Corporation, et al. v. United States Railway Association, et al.* A three-judge constitutional court consisting of Circuit Judge Ruggero J. Aldisert and District Judges John P. Fullam and Louis C. Bechtle was convened to hear the cases. All plaintiffs filed motions for summary judgment seeking an injunction restraining enforcement of various portions of the Act and a declaratory judgment that the Act or portions thereof violate the Constitution.

On June 25, 1974, the three-judge court entered an opinion and order enjoining the United States Railway Association ("USRA") from certifying a Final System Plan pursuant to Section 209(c) of the Act, all defendants from taking any action to enforce Section 304(f) of the Act relating to abandonment, cessation or reduction of rail service, and all parties from enforcing that portion of Section 207(b) of the Act requiring dismissal of pending reorganization proceedings under Section 77 of the Bankruptcy Act. The court also entered a declaratory judgment that § 303 of the Act is null and void in that it fails to provide compensation for interim erosion pending final implementation of the Final System Plan and that § 304(f) of the Act is null and void as violative of the Fifth Amendment to the Constitution insofar as it requires continued operation of rail services at a loss. The court below also declared a portion of § 207(b) of the Act null and void as violative of Article I, Section 8, Clause 4 of the Constitu-

3. *Penn Central Company v. Brinegar, et al.*, Complaint at J. A. pp. 341-349.

tion in that the Act is not uniform geographically throughout the United States.

All defendants, including the intervenor defendants Penn Central Trustees appealed the three-judge court order to this Court (Appeals docketed as 74-165, 74-167 and 74-168). The New Haven Trustee, a plaintiff below, cross-appealed to this Court from those portions of the Order denying summary judgment (docketed as 74-166).

SUMMARY OF ARGUMENT.

Penn Central Company, appellee in appeals 74-165, 74-167 and 74-168, contends that the Order of the three-judge court prohibiting certification of the Final System Plan and Section 304(f) should be sustained. The Court was correct in finding that the Act requires continued operations of Penn Central Transportation Company pending implementation of the Final System Plan and that no compensation is provided the estate or its creditors and shareholders for such interim erosion in violation of the Fifth Amendment to the Constitution. The Court was correct in finding that the Tucker Act cannot be used to save the constitutionality of the Act. The Court was also correct in holding that the Act was not geographically uniform.

Penn Central Company also contends that the order of the Court enjoining certification of the Final System Plan and Section 304(f) can and should be sustained for the additional reasons that the final conveyance of rail properties from the Transportation Company to Conrail is not adequately compensated for as required by the Fifth Amendment, and that, because the Act is not geographically uniform, it violates Article I, Section 8, Clause 4 of the Constitution.

I.

The Court was correct in concluding that the Rail Act requires continued operation of the Penn Central Transportation Company's rail facilities during the period of formulation and approval of the Final System Plan pursuant to Sections 206, 207 and 208 of the Act. Section 304(f) mandates that no railroad may discontinue service or abandon any lines except in accordance with the terms of the Act unless authorized to do so by USRA and there is no reasonable opposition by any affected region or locale.

The Court was also correct in concluding that there is no adequate compensation provided for in the Act for this interim taking. Section 213 limits the authority of the Secretary of Transportation to authorize funds for rail service during the implementation period to $85 million. This amount is clearly insufficient to protect the Penn Central Transportation Company and its creditors and shareholders during the implementation period and indeed even this sum has not yet been appropriated. Section 215 provides funds merely for acquisition, maintenance or improvement of rail properties and relieves Conrail from any obligation to compensate a railroad for that portion of the value of the transferred properties which is attributable to such acquisition, maintenance or improvement.

The law is clear that a railroad cannot be constitutionally compelled to continue its operations when such operations result in continuing losses and there is no reasonable prospect of a successful reorganization. The facts are clear that the Penn Central estate has suffered, is currently suffering and will continue to suffer staggering losses. The reorganization court has found that there is no possibility of an income-based reorganization pursuant to Section 77 of the Bankruptcy Act within a reasonable time. Conrail, the corporation established by the Act will not be significantly different from Penn Central. No evidence whatsoever has been introduced either in the court below or in the reorganization court that Conrail has any reasonable likelihood of success. On the other hand, significant evidence was introduced that Conrail is doomed to failure.

Since the Act takes plaintiff's property during the interim period before the Final System Plan is approved, since the Act provides no just and adequate compensation for such taking and since the Act provides no reasonable likelihood of a successful reorganization, the Act violates the Fifth Amendment to the Constitution and is invalid.

II.

The decision of the lower court enjoining certification of a Final System Plan can be sustained for the additional reason that the Act's provisions relating to the final conveyancing of rail properties effects a taking of plaintiff's property without just compensation in violation of the Fifth Amendment.

This issue is clearly ripe for determination. The Act is comprised of a series of steps which lead inexorably to the conveyance of rail properties. Plaintiff has no choice or options with respect to the transfer and valuation of the properties. If plaintiff's claims as to the final taking are not decided at this time, there will never again be a meaningful time in which they can be decided.

There is no question that the compulsory conveyance features of the Act result in a taking of plaintiff's property. The Act violates the Fifth Amendment in that it limits the amount to be paid for the properties to $500 million, an amount clearly below the value of the Penn Central assets let alone the additional value of the other affected railroads. The Act also violates the Fifth Amendment in that it does not provide for payment in legal tender and it removes from the judiciary their constitutional function to determine compensation to be paid and places it in Congress.

III.

The court's decision that a Tucker Act remedy is not available is correct. The legislative history, both before and after passage of the Act, is clear that Congress considered the issue of a Court of Claims suit for compensation and squarely reflected it. Congress intended the provisions of the Act to provide the only compensation available for the taking of railroad property.

Indeed, a Court of Claims suit would not provide an adequate remedy. That court can not satisfy the objections of Penn Central Company and the other plaintiffs to the Act. In addition, of course, even were a judgment to be recovered in the Court of Claims, there is no reasonable likelihood that Congress will appropriate money for it. In fact, there is every likelihood that it will not.

The most that can be seriously contended by defendants is that the availability of a Tucker Act suit is extremely uncertain. This extreme uncertainty itself is enough to render the Act unconstitutional.

IV.

The decision of the lower court enjoining certification of a Final System Plan can be sustained for the additional reason that the Act is a non-uniform law on the subject of bankruptcies and therefore violates Article I, Section 8, Clause 4 of the Constitution.

The Court was clearly correct in holding that the Act failed the Constitution's uniformity test. It applies only to certain railroads in certain specified portions of the United States. The Act is clearly a law on the subject of bankruptcies. It supplements Section 77 of the bankruptcy laws and overrides it in numerous instances.

The Act cannot be upheld under the Commerce Clause. Enacted under Congress' bankruptcy power, the Act must satisfy that clause's provisions which more specifically apply.

Even if the Commerce Clause does apply to the Act, numerous Sections other than 207(b) are clearly based solely on Congress' bankruptcy power and must therefore be declared unconstitutional for being geographically non-uniform.

ARGUMENT.

I. The Interim Erosion of Penn Central's Assets Caused by the Operation of § 304(f) of the Act Violates Plaintiff's Fifth Amendment Rights.

A. The Legal Background of the Fifth Amendment as It Affects Property Rights and Its Application by the Court Below.

The Fifth Amendment to the Constitution requires that no "private property be taken for public use, without just compensation."

In *Pennsylvania Coal Company v. Mahon,* 260 U. S. 393 (1922), the problem of determining when governmental regulation ended and a taking began was discussed by Mr. Justice Holmes:

> "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use but provides that it shall not be taken for such use without compensation. . . . The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . . We are in danger of forgetting that a strong public desire to improve the public condition was not enough to warrant achieving a desire by a shorter cut than the constitutional way of paying for the change." *Id.* at 415-16.

The Court in *Mahon* further stated, with regard to a statute which purported to regulate the property interest in issue, that "[w]e assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists

that would warrant the exercise of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall." *Id.* at 416. The *Mahon* Court thereby recognized that the provisions of the Fifth Amendment must be respected and complied with regardless of the demands of public necessity.

A "taking" results if there is an intent on the part of the government or of a branch of government to control, confiscate, employ or gain dominion over the property in question and the property is acquired for public use with resultant interference with individual property rights. *Sayre v. United States,* 282 F. Supp. 175 (N. D. Ohio 1967); *United States v. Willow River Power Co.,* 324 U. S. 499, 502-503 (1945). Such governmental intent can be inferred. *United States v. Causby,* 328 U. S. 256 (1946); *Portsmouth Harbor L. & H. Company v. United States,* 260 U. S. 327 (1922); *United States v. Lee,* 106 U. S. 196 (1882). In *Eyherabide v. United States,* 345 F. 2d 565 (Ct. of Cl. 1965), the Court citing *Causby, Mahon* and their progeny, stated that "federal law recognizes that, although there may be no official intention to acquire any property interest, certain governmental actions entail such an actual invasion of private property rights that a constitutional taking must be implied." *Id.* at 506. The property rights protected by the Fifth Amendment have been described by the federal courts. For example, in *United States v. Finn,* 127 F. Supp. 158, 167 (D. Cal. 1954), *modified on other grounds,* 239 F. 2d 679 (9th Cir. 1956), the Court said:

> "Property . . . denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . The constitutional provision is addressed to every sort of interest the citizen may possess."

Similarly, in *Pennsylvania Coal Company v. Mahon, supra,* 260 U. S. at 414-415, the Court stated:

> "What makes the right to mine coal valuable is that it can be exercised for profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."

In *United States v. Causby, supra,* 328 U. S. at 267, it was recognized that "[I]t is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines whether it is a taking." Similarly, in *United States v. General Motors Corp.,* 323 U. S. 373, 378 (1945), the Court stated that it is "the deprivation of the former owner rather than the accretion of a right or interest to the sovereign [which] constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking." *See Eyerabide v. United States, supra,* 345 F. 2d at 567; *Pennsylvania Coal Co. v. Mahon, supra,* 260 U. S. at 413. Interference with useful possession is itself sufficient to constitute a taking, so long as it can be assumed that the United States has acquired a definite interest in the property, be that interest permanent or temporary *e.g., Eyerabide v. United States, supra,* 345 F. 2d at 567.

Once it has been determined that a taking has occurred, "assurance of payment in cash or equivalent is a constitutional requirement." *Almota Farmers Elev. & Whse. Co. v. United States,* 409 U. S. 470 (1973); *United States v. Reynolds,* 397 U. S. 14 (1970); *United States v. Miller,* 317 U. S. 369 (1943); *Olsen v. United States,* 292 U. S. 246 (1934); *Van Horne's Lessee v. Dorrance,* 2 Dale. 304 (Cir.

Ct. Pa. Dist. 1795); Nicholas, *Eminent Domain*, § 8-2 (3d Rev. ed. 1970).

It is against this background that the three-judge Court found, as a matter of law, that § 304(f) of the Act affects a taking of the private property of the Estate, its creditors and shareholders for public use by its requirement of continued rail operations during the period before a Final System Plan is developed resulting in interim erosion of Penn Central Transportation Company's assets, that the Act does not provide compensation for the taking, and that, therefore, Congress cannot constitutionally prevent cessation of rail operations under the terms of the Act.

In discussing the ripeness of the interim erosion issue, the court first commented upon the history of Penn Central Transportation Company's rail operations:

> ". . . During the period that began June 21, 1970, until December 31, 1973, Penn Central sustained ordinary net losses in an amount which approximates $851,000,000.00.
>
> "It is also stipulated that for the two months ended February 28, 1974, Penn Central had a deficit in net railway operating income, a deficit in total income, a deficit in income available for fixed charges and deficit net income, as those items are determined in accordance with accounting regulations of the Interstate Commerce Commission. As previously stated, the Penn Central reorganization court has ruled that the railroad is not reorganizable on an income basis within a reasonable time under Section 77 of the Bankruptcy Act. Opinion of three-judge court (J. A. pp. 36-37).[4, 5]

4. See Opinion of three-judge court, J. A. at pp. 36-40 for more details on erosion issue.

5. See Stipulation of Plaintiff and Defendants as to Factual Matters (J. A. pp. 370-375).

The Trustees had pointed out early in 1973 that, as a result of claims against the Penn Central estate, there was little probability that the railroad could win the battle against the continuing erosion of its assets:

> ". . . the value of the estate has already been substantially eroded and the Trustees are presently unable to prevent continuing erosion. . . .
>
> "There is, simply, not enough cash to cope with continuing claims and to embark upon the capital improvement programs which would permit a continuation of service improvements. Not only is the ability to preserve earning power jeopardized, but Penn Central's essential public services cannot be sustained on this basis." Trustees' Interim Report of January 1, 1973, p. 4 (Doc. No. 4911), cited in *Connecticut General, supra* (J. A. p. 39).

The court then reviewed earlier judicial decisions which had acknowledged that forcing the railroad to continue operating at staggering losses offends the Constitution:

> "The Court of Appeals for the Third Circuit suggests: 'If, as some of the reports filed by the trustees suggest, it is already clear that such a reorganization is not feasible, then *this reorganization is already at the point where the erosion of the estate in deficit operations must cease* and a liquidation alternative must be considered if the secured creditors or other interested parties insist upon such consideration.
>
> [*In the Matter of Penn Central Transportation Co., Debtor,* (Columbus Option Cases), 494 F. 2d 270, 283 (3d Cir. 1974)]
>
> "Over a year ago the Section 77 Reorganization Court warned: '1. *Erosion.* While the precise calculations have not been fully developed, the record justifies the

conclusion that post-reorganization deferrals and unpaid administration claims have already eroded the Debtor's estate to the extent of about $500 million. Whether the constitutional limit has been exceeded depends primarily upon how the remaining assets are to valued; and this in turn may well depend upon how those assets are to be used at the conclusion of this reorganization. Under any view of the matter, it seems clear that *the point of unconstitutionality is fast approaching, if it has not already arrived.* . . . On the basis of the record to date, it appears highly doubtful that the Debtor could properly be permitted to continue to operate on its present basis beyond October 1, 1973.' *In re Penn Central Transportation Company,* 355 F. Supp. 1343, 1344, 1346 (E. D. Pa. 1973)." *Connecticut General, supra,* (J. A. pp. 39-40). [footnotes omitted] [Emphasis supplied]

The three-judge court then concluded that the issue of interim erosion was indeed ripe for judicial determination:

"Cognizant of massive operational losses of $851,000,000 during the present reorganization proceedings, and cognizant also that unsecured creditor as well as secured creditor interests are squarely before this court, we are persuaded that a significant possibility exists that a point of erosion either has been or may soon be reached so that it can be said that plaintiffs' contention of interim unconstitutional taking by continued loss operations is ripe for adjudication. Having determined that there is a controversy ripe for adjudication, we now examine the merits of plaintiffs' contention." *Id.* (J. A. p. 40).

The Court then recognized that the Act makes no provision for any compensation for interim erosion, noting that:

"[t]he defendants acknowledge that if a point is reached where continued loss operations during the interim amount to an unconstitutional taking, the Act does not explicitly provide for the payment of just compensation." *Id.* (J. A. pp. 40-41)

The Court then proceeded to review the legal authority relating to taking, and finally concluded that the continued interim erosion forced by the Act results in a taking, and that the absence of any provision for just compensation renders the taking unconstitutional:

> "Accordingly, we hold that Section 304(f), in requiring mandatory interim operations without providing a legal remedy to furnish fair and just compensation for *an erosion of property beyond constitutional limits,* offends the Fifth Amendment." (J. A. p. 53). [Emphasis supplied]

The lower court's finding of a taking must be given great weight by this Court. It can be reversed only upon a showing that the court abused its judicial discretion. In *Continental Illinois Nat. Bank & T. Co. v. Chicago, Rock Island & Pacific Ry. Co.,* 294 U. S. 648 (1935), appellant bond holders attempted to overturn the lower court's judgment enjoining them from foreclosing on their liens against the railroad. The Supreme Court refused to reverse the District Court's decision. The government defendants cited that decision to the three-judge court below in their brief at pp. 41-42, including language with which plaintiff fully agrees:

> "* * * A claim that injurious consequences will result to the pledgee or the Mortgagee * * * presents a question addressed not to the power of the court but to its discretion—a matter not subject to the interference of

an appellate court unless such discretion be improvidently exercised." *Id.* at 677.

Plaintiff submits that the lower court's judgment that the Act results in a taking is a correct decision and that the court's discretion was indeed providently exercised. Consequently, this Court should affirm.

B. The Act Unconstitutionally Takes Plaintiff's Property Without Any Provision for Just Compensation.

The theory upon which the government bases its defense of § 304(f) of the Act is essentially that the public interest in preserving rail service in the Northeast is so paramount that stockholders and creditors of the railroad can be forced to shoulder the burden of providing that service to the public.[6] The lower court properly rejected that argument.

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6. The government also suggests that any decision as to the existence of a taking is premature unless facts have been developed by which a plaintiff can show he would enjoy a better financial position if the Act did not operate to restrain his freedom. This newly concocted theory has no precedent in law. The Fifth Amendment protects not only the right to profit from one's property, but also the right to dispose of the property, regardless of the risks and uncertainty involved in any choice of method for disposition. *See, e.g., United States v. Finn, supra,* 127 F. Supp. 157, 167 (S. D. Cal. 1954).

Even the defendant Secretary of Transportation, has recognized that the Congressional foreclosure of choice of disposition of property amounts to a taking in this instance:

> "The essence of a condemnation is to deprive a property owner by operation of law of his options to do anything with his property but sell it to the government or a designated public utility. While it may well be most advantageous for a railroad in reorganization to reorganize by conveying its assets to the Corporation pursuant to this bill (H. R. 9142, the predecessor of the Act), *if all other options available to the railroad are foreclosed by this statute, then what you have is, in legal effect, a condemnation.*" Letter from Claude S. Brinegar, Secretary of Transportation, to Senators Magnuson and Cotton, reproduced in S. Rep. 93-601, 93d Cong., 1st Sess. 131-2 (1973). (Emphasis added)

As early as 1920, Justice Holmes stated for a unanimous Supreme Court the well-established principle that the government cannot force a railroad to operate at a loss. *Brooks-Scanlon Co. v. Railroad Commission of Louisiana*, 251 U. S. 396 (1920):

> ". . . A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of its carriage. On this point it is enough to refer to Northern Pacific Ry. Co. v. North Dakota, 236 U. S. 585, 595, 599, 600, 604, Illand Norfolk & Western Ry. Co. v. West Virginia, 236 U. S. 605, 609, 614. . . . It is true that if a railroad continues to exercise the power conferred upon it by a charter from the State, the State may require it to fulfill an obligation imposed by the charter even though fulfillment in that particular may cause a loss. Missouri Pacific Ry. Co. v. Kansas, 216 U. S. 262, 276, 278. But that special rule is far from throwing any doubt upon a general principle too well established to need further argument here. The plaintiff may be making money from its sawmill and lumber business but it no more can be compelled to spend that than it can be compelled to spend any other money to maintain a railroad for the benefit of others who do not care to pay for its.

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6. (Cont'd.)

The lower court properly rejected the government's theory. Besides the fact that there is no precedent for such a formula, the government's conception places an impossible burden upon the plaintiffs, requiring them to prove the outcome of their choice of disposition of PCTC's property, a prediction which must necessarily rest upon pure speculation. While plaintiff pointedly rejects the government's comparison theory, if this Court were to decide that the Fifth Amendment does require some sort of relative financial outcome test, then *the burden must be laid on the government* to prove that the continued daily losses forced by the Act creates a better financial atmosphere for the Penn Central's shareholders and creditors than would result from a restoration to them of their right to freely deal with or dispose of their property.

> If the plaintiff be taken to have granted to the public an interest in the use of the railroad it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss. Munn v. Illinois, 94 U. S. 113, 126. The principle is illustrated by the many cases in which the constitutionality of a rate is shown to depend upon whether it yields to the parties concerned a fair return." *Id.* at 399.

In *Brooks-Scanlon*, then, the Supreme Court held it unlawful to force a railroad to maintain a *branch line* as a public service where to so require would result in a loss to the railroad of more than *$1,500 a month*. *Id.* at 397. Here, the government is attempting to force continued operation of an *entire railroad at a loss of well over $15 million a month*. If the situation in *Brooks-Scanlon* constituted a taking, then certainly the 1973 Act must be similarly viewed.

A year after *Brooks-Scanlon*, the Supreme Court again held that compelling deficit rail operations is unlawful. In *Bullock v. State of Florida*, 254 U. S. 513 (1921), the government attempted to prevent an insolvent railroad from dismantling its questions. Once again, Justice Holmes spoke for a unanimous court:

> "Apart from statute or express contract people who have put their money into a railroad are not bound to go on with it at a loss if there is no reasonable prospect of profitable operation in the future. Brooks-Scanlon Co. v. Railroad Commission of Louisiana, 251 U. S. 396, 40 Sup. Ct. 183, 64 L. Ed. 323. No implied contract that they will do so can be elicited from the mere fact that they have accepted a charter from the State and have been allowed to exercise the power of eminent domain. Suppose that a railroad company

> should find that its road was a failure, it could not make the state a party to a proceeding for leave to stop, and whether the state would proceed would be for the state to decide. The only remedy of the company would be to stop, and that it would have a right to do without the consent of the state if the facts were as supposed. Purchasers of the road by foreclosure would have the same right. *Id.* at 520-521.

The fact that a statute is involved in the present situation cannot be read to allow the taking. The legislature does not have the power to contravene the Constitution. Moreover, the railroad, its stockholders and its creditors cannot be said, by virtue of their public charter, to have impliedly accepted a duty to maintain services at their expense for the benefit of the public; only a statute can create that duty, and the statute here is ex post facto. "Without *previous* statute or contract to compel the company to keep on at a loss would be an unconstitutional taking of its property." *Id.* at 521 (Emphasis supplied). Only if the railroad and its investors had expressly agreed to the strictures of the RRRA *before* beginning any rail operations at all could the investors be said to have accepted any such duties.

In 1924 the Supreme Court had to decide an appeal by the State of Texas from a District Court's ruling that the State could not prevent the owner of a railroad from exercising its "right . . . to dismantle and abandon its road." *Railroad Commission of Texas v. Eastern Texas R. Co.*, 264 U. S. 79, 82 (1924). Once again, the Court unanimously recognized that a doctrine of "public necessity" could not be employed to lessen the force of the Fifth Amendment:

> "The usual permissive charter of a railroad company does not give rise to any obligation on the part of the company to operate its road at a loss. No contract

that it will do so can be elicited from the acceptance of the charter or from putting the road in operation. The company, although devoting its property to the use of the public, does not do so irrevocably or absolutely, but on condition that the public shall supply sufficient traffiic on a reasonable rate basis to yield a fair return. And if at any time it develops with reasonable certainty that future operation must be at a loss, the company may discontinue operation and get what it can out of the property by dismantling the road. To compel it to go on at a loss or to give up the salvage value would be to take its property without the just compensation which is a part of due process of law. The controlling principle is the same that is applied in the many cases in which the constitutionality of a rate is held to depend upon whether it yields a fair return. Brooks-Scanlon Co. v. Railroad Commission of Louisiana, 251 U. S. 396, 399, 40 Sup. Ct. 183, 64 L. Ed. 323; Bullock v. Railroad Commission of Florida, 254 U. S. 513, 520, 41 Sup. Ct. 193, 65 L. Ed. 380; State ex rel. v. Jack (C. C.) 113 Fed. 823; Id., 145 Fed. 281, 76 C. C. A. 165; State v. Old Colony Trust Co., 215 Fed. 307, 312, 131 C. C. A. 581, L. R. A. 1915A, 549; Northern Pacific R. R. Co. v. Dustin, 142 U. S. 492, 499, 12 Sup. Ct. 283, 35 L. Ed. 1092; Commonwealth v. Fitchburg R. R. Co., 12 Gray (Mass.) 180, 190; State v. Dodge City, etc., Ry. Co., 53 Kan. 329, 336, 36 Pac. 755, 24 L. R. A. 564.

"So long as the railroad company continues to exercise the privileges conferred by its charter, the state has power to regulate its operations in the interest of the public, and to that end may require it to provide reasonably safe and adequate facilities for serving the public, even though compliance be attended by

some pecuniary disadvantage. Atlantic Coast Line R. R. Co. v. North Carolina Railroad Commission, 206 U. S. 1, 26, 27 Sup. Ct. 585, 51 L. Ed. 933, 11 Ann. Cas. 398; Missouri Pacific Ry Co. v. Kansas, 216 U. S. 262, 279, 30 Sup. Ct. 330, 54 L. Ed. 472; Chesapeake & Ohio Ry. Co. v. Public Service Commission, 241 U. S. 603, 607, 37 Sup. Ct. 234, 61 L. Ed. 520. But this rule in no wise militates against the principle that the company may withdraw its property from use by the public when that use can be kept up only at a loss. Brooks-Scanlon Co. v. Railroad Commission of Louisiana, supra." *Railroad Commission of Texas v. Eastern Texas R. Co., supra,* 264 U. S. 85-86.

In addition to *Brooks-Scanlon, Bullock,* and *Eastern Texas, see Louisville Joint Stock Land Bank v. Radford,* 295 U. S. 555 (1935); *In re Third Avenue Transit Corp.,* 198 F. 2d 703 (3d Cir. 1952); *Central Railroad Co. of New Jersey v. Manufacturers Hanover Trust Co.,* 421 F. 2d 604 (3d Cir. 1970), *cert. denied* 398 U. S. 949 (1970); *In the Matter of the Central Railroad Company of New Jersey,* (Bky. No. B401-67, 3d Cir., Aug. 27, 1973).

Those decisions which hold that a railroad cannot be constitutionally compelled to continue its operations when such operations result in continuing losses and there is no reasonable prospect of reorganization are still good law. The Third Circuit made this clear in *In re Penn Central Transportation Company,* 494 F. 2d 270 (3rd Cir. 1974) (*Columbus Options*), when it reviewed *Brooks-Scanlon, Bullock* and *Eastern Texas* and the more recent decisions in the *Penn Central Merger Cases,* 389 U. S. 486 (1968) and the *New Haven Inclusion Cases,* 399 U. S. 392 (1970). The Third Circuit in *Columbus Options* held that where the government had a prior lien on all assets of the debtor,

and where certain assets were to be sold in order to reimburse the debtor's general operating funds rather than to pay off the liens, interests of junior creditors were so compromised that the entire scheme resulted in a taking unless the marshalling rules were applied. Circuit Judge Gibbons disputed the government's contention that this court in the *New Haven Inclusion Cases, supra,* had laid down a new principle of constitutional law:

> "That new principle, they argue, is that secured investors in a railroad enterprise take on obligations in relation to the public which makes it appropriate that they run such a risk of erosion of their investment as is necessary in the public interest in order to preserve railroad service." 494 F. 2d at 279.

After carefully analyzing the factual circumstances of the *New Haven Inclusion Cases,* Judge Gibbons noted that "[t]he constitutionality of the erosion which had taken place . . . was never presented to the court in any proceeding in which it could have passed upon that issue." *Id.* at 282. The Supreme Court's grounds for decision had been narrow, entirely avoiding a ruling on any question of a taking:

> "The *New Haven Inclusion Cases* decide no more than that Penn Central does not have to pay for erosion which took place prior to its purchase of the assets . . . The erosion which took place in the New Haven reorganization did not occur because either the reorganization court or the Supreme Court considered that a new interpretation of the Fifth Amendment was being announced. Rather the reorganization court acting slowly, but with the concurrence of the bondholders, sought a purchaser which would pay creditors what

Brooks-Scanlon, Eastern Texas and *Third Avenue* required. The Supreme Court merely approved the reorganization court's application of settled Fifth Amendment law. Nothing more was presented to it in either of the cases relied on by the government and the trustees. Neither the *Penn Central Merger Cases* nor the *New Haven Inclusion Cases* cast doubt upon the continued viability of the *Third Avenue*[7] and *Jersey Central*[8] rules." 494 F. 2d at 282.

The *Third Avenue* and *Jersey Central* rules as construed in *Columbus Options* require that before the railroad, its stockholders and its creditors can be forced to shoulder continued burdens in the reorganization, it must be shown that there is a reasonable likelihood of *successful* reorganization. Mere legislative enactments and hopes for success do not satisfy the burden placed upon the government:

> "The appellees suggest that we can take judicial notice of proposed legislative solutions for the northeast rail transportation crisis which at the time of argument were under active consideration in Congress and have since been enacted. They suggest, further, that such judicial notice can serve as a substitute for the findings required by the *Third Avenue* and *Jersey Central* rules. We do take judicial notice that legislative solutions were under active consideration and have now been enacted. We also take notice that it is highly likely that some form of rail transportation system, publicly or privately owned, will almost certainly survive even

7. *In re Third Avenue Transit Corp.*, 198 F. 2d 703 (2d Cir. 1952).

8. *Central Railroad Co. of New Jersey v. Manufacturers Hanover Trust Co.*, 421 F. 2d 604 (3d Cir. 1970), *cert. denied*, 398 U. S. 949 (1970).

> if the present proceedings under § 77 are dismissed. But such judicial notice cannot serve to enlarge the power of the reorganization court and the ICC to subject the property of secured[9] creditors to a taking while, like Mr. Micawber, they wait for something to turn up. Congress, in devising a legislative solution, will be bound by the Fifth Amendment to pay the fair value of the Penn Central properties at the time any new rail transportation entity takes them. Any amount beyond that value, which would compensate secured creditors for the erosion which took place while the reorganization court and the ICC waited for a congressional solution [i.e., before the effective date of the congressional solution on January 2, 1974], would be a matter of legislative grace." *Columbus Options,* 494 F. 2d 282-3.

Judge Gibbons further recognized that the sorry state of Penn Central's finances already dictated a choice of either liquidation or compensation:

> "If as some of the reports filed by the trustees suggest, it is already clear that such a reorganization is not feasible, [footnote omitted] then this reorganization is already at the point where the erosion of the estate in deficit operations must cease and a liquidation alternative must be considered if the secured creditors or other interested parties insist upon such consideration." *Id.* at 283.

Likewise, the government defendants in this case cannot rely on their theory that so long as a "light at the end of the tunnel" exists, the public interest may then be permitted to outweigh the interests of the estate during the

9. Unsecured creditors and stockholders were not before the Court, *Columbus Option Appeals, supra* at n. 13.

interim. As the court held in *Columbus Options,* hopes cannot serve as a substitute for the findings required by the *Third Avenue* and *Jersey Central* rules. Judge Fullam very plainly outlined this principle in his opinion below:

> ". . . It must be assumed that USRA will strive diligently to comply with the Congressional directive to design both 'a financially self-sustaining rail service system' and a 'rail service system adequate to meet the rail transportation needs and service requirements of the region.' At present, no one knows whether these somewhat inconsistent goals can be achieved. Congress itself has recognized the uncertainty, by retaining the right to review the plan before it becomes effective. And, of course, even if the Final Plan is designed to show profitability on the basis of *pro forma* projections, there can be no assurance that actual results will live up to the forecasts.
>
> "The point is, not that these uncertainties can or should be eliminated, but that all risks—of the possibility of designing a profitable system, of ultimate profitability, and of interim losses while the hypotheses are explored—are imposed upon the debtors and their creditors, who are to be irretrievably committed to the project in advance, no matter how it works out.
>
> ". . . [I]t is impossible to avoid the conclusion that, before the burden of further interim erosion can constitutionally be imposed upon the railroad and its creditors, there must be greater assurance of a constitutionally acceptable end result than is provided by this statute." *Connecticut General, supra,* concurring opinion (J. A. pp. 79-80).

The government purports to see a "light at the end of the tunnel". The fact is, however, that there simply is no

reasonable prospect of successful reorganization under the Act as is required by the cases before continued loss operations can be imposed upon the Penn Central estate over appellees' objections. The Penn Central Reorganization Court has found that there is no possibility of an income-based reorganization within a reasonable time pursuant to Section 77 of the Bankruptcy Act (J. A. pp. 84-103). Conrail will not be significantly different from the present Penn Central System, as the four small bankrupt lines in addition to Penn Central will constitute no more than 10% of Conrail's trackage and revenues.[10] The same basic problems which ultimately led to the Penn Central's collapse and which still exist today will be faced by a Conrail System, 90% of which is composed of Penn Central. No demonstration has been made as to the likelihood of Conrail's viability, nor can a reasonable expectancy of such future viability be shown at this point in time, particularly in light of the withdrawal of the Erie Lackawanna and the Boston & Maine from the proposed system. Large scale abandonments of present lines are unlikely given the already mounting opposition to such widespread rationalization by local interests.[11] Furthermore, large scale abandonments may not be a total cure all for the inherent deficiencies of a Conrail system (made up primarily of Penn Central trackage) given the conclusion reached by the Wyer, Dick Studies that a 15,000 mile Penn Central system is not viable. The Act provides no means to achieve improved manpower productivity by eliminating unnecessary employees or to alter the inflexible labor rules which have

10. The Reading, the Lehigh Valley, The Central Railroad of New Jersey, and the Ann Arbor account for only about 11% of present trackage and 8% of present revenue for miles. DOT Report, Vol. I, p. 7.

11. *See* Rail Services Planning Office Evaluation of the DOT Report, at 9-10.

plagued Penn Central throughout its existence. The Act looks towards the continuation of passenger services without making any attempt to deal with the present conflict between freight and passenger services within the existing Penn Central System. As such, it ignores one of the basic viability requirements established by the Trustees, that is, that the reorganized rail system deal in passenger service only to the extent that such service impose no burden whatsoever upon freight operations. Finally, there has been no showing made that Conrail will be able to satisfy the Trustees' viability conditions concerning traffic and revenues. As a result of the Act's failure to provide adequate funds for rehabilitating and modernizing Penn Central's plant, it is unlikely that these operating levels can possibly be delivered for a Penn Central system, let alone for a Conrail system which incorporates four additional bankrupt lines.

There is a lesson to be learned from the New Haven reorganization. In dismissing the government's contention that investors in a railroad could be forced to "run such risk of erosion of their investment as is necessary in the public interest in order to preserve railroad service," *Columbus Options, supra* at 279, the Third Circuit dwelt upon where the limitations of such a principle might lie:

> "Neither appellee suggests the precise contours of what is claimed to be the new constitutional rule. The government, however, points out that in the New Haven reorganization erosion of the interests of secured creditors amounted to $70 million while the railroad was waiting to be included in the Penn Central merger. *See New Haven Inclusion Cases,* 399 U. S. at 490. We know, with the benefit of hindsight, that since 1968 the New Haven bondholders have fared even worse. If the results of the New Haven reorganization determine the

constitutional limitations of a reorganization court's power to subject mortgaged assets to erosion, there may be no limitation whatsoever." *Id.* at 279.

Unlike the situation present in the *New Haven Inclusion Cases*, Penn Central Company has objected to the reorganization plan originally proposed by the Trustees and has requested termination of the rail operations of Penn Central Transportation Company (J. A. pp. 377-381). In the *New Haven* situation, not only did the creditors not actively oppose the reorganization plan but they all urged inclusion of the New Haven into the Penn Central. Here, to the contrary, all creditor and shareholder interests oppose continued operation of the railroad. In addition, in the *New Haven*, the reorganization court had supervision and control over the reorganization plan—inclusion of the New Haven into the Penn Central. It determined the date, feasibility and value of the inclusion. Here, of course, the Reorganization Court has no power or control whatsoever over the procedures established by the Act.

The erosion here has progressed, very simply, too far and for too long. During the period of Penn Central's reorganization prior to the effective date of the Act, rail operations resulted in losses of $851 million.[12] From the inception of the Act until May, 1974, Penn Central's net losses exceeded $97 million.[13] If the processes of the Act are allowed to continue through the end of 1975, then the rail operations forced by the Regional Rail Reorganization Act will result in a further projected loss of $443.1 million.[14]

12. Reorganization Court's Memorandum and Order No. 1543, 120 day decision (May 2, 1974), (J. A. pp. 84-103), Finding of Facts Nos. 1, 4 (J. A. pp. 89-90).

13. Trustee's Statement of Revenues and Expenses of Penn Central for May, 1974.

14. Reorganization Court's Memorandum and Order No. 1543, *supra*, Finding of Facts Nos. 24, 25 (J. A. pp. 98-99). Additionally, it should be noted that U. S. R. A. has recently requested of Congress

Visions of ultimate success can be nothing more than sheer speculation, and sheer speculation cannot be used to counteract the reality of the unbearable financial burdens placed on the plaintiffs here. We have here a far different situation than faced the courts in the *New Haven Inclusion Cases, supra, Continental Illinois Nat. Bank & T. Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648 (1935); *Reconstruction Finance Corp. v. Denver & Rio Grande Western Ry. Co.*, 328 U. S. 495 (1946). There the courts were presented with Plans of Reorganization. The very real possibility existed that the railroads could be reorganized. Under those circumstances, the Courts held that the losses of the creditors incurred during the reasonable time in which it took for the Plans to be drafted need not be constitutionally remedied. Here, the reorganization court has found there is no possibility for a reorganization pursuant to Section 77 and *no one has presented any evidence whatever that Conrail has any reasonable likelihood of success while significant evidence has been presented that it is doomed to failure.*[15] In the Reorganization Court, the testimony of John W. Ingraham, vice president of First National City Bank was introduced into evidence.[16] That evidence shows that Conrail would likely run out of cash three to five years after conveyance of the rail properties to it and that from 1975-1982 Conrail would not be able to obtain adequate financing from the private sector and there is no likelihood that dividends will be paid on Conrail stock. Mr. Ingraham concluded that the value of Conrail stock would be at most $160 million. The

14. (Cont'd.)
a four month delay for the issuance of preliminary and final system plans. Therefore, interim losses will continue an additional four months.

15. See discussion, *supra*, pp. 26-27.

16. Document No. 7598 in the reorganization court proceedings.

Ingraham testimony stands unchallenged and uncontradicted.

There is no question but that the Act requires continued operation of the Penn Central pending implementation of the Final System Plan. The very purpose of the Act is to transfer to Conrail the rail properties of the affected railroads. Section 304(f) provides that after the enactment of the Act, "no railroad in reorganization may discontinue service or abandon any line of railroad other than in accordance with the provisions of this Act" unless it is authorized to do so by USRA and no reasonable opposition has been made by any affected region or locale. USRA has not authorized any abandonments and in response to requests by the Penn Central Trustees for approval of abandonments, USRA stated that it had established no procedures to deal with such requests. (See Joint Documentary Submissions 64, 65.) It would be most surprising if USRA, whose goal is to achieve a Final System Plan for all railroads in reorganization in the area, would agree to the abandonment of integral portions of the system. It is most certainly clear that the states and local regions affected by the Act will continue to oppose all abandonments as they have in the past. The Act means what it says—rail operations *must* be continued.

This Act, while compelling continued rail operations during the period before the Final System Plan is implemented, fails utterly to provide adequate compensation for such a taking. The sole provisions of the Act which provide for the payment of monies to the subject railroads, Sections 213 and 215, are wholly inadequate to compensate the estates for the burdens caused by mandated interim operations. Section 213 limits the authority of the Secretary of Transportation to authorize funds for rail services during the implementation period of $85 million. This amount is clearly insufficient to protect the bankrupt rail-

roads from the considerable injury that they will suffer from interim operations and as the lower court pointed out, the full statutory authorization has not been appropriated and there is no agreement as to the nature of these payments (J. A. 31-32). Section 215 merely provides funds for the acquisition, maintenance or improvement of rail properties and specifically releases Conrail from any obligation to compensate a railroad for that portion of the value of the transferred properties which is attributable to such acquisition, maintenance, or improvement. The lower court, after reviewing these provisions in conjunction with the history of Penn Central losses, both past and continuing, concluded:

> "It becomes quickly apparent that the limited amounts of these funds—available to railroads in reorganization in the region—have not been specifically designated to meet challenges of unconstitutional erosion." (J. A. p. 31)

The Court, therefore, held that Section 303 violated the constitutional rights of the Appellees for the specific reason that it, being "the only provision of the Act pertaining to valuation of the railroad estate, [failed] to provide a remedy for any unconstitutional erosion." (J. A. p. 53).

No matter how serious the rail crisis might be, no matter how important continued rail operations might be, the method that Congress has chosen here, the Regional Rail Reorganization Act, does blatant violence to the Constitution. Judge Fullam made that abundantly clear in his 180 day decision pursuant to § 207(b) of the Act:

> "The issue is not whether governmental action may properly be taken to avoid such dislocations, but rather whether the method selected by Congress, the RRRA, is a constitutional method of achieving that legitimate public goal. In short, the question is whether the gov-

ernment can avoid such disruptions by imposing the costs and risks of a possible solution upon the Debtor's estate. Support for an affirmative answer to that question is to be found, if at all, in the concept that the privilege of a government-protected railroad monopoly gives rise to a residual claim in the public for continuation of railroad operations, to wit, the notion of 'common carrier responsibility' which finds statutory expression in § 1(18) of the Interstate Commerce Act.

"The legitimacy of 'common carrier responsibility' is, of course, not in question. But the duration of that responsibility is. Stated briefly, the issue is whether the government may treat a common carrier whose government-sponsored monopoly is no longer profitable, as if it remained profitable.

"In the so-called Granger case, *Munn v. Illinois*, 94 U. S. 113 (1876), the Supreme Court articulated the 'public interest' theory upon which economic regulation was based for almost 60 years:

> 'Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to the use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to control.' 94 U. S. at 126.

"In the case of railroads, the right to withdraw is not unqualified. State legislatures early authorized regulatory agencies to control the abandonment and termi-

nation of services of rail carriers. Since railroads operate under government-created monopolies, that extension of regulatory power was both logical and lawful, if the carrier's total operations were profitable. Charington, *The Regulation of Railroad Abandonments,* 17-25 (Harv. 1948).

"However, when a carrier's operations are not profitable, it is unconstitutional to require their continuance. *Brooks-Scanlon Co. v. Railroad Commission,* 251 U. S. 396 (1920); *Bullock v. Florida ex rel. Railroad Commission,* 254 U. S. 513 (1921); *Mississippi R. R. Commission v. Mobile & Ohio R. R. Co.,* 244 U. S. 388 (1917). Enactment of the Transportation Act of 1920, which contains what is now §1(18) of the Interstate Commerce Act, did not alter this constitutional doctrine. *Railroad Commission v. Eastern Texas R. R. Co.,* 264 U. S. 79 (1924). The Supreme Court has recently recognized the continuing validity of those cases, in the *New Haven Inclusion* case, *supra* (399 U. S. at 491). Recent decisions in the Third Circuit, *In the Matter of Penn Central Transportation Co.,* 49 F. 2d 270 (3d Cir. 1974) (Columbus options case), and in the First Circuit, *In Re Boston & Maine Corp.,* 484 F. 2d 369 (1st Cir. 1973), as well as the decision in *Connecticut General, supra,* are all to the same effect. Indeed, the government does not dispute, as an abstract principle of constitutional law, the doctrine that there may be a point beyond which a railroad cannot constitutionally be required to continue to provide service.

"It appears to be the government's contention that in the present case the Debtor can be forced to continue rail operations, not indefinitely, perhaps, but at least for a substantial further period, without regard to whether the accruing administration expenses reduce the value of the estate less than its present liquidation

value. The monopoly rationale of railroad regulation, as noted above, does not support that argument. And I am unable to perceive any basis in the general concept of police power for upholding that result.

"The government may, of course, preclude uses of property which are harmful to the public, and even render valueless under certain circumstances private property without compensation in order to obviate the harm, *e.g., Miller v. Schoene,* 276 U. S. 272 (1928) (destruction of cedar trees spreading disease to apple orchards). But, except for the monopoly rationale, there is no authority for affirmatively requiring uncompensated continuation of a use of property merely because cessation of that use would be detrimental to the public. Indeed, there are constitutional limits to governmental restrictions of the use of property, when such restrictions are confiscatory. *Pennsylvania Coal Co. v. Mahon,* 260 U. S. 393."

In re Penn Central Transportation Company (Bky. No. 70-347, July 2, 1974), Memorandum Decision (J. A. pp. 143-146). (Footnotes omitted).

While the public interest in continued rail services is important, this Court has recognized the supremacy of the Constitution to such public interest:

"The constitutional protection afforded by the Bill of Rights and the Fourteenth Amendment were designed to protect fundamental rights, not only of the majority but of minorities as well, even against the will of the majority. The effort to accommodate community sentiment or the wishes of a majority of voters, although usually valid and desirable, cannot justify abandonment of our Constitution." *Reitman v. Mulkey,* 387 U. S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967); *Lucas*

v. Forty-Fourth General Assembly, 377 U. S. 713, 84 S. Ct. 1459, 12 L. Ed. 2d 632 (1964).

As the Reorganization Court has clearly recognized, the creditors and shareholders have acted with utmost patience and deference through these proceedings:

> "It is easy to picture that present controversy as a dispute between grasping creditors, on the one hand, and the public interest, on the other. But that simplistic picture is entirely inaccurate. In the first place, the creditors and stockholders of the Penn Central Transportation Company have exhibited commendable patience and restraint in supporting the continued operation of the railroad during reorganization, at a cost of nearly $1 billion. More importantly, the immediate impact of continued loss operations is being absorbed by state and local taxing authorities, and by pre-bankruptcy personal injury claimants, whose judgments have been held in abeyance for more than four years, and cannot be paid until all senior claimants are taken care of in a plan of reorganization. Whatever may be said of trade creditors and investors, surely the local taxing authorities and personal injury claimants cannot be said to have made an investment decision of any kind or to have extended credit voluntarily to the railroad.
>
> "Among the 160,000-odd stockholders, and the upwards of 50,000 bondholders, I have no doubt that a significant portion do not readily conform to the image of sophisticated investors. And even if they were all established financial institutions, some mention should be made of the generally accepted view that our system of private enterprise can best be preserved if investor confidence

is not unnecessarily jeopardized." *In re Penn Central Transportation Company,* (Bky. No. 70-347, July 21, 1974), Memorandum Decision (J. A. 148-149).

The creditors and stockholders cannot suffer their constitutional rights to be violated. On innumerable occasions, this Court has reaffirmed the basic principle that a private party cannot be compelled to bear a burden which, in all justice and fairness, should be borne by the public. *United States v. Pewee Coal Co.,* 341 U. S. 114 (1951). See *Armstrong v. United States,* 364 U. S. 40, 49 (1960); *Louisville Joint Stock Land Bank v. Radford,* 295 U. S. 555, 602 (1935).

The Fifth Amendment to the Constitution prohibits the government from taking property without paying just compensation. Yet, this Act mandates the taking of plaintiffs' property without any compensation during the indefinite period of preparation of a Final System Plan. Therefore, the Act in this respect must fall.

II. The Final Taking of Property Pursuant to the Act Violates Penn Central Company's Fifth Amendment Rights.

A majority of the three-judge court held that the issue of whether the final conveyance of property mandated by the Act takes plaintiff's property without adequate compensation in violation of the Fifth Amendment was not ripe for adjudication. Judge Fullam dissented stating that the issue was ripe. Penn Central Company concurs in Judge Fullam's reasoning and contends that the Order of the three-judge court below enjoining certification of the Final System Plan should be sustained for the reason that the final taking of property pursuant to the Act violates the Fifth Amendment.

A. The Compulsory Conveyance Features of the Act Are Ripe for Adjudication.

The final taking effectuated by the Act presents constitutional issues that are not only ripe for adjudication at this time but issues that must be confronted by the court. The "ripeness" doctrine is a judicial rule conceived as a means of insuring that the court's jurisdiction would not extend beyond "cases" and "controversies." As one of a number of judge-made rules that serve as stepping stones to the availability of the courts' decisional process, "ripeness" is a word of art conceived to insure that the parties to the litigation and the issues subject to adjudication are presented in a clean, concise and well-defined context. Where declaratory relief is sought the question of whether a "controversy" is ripe is forever in the forefront of issues to be decided before the substantive merits of the claim are adjudicated.

In determining whether a "controversy" is judicially cognizable at the time it is presented, this Court in *Aetna Life Ins. Co. of Hartford, Conn. v. Haywarth,* 300 U. S. 227, 240-241 (1937), has set out what have become the standard general guidelines:

> "A 'controversy' in this sense must be one that is appropriate for judicial determination. Osborn v. Bank of United States, 9 Wheat. 738, 819, 6 L. Ed. 204. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. United States S. S. Co., 253 U. S. 113, 116, 40 S. Ct. 448, 449, 64 L. Ed. 808. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. South Spring Gold Co. v. Amador Gold Co., 145 U. S. 300, 301, 12 S. Ct. 921, 36

> L. Ed. 712; Fairchild v. Hughes, 258 U. S. 126, 129, 42 S. Ct. 274, 275, 66 L. Ed. 499; Massachusetts v. Mellon, 262 U. S. 447, 487, 488, 43 S. Ct. 597, 601, 67 L. Ed. 1078. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, and distinguished from an opinion advising what the law would be upon a hypothetical state of facts. . . . Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised . . ."

The application of these standards to concrete factual settings has, however, proved to be a difficult task for subsequent courts. As the Supreme Court frankly recognized in *Maryland Casualty Co. v. Pacific Coal and Oil Co.*, 312 U. S. 270, 273 (1941):

> "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. See *Aetna Life Ins. Co. v. Hayworth*, 300 U. S. 227, 239-242, 57 S. Ct. 461, 463, 464, 81 L. Ed. 617, 108 A. L. R. 1000."

The Supreme Court in *Poe v. Ullman*, 367 U. S. 497, 508-9 (1961), has provided guidance in attempting to discern whether an actual "controversy" is present:

"Justiciability is of course not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures, including the appropriateness of the issues for decision by this Court and the actual hardship to the litigants of denying them the relief sought."

As Justice Douglas observed in his concurrence in *Public Affairs Associates, Inc. v. Rickover*, 369 U. S. 111, 114-117 (1962):

"The requirements of a 'case' or 'controversy' and the propriety of the use of the declaratory judgment are at times closely enmeshed. In resolving those issues the Court has on the whole been niggardly in the exercise of its authority . . . At times the question of 'ripeness' of an issue for judicial review is brigaded with the appropriateness of declaratory relief . . . At other times the issue is said to be 'abstract' because of the lack of immediacy in the threatened enforcement of a law. Thus, a person must risk going to jail or losing his job to get relief . . . the list is not complete. But these cases illustrate the restrictive nature of the judge-made rules which have made the federal courts so inhospitable to litigation to vindicate private rights. At no time has the Court been wholly consistent; nor have I . . . But my maturing view is that *courts do law and justice a disservice when they close their doors to people who, though not in jail nor yet penalized, live under a regime of peril and insecurity. What are courts for, if not for removing clouds on title, as well as for adjudicating the rights of those against whom the law is aimed, though not immediately applied?* The approach we take today has often been used to abdicate the judicial function under resounding utterances con-

cerning the importance of judicial self-denial. It has also served to place undue emphasis under the clarity and precision of the questions presented." [Emphasis added]

The factual context in which the final taking mandated by the Rail Act is presented to the court heavily supports the conclusion that the taking effected by the Act presents a justiciable controversy that is ripe for adjudication. The Act sets out mandatory procedures which lead inexorably to the taking of plaintiff's property without provision for just compensation in violation of the Fifth Amendment. Section 206 establishes the guidelines for the Final System Plan which is then prepared and implemented by USRA (§ 202). In particular, § 206 provides that the Final System Plan will designate which rail properties will be transferred to Conrail (§ 206(c)(1)(A)), that the transfer of such properties will be in exchange for stock in Conrail (§ 206 (d)(1)) and will designate the value of rail properties to be transferred and the value of the securities to be received (§ 206(f)). There is little question and indeed the parties have stipulated herein that PCTC rail properties will in all likelihood be included in the Final System Plan.[17]

Under § 207 a two step procedure by which a railroad becomes subject to the transfer provisions contained in the Final System Plan is set out. Within 120 days after enactment the § 77 reorganization court determines whether the railroad is recognizable on an income basis (§ 207(b)). Penn Central has already been found not to be so reorganizable.[18] The next step, within 180 days of enactment, is another determination by the reorganization court that the railroad will be reorganized pursuant to the Act unless the

17. Stipulation of Plaintiff and Defendants as to Factual Matters (J. A. 370-371).

18. J. A. 84-103.

railroad is reorganizable on an income basis or the Act does not provide a process which is fair and equitable to the estate of Penn Central (207(b)).[19]

The reorganization of the railroad proceeds pursuant to the Act if the special court fails to find that the railroad should not be subject to the process of the Act. Under § 207(c) USRA must prepare a Final System Plan. That plan is then submitted to Congress where, in accordance with § 208(a), it is "deemed approved" at the end of 60 days unless affirmative action is taken by Congress formally disapproving the Plan. USRA is under a continuing duty to revise the Final System Plan in the event Congress does express its disapproval (§ 208(b)). Under § 208 the only judicial review of the Final System Plan provided for after Congressional approval under § 208, is of the value of the rail properties to be conveyed and the value of the consideration to be received. The rail properties must be conveyed by the Special Court under § 303(b). The Act does not allow for any discretion on the part of the Special Court. Indeed, the Act specifically precludes court action to restrain or enjoin any conveyance (§ 303(b)(2)). Section 303(c) allows, after the conveyance, review by the Special Court of the fairness and equity of the completed conveyances and provides the sole method by which the consideration for the conveyances can be altered in the event it is not found fair and equitable to the estate of the railroad.

Thus, the issue of the final taking of Penn Central's rail property when viewed in the context of the Act which

19. The finding by Judge Fullam, in *In the Matter of Penn Central Transportation Co.*, (Bky. No. 70-347), pursuant to Section 207(b), that the Act does not provide a process which would be fair and equitable to the Estate of Penn Central (J. A. 104-152) has been stayed pending the final determination of this issue by the Special Court pursuant to Section 207(b). It must be noted that the Act specifically prohibits any review of the decision entered by the Special Court (Section 207(b)).

effectuates that taking is undeniably a justiciable controversy. The Act is comprised of a series of steps which lead inexorably to the conveyance of the rail properties of Penn Central. It is clear from even a superficial reading of the Act that plaintiff has absolutely no choice with respect to the transfer and valuation of his properties.[20] The Final System Plan is formulated, approved and implemented without the consent of any creditor or stockholder interest. Indeed, these parties are entirely powerless to prevent the inevitable conveyance once the process of the Act has begun. The Act's attempt to substitute choice in the Court for choice in the owner fails to provide any such meaningful choice.[21] The only time before the conveyance of the rail property at which judicial review of the entire Act is possible is under § 207(b). It is at that point that the reorganization court determines whether the process of the Act is fair and equitable to the estate of the railroad. But, at this point, a court can make only highly conjectural deter-

20. Judge Fullam noted in his Section 207(b), 180 day opinion, "Under normal concepts of due process in the administrative field, one would expect to find some opportunity for obtaining and considering the views of the affected property owners in advance of such value determinations." (J. A. p. 135).

21. Judge Fullam recognized in his 180 day decision, *supra* at 12, that, "A more serious, or at least more noticeable, problem pursuant to the Final System Plan are mandated to occur in advance of any judicial scrutiny and in the absence of any judicial determination as to the fairness and equity of the proposed exchanges. Arguably, even this defect might be remedied if the Special Court were empowered to set aside the conveyances if it should find unfairness of inequity. But it is clear that the Act does not permit any such curative action by the Special Court. And finally, even this series of problems could perhaps be overlooked if the Special Court could, by some alternative means, see to it that the respective estates received the "constitutional minimum" due them from their properties. But it is entirely clear that the Special Court, upon finding that the transfers are less than fair and equitable, is limited to reallocating the securities specified in the Final System Plan and, if the result is still unfair or inequitable, to imposing a deficient judgment against Conrail." (J. A. pp. 136-137).

minations on the basis of a non-existent record. Later, after the conveyance has occurred, the Special Court, under § 303(c), is empowered to determine if the conveyance has been fair and equitable. But, at this point it is too late to prevent the conveyance. Thus, the attempt to provide for conveyances based on judicial decisions is wholly ineffectual. At the time when a court can make an effective decision it does not have the information available to make that decision meaningful, and when the information is available a decision by the court no longer has any real meaning. Thus, this is the only time when Penn Central Company's claim that the final taking is unconstitutional can be effectively and meaningfully heard. A decision three years after conveyance will be of litle help to anyone. The fact is that the process of the Act has already begun to operate and plaintiff's rights are now being effected.

In *Pennsylvania v. West Virginia,* 262 U. S. 553 (1922) suits were brought to enjoin West Virginia from enforcing an act of its legislature which Pennsylvania and Ohio claimed would injuriously affect the supply of natural gas entering their states. The Court, in holding that the suits were not brought prematurely, discussed the factual context of the case:

> "*The second question is whether the suits were brought prematurely.* They were brought a few days after the West Virginia Act went into force. No order under it had been made by the Public Service Commission; nor had it been tested in actual practice. But this does not prove that the suits were premature. Of course they were not so, if it otherwise appeared that the Act certainly would operate as the complainant states apprehended it would. *One does not have to await the consummation of threatened injury to obtain preventive relief.* If the injury is certainly impending, that is enough.

> "Turning to the Act, we find that by its first section it lays on every pipe line company a positive duty—to the extent of the supply of gas produced in the state, whether produced by it or others—to satisfy the needs, whether for domestic, industrial or other use, of all intending consumers, whether old or new, who are willing to pay for the gas and want it for use within the section of the state in which it is produced, in that through which it is transported, or in that wherein it is supplied to others. This is a substantive provision, whose terms are both direct and certain, and to which immediate obedience is commanded. No order of the commission is required to give it precision or make it obligatory, and it leaves nothing to the discretion of those who are to enforce it. On the contrary, it prescribes a definite rule of conduct and in itself puts the rule in force. It imposes an unconditional and mandatory duty, as counsel for the state admit, and obviously is intended to enforce a preferred recognition and satisfaction of the needs of consumers within the state, present and prospective, regardless of the effect on the interstate stream or on consumers outside the state." 592-4 [emphasis added]

The stress put on the mandatory aspects of the act and the lack of discretion involved in implementing the act evidence the Court's concern, not with whether the potential injury was already consummated but rather, with the fact that the act was so structured that the threat of harm occasioned by its mere passage was enough to establish the "ripeness" of the controversy. There were contingencies that may have affected any injury to be sustained by the plaintiff but the Court did not find these persuasive in light of the "procedural, penal, and remedial provisions" of the act.

Again, in *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936), the Court looked to the mandatory provisions of the statute to determine whether the issues were prematurely raised. In holding the suits "ripe" for adjudication the Court stated,

> "That the suits were not prematurely brought also is clear. Section 2 of the Act is mandatory in its requirement that the commission be appointed by the President. The provisions of Section 4 that the code be formulated and promulgated are equally mandatory. The so-called tax of 15% is definitely imposed, and its exaction certain to ensue." 298 U. S. at 287.

Although the suits were brought immediately after the effective date of the Act, although no commission had been appointed and no "tax" yet enacted, the suits were ripe for adjudication. The mandatory nature of the act made the threatened injury real enough to satisfy the requirements for a "case" or "controversy." The factual context of *Carter v. Carter Coal Co., supra,* is similar to the situation in which the instant issues are presented. There, the act was in response to a critical problem and enacted to, provide, *inter alia,* for the general welfare. The drastic solution to this crucial problem envisaged by the act, however, was not allowed to conflict with the constitution, ". . . for nothing is more certain than that beneficial aims, however great or well directed, can never serve in view of constitutional power." 298 at 291. These words apply with equal force here.

The decision in *Pierce v. Society of the Sisters of the Holy Name of Jesus and Mary,* 268 U. S. 510 (1925) provides further support for the proposition that the mandatory process of the Act makes the final taking issues ripe for adjudication. Suits were brought to enjoin the enforce-

ment of Oregon's Compulsory Education Act of 1922. Although the effective date of the Act was not until 1926, the Court held that:

> "The suits were not premature. The injury to appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well recognized function of courts of equity." 268 U. S. at 536.

The mandatory nature of the act created the "present and very real" injury. The time lag between the enactment and effective date of the act was not seen as a material contingency destroying the "ripeness" of the controversy. The court was keenly sensitive to the injury to appellees that would result from the failure to hear the issue.

The mandatory process of this Act, leading inevitably to the ultimate taking, provides the requisite substantial controversy, between parties having adverse interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. That there are certain contingencies that must occur prior to the consummation of the conveyance of the rail properties does not detract from the mandatory process of the Act nor transform the ripe issues into prematurely raised issues. It is inherent in the nature of the remedies of declaratory judgments and injunctions that the injury has not yet become finalized. Rather, the purpose of these remedies is to keep the threat of injury from becoming real. In *Swift and Co. v. United States,* 276 U. S. 311 (1928), Justice Brandies, in response to the argument that the Court lacked jurisdiction because there was no case of controversy cautioned that:

> "The argument ignores the fact that a suit for an injunction deals primarily, not with past violations, but with threatened future ones; and that an injunction may issue to prevent future wrong, although no right has yet been violated." 276 U. S. at 326.

See also *Izaak Walton League of America v. St. Clair,* 313 F. Supp. 1312, 1315 (D. Minn. 1970); *Delaney v. Carter Oil Co.,* 174 F. 2d 314, 317 (10th Cir. 1949); *A. S. Abell Co. v. Chell,* 412 F. 2d 712 (4th Cir. 1969); *Pennsylvania Casualty Co. v. Upchurch,* 139 F. 2d 892 (5th Cir. 1943); *Seguros Tepeyac, S. A. Compania Mexicana v. Jernigan,* 410 F. 2d 718 (5th Cir. 1969).

In *American Machine and Metals v. DeBothezat Impeller Co.,* 166 F. 2d 535 (2nd Cir. 1948), declaratory relief was sought defining the legal relationship of the parties in the event the plaintiff gave notice of termination of its contract with the defendant. In granting the declaratory relief the court discussed the existence of contingencies and their affect on the presence of an actual "controversy" and the right to declaratory relief:

> "As the Supreme Court said in Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U. S. 270, 273, 61 S. Ct. 510, 85 L. Ed. 826, the difference between an abstract question and a 'controversy' is one of degree. If notice of termination had been given, the defendant apparently concedes that there might be an actual controversy, although even after termination it would still be optional with the plaintiff whether to continue the business and an adverse decision would probably induce him not to continue. Before termination, the controversy is one step further removed from actuality but not so far removed as to present only an abstract question, in our opinion. Once the notice of termina-

tion is given, it is beyond recall; the dispute between the parties concerns the right of the plaintiff to continue business if that contingency happens. Where there is an actual controversy over contingent rights, a declaratory judgment may nevertheless be granted. Pennsylvania Casualty Co. v. Upchurch, 5 Cir., 139 F. 2d 892, 894; Franklin Life Ins. Co. v. Johnson, 10 Cir. 157 F. 2d 653, 658; Sigal v. Wise, 114 Conn. 297, 158 A. 891, 892, 893; Borchard, Declaratory Judgments, pp. 422-3." at 536

The presence of contingencies will not, therefore, bar declaratory relief as a matter of course. The nature of the contingencies must be closely scrutinized to determine whether they transform an actual controversy ripe for adjudication into a premature claim. In his decision below Judge Aldisert for the majority focused on three contingencies that, in his estimation, rendered the final taking issues premature. The second and third of these contingencies, delivery of the Final System Plan to Congress (§ 208(a)) and the actual conveyance pursuant to the order of the Special Court § 303(b) are merely time gaps that in no way detract from the ripeness of the issues. As Judge Fullam pointed out in his opinion, the submission and approval of a Final System Plan is inevitable and the Special Court has no discretion whatsoever in ordering the conveyance.[22] Thus, these contingencies are even less relevant to the ripeness of the final taking issues than were the contingencies present in *A. S. Abell Co., supra; Pennsylvania Casualty Co., supra;* and *American Machine and Metals, supra.* These contingencies may result in a time delay but they do not affect the inevitable taking mandated by the Act.

22. Opinion of Judge Fullam, (J. A. pp. 57-58).

The first contingency cited by Judge Aldisert, that action by the reorganization court under § 207(b) may prevent a conveyance from taking place, actually supports the conclusion that the final taking issues are ripe. Pursuant to § 207(b) the reorganization court must determine whether the Act, "provide[s] a *process* which would be fair and equitable to the estate of the railroad in reorganization . . ." [Emphasis added] Such a determination necessarily requires an assessment of the entire Act, that is, all its procedures and most importantly the provisions regarding the conveyancing of rail properties to Conrail.[23] As Judge Fullam forcefully pointed out in his decision in *Connecticut General:*

> "Under § 207(b), the Reorganization Court will have to consider at least some of the cluster of discrete issues concerning the ultimate conveyance provisions of the Act, including some of the constitutional issues raised by these cases. This is so because the Reorganization Court must consider the RRRA in its entirety in order to ascertain whether the process is fair and equitable to the estates. Moreover, it is highly improbable that a Reorganization Court could successfully reject the statute as unfair or inequitable under § 207(b) for reasons of less than constitutional magnitude. Indeed, the government's position at the June 10 hearing in the Reorganization Court was that nothing short of unconstitutionality would justify rejection of the Act under § 207(b)." (J. A. pp. 58-59).

Thus, the final taking issues must be determined at this moment. The inevitability and immediacy of this deter-

23. Indeed Judge Fullam stated in his 180 day decision that the final taking issues must be considered at this point . . ." [I] see no way to avoid it in the present litigation, where an evaluation of the fairness and equity of the RRRA is mandated." (J. A. p. 140).

mination renders the final taking issues ripe for adjudication before this court.

The contingencies that are present in the Act are, therefore, not contingencies at all. They are merely stumbling blocks on the path to the inevitable taking mandated by the Act. They cannot serve to render the constitutional issues raised by the process of the Act premature. The decisions cited by the majority do not dictate the conclusion that the final taking issues are premature. Read together, *Communist Party of United States v. Subversive Activities Control Board,* 367 U. S. 1 (1961), and *Albertson v. Subversive Activities Board,* 382 U. S. 70 (1965), establish a continuum along which a controversy proceeds from abstraction to ripeness. In *Communist Party,* the controversy was still at the hypothetical stage because of various abstract possibilities. In holding the issues premature, the Court recognized that the privilege was asserted on behalf of *unnamed* officers, that the Party might choose to register and thus the duty of those officers would never arise, that it was unknown whether the officers would claim the privilege and, if so, whether the Attorney General would honor it. Thus, the number and voluntary nature of these contingencies precluded there being a precise factual citing for the resolution of the issues. An overriding factor in the Court's conclusion was the fact that any disallowance of the claim of privilege in the context of the Act "may raise novel and difficult questions as to the reach of the Fifth Amendment." In *Albertson,* the court held that plaintiffs did not have to await prosecution for failure to register to have their constitutional claims adjudicated. Here, the Act is before the Court. There are no voluntary contingencies that stand between plaintiffs and the inevitable injury visited by the Act. Thus, the final taking issues presented are clearly further along the continuum than in *Communist Party.* Here, as in *Albertson,* the plaintiffs need not wait

until the unconstitutional conveyances are consummated before litigating their claims.

The final taking issues are, thus, ripe for adjudication by the court at this time. This conclusion is required by the factual context in which the issues are raised. The mandatory process of the Act itself creates the ripeness of these issues. The lack of discretion on the part of any future court in evaluating the constitutionality of the conveyances coupled with the involuntary nature of the transfers buttress this conclusion.

B. The Act Ultimately Results in a Taking of Appellee's Property Within the Meaning of the Fifth Amendment.

There can be little doubt that Penn Central Company's property will be "taken" under the Act as that term is used in the Fifth Amendment to the Constitution of the United States. As explained in detail at pp. 40-41, 48-49 *supra*, the Act mandates the involuntary transfer of rail properties to Conrail. Without its consent, Penn Central Company's shares of Penn Central Transportation Company will be confiscated and it will receive Conrail securities in return.

Clearly, transfer of the rail properties of Penn Central to Conrail effects a taking of the property of Penn Central Company, the sole shareholder of Penn Central Transportation Company and an unsecured creditor. If a substantial interference with the use and possession of property constitutes a taking, *United States v. Cousby, supra; United States v. General Motors Corporation*, 323 U. S. 373, 378 (1945); *Pennsylvania Coal Company v. Mahon*, 360 U. S. 393 (1922); *Eyerabide v. United States*, 345 F. 2d 565 (Ct. of Cl. 1965), it follows that the Act's mandatory

transfer of Appellee's rail properties constitutes a taking within the meaning of the Fifth Amendment.

C. The Method and Procedure of Taking Prescribed by the Act Is Unconstitutional.

The Fifth Amendment to the Constitution of the United States proscribes the taking of "private property . . . for public use without just compensation." The fundamental importance of this constitutional right has long been recognized:

> "Indeed, in a free government almost all other rights would become utterly worthless if the government possessed an uncontrollable power over the private fortune of every citizen. One of the fundamental objects of every good government must be the due administration of justice; and how vain it would be to speak of such an administration, when all property is subject to the will or caprice of the legislature and the rulers." Story, *Commentaries on the Constitution of the United States,* Volume 2 § 1790 at p. 570.

This Court has in numerous cases applied the Fifth Amendment's guarantee of full and adequate compensation for property taken by the government for public use. *Almota Farmers Elevator and Warehouse Co. v. United States,* 409 U. S. 470 (1973); *United States v. Miller,* 317 U. S. 369 (1943); *Olson v. United States,* 292 U. S. 246 (1934); *Joslin Manufacturing Co. v. Providence,* 262 U. S. 668 (1923). Although it was perhaps with exemplary motivation, Congress in this Act has circumvented the Fifth Amendment's prohibition against uncompensated taking and has denied to the judiciary its proper constitutional function of determining the amount of compensation to be paid.

1. The Act Violates the Fifth Amendment in That It Does Not Provide for Payment in Legal Tender and Limits the Amount to Be Paid.

The Act specifically provides that USRA is authorized to issue bonds, debentures, trust certificates, securities or other obligations up to $1,500,000,000 value. Section 210(b). Of this amount, up to $1,000,000,000 may be issued to Conrail. Section 210(b). Because Section 210(b) of the Act requires Conrail to utilize at least $500,000,000 for rehabilitation and modernization of the rail properties, Conrail, therefore, will have a maximum of $500,000,000 to use in issuing securities in payment for acquired rail properties.[24] Section 206(d) makes it clear that the confiscation of rail properties be compensated in the form of securities of Conrail. Thus, both the Act unambiguously proscribes compensation in the form of legal tender and substitutes payment of securities in the newly created Conrail.

The rule that payment for property taken by the government for public use must be in the form of money is almost as old as the Constitution itself. In *Vanhorne's Lessee v. Dorrance,* 2 Dall. 304, 313 (Cir. Ct., Pa. Dist. 1795) Justices Paterson and Peters stated:

> ". . . No just compensation can be made except in money. Money is a common standard, by comparison with which the value of any thing may be ascertained. It is not only a sign which represents the respective values of commodities, but it is a universal medium, easily portable, liable to little variation, and readily exchanged for any kind of property. Compensation is a recompense in value, a *quid pro quo,* and must be in money . . ."

24. It must be noted that this $500 million will be paid in exchange for the rail properties not just of Penn Central but of seven other railroads affected by the Act.

As recently as last year, in *Almota Farmers Elevator & Warehouse Co. v. United States,* 409 U. S. 470 (1973), this court restated the rule that compensation must be the monetary equivalent for the taken property:

> "The Fifth Amendment provides that private property shall not be taken for public use without 'just compensation.' And 'just compensation' means the *full monetary* equivalent of property taken. The owner is to be put in the same position *monetarily* as he would have occupied if his property had not been taken." 409 at 794.

See also *United States v. Reynolds,* 397 U. S. 14 (1970); *United States v. Miller,* 317 U. S. 369 (1943).

The Act is therefore constitutionally deficient because compensation is to be in Conrail securities and not in legal tender. However, the Act suffers from the further constitutional deficiency that it limits the amount which may be used in connection with the acquisition of rail properties. In *Monongahela Navigation Co. v. United States,* 148 U. S. 312 (1893) a federal statute was held unconstitutional which limited the amount payable for property taken by the government. The Court addressed the issue of the compensation required by the Constitution:

> "The noun 'compensation', standing by itself, carries the idea of an equivalent. . . . And this is made emphatic by the adjective 'just'. There can, in view of the combination of those two words, be no doubt that *the compensation must be a full and perfect equivalent for the property taken.* . . . This excludes the taking into account as an element in the compensation any supposed benefit that the owner may receive in common with all from the public uses to which is private property is appropriated, and leaves it to stand as a

> declaration that *no private property shall be appropriated for public uses unless a full and exact equivalent for it be returned to the owner.*" 148 U. S. at 326 [emphasis added]

As shown above, the Act limits the amount of money available to Conrail and USRA for use in creating the securities to be paid as compensation. Clearly, this limitation denies to appellee its constitutional right to assurance of full compensation before its property is taken. For this reason alone the Act should be declared unconstitutional. *United States v. Reynolds,* 397 U. S. 14 (1970); *United States v. Miller,* 317 U. S. 369 (1943); *Olson v. United States,* 392 U. S. 246 (1934); *Miller v. United States,* 57 F. 2d 424 (D. C. Cir. 1932).

Although Section 303(c)(2) permits the Special Court to issue deficiency judgments against Conrail if it determines that the securities which are deposited with the Court in exchange for rail properties do not meet constitutionally mandated levels of minimum compensation, such deficiency judgments would in no way serve to meet the just compensation requirements of the Fifth Amendment. The inherent constitutional deficiencies in this scheme are obvious: any reallocation of securities would be subject to the upper limit of the amount of securities which the Corporation as a whole could issue; the issuance of additional Conrail securities would dilute the value of the securities already issued and would in no way result in a curing of the deficiency; and a deficiency judgment brought against Conrail would result in an overall decrease in the net worth of Conrail and a resultant decrease in the value of all of the securities which had been or were to be issued in the future by Conrail. Nor is there any assurance that a deficiency judgment against Conrail would be collectible; nor indeed

that this type of deficiency judgment would not itself plunge Conrail into the Bankruptcy Courts.

All the evidence presented to the Reorganization Court and the three-judge court below demonstrates that the rail assets of Penn Central alone are far in excess of the $500 million available to be paid for the rail assets of all railroads affected by the Act. The Day and Zimmerman Study conducted for the trustees estimated the value of the assets of Penn Central as of December 31, 1970. The study found that the value of the assets assuming continued rail use was $13.5 billion. The value of the assets assuming liquidation for non-rail use was projected at between $1.99 billion and $3.5 billion (Joint Documentary Submission No. 40). While this study includes all assets of Penn Central, not merely those used for rail operations, it can only be concluded that the $500 million available for payment to all railroads is nowhere near sufficient to adequately compensate Penn Central for its rail operations. Indeed this is precisely what the Reorganization Court found in its 180 day decision (J. A. p. 137).

2. The Act Is Unconstitutional Because It Prescribes the Judiciary's Constitutional Function to Determine the Amount Payable as Compensation.

The measure of compensation payable for property taken by the government for public use is:

> "That equivalent is the market value of the property at the time of the taking contemporaneously paid in money." *Olson v. United States, supra,* at 255.

It is established that the determination of the amount to be paid as compensation is a judicial function:

> "By this legislation, Congress seems to have assumed the right to determine what shall be the measure of

compensation. *But this is a judicial, and not a legislative, question.* The legislature may determine what private property is needed for public purposes; that is a question of a political and legislative character. But when the taking has been ordered, then the question of compensation is judicial. *It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid or even what shall be the rule of compensation. The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.*" *Monongahela Navigation Co. v. United States, supra,* at 327 [emphasis added]

In the area of the Fifth Amendment's protection of the individual's property rights, just as in the case of other basic constitutional issues, it is the courts that are invested with the authority and duty to determine what constitutes constitutional exercises of power. *United States v. 9.94 Acres of Land in City of Charlestown,* 51 F. Supp. 478 (E. D. S. C. 1973); *United States v. 677.50 Acres of Land in Marion County, Kansas,* 239 F. Supp. 318 (D. Kan. 1965); *United States v. 60, 000 Square Feet of Land and 8-Story Hotel Thereon, Known as Oakland Hotel,* 53 F. Supp. 767 (N. D. Cal. 1943); *United States v. 2715.98 Acres of Land, More or Less, in Jefferson County, Washington,* 44 F. Supp. 683 (W. D. Wash. 1942).

The Act violates this basic constitutional principle by granting to Congress the power to determine the amount and type of compensation to be paid. Congress has defined the type of compensation to be paid in § 303(c) of the Act by providing that Penn Central Company, creditor and stockholder of the debtor, will receive securities of unknown value. In § 210 of the Act, Congress has limited the amount

available for use in connection with compensation. The Act, therefore, usurps the judiciary's exclusive duty to apply and protect the constitutional right to "just" compensation. *Monongahela Navigation Co. v. United States,* 148 U. S. 312 (1893).

III. The Tucker Act Remedy.

A. The Act's Language and Legislative History Show That Congress Intended That a Tucker Act Remedy Is Not Available; It Certainly Is Not Adequate.

The Governmental defendants argue that whether or not there is a taking, the Act is constitutional because a Tucker Act remedy is available to claimants of the estate. Plaintiffs contend and the court below concluded from an examination of the Act that a Tucker Act remedy is lacking:

> "We are persuaded that the legislative history supports the conclusion that Congress intended that financial obligations be limited to the express terms of the Act. Article I, Section 9, Clause 7 provides that no money shall be drawn from the Treasury of the United States except in consequence of an appropriation made by law. Section 213(b), *supra,* and Section 214 entitled 'Authorization for Appropriations' place an express ceiling on expenditures. Section 210 describes the maximum obligational authority of the Association, and the authorization for appropriation is limited to 'such amounts as are necessary to discharge the obligations of the United States arising *under this section.*' [Emphasis supplied] Judicial review is delineated with specificity in Sections 209(a) and 303 with no mention of the Court of Claims." Opinion of three-judge court (J. A. pp. 50-51).

In reaching its decision, the court found the following colloquy between two of the House Managers of the bill to be especially significant:

> "*Mr.* [Dan] *Kuykendall.* 'Mr. Speaker, I would like to ask the gentleman from Washington one point, and that is the matter of the deficiency judgment. There was a lot of colloquy in the original debate which expressed fears that the Federal Court had the key to the Treasury.
>
> " 'Will the gentleman give us his interpretation of the guarantees we have to keep that from happening in the court proceedings?'
>
> "*Mr.* [Brock] *Adams.* 'Mr. Speaker, *there is a definite limitation on the total amount that can be authorized under this bill. Any amounts that go beyond that, or the shifting of the way in which it is spent, is to be approved by an Act of Congress, to be signed by the president.* . . . [I]t was the clear intent of the managers that any amount other than common stock [of Conrail] was to be at the lowest possible limit to meet the constitutional guarantees.'
>
> • • •
>
> "*Mr. Kuykendall.* 'There is no way the Federal Court may assess the taxpayers or this Congress on the judgments of the creditors, is that correct?'
>
> "*Mr. Adams.* 'The gentleman is correct.'
>
> "*Mr. Kuykendall.* 'There is no way they can assess the Congress for the money?'
>
> "*Mr. Adams.* 'The gentleman is correct.' " 119 Cong. Rec. H. 11876 (1973); cited in three-judge court opinion (J. A. pp. 49-50). [Emphasis supplied].

The discussion between Representatives Kuykendall and Adams clearly expresses the Congressional intent that a Tucker Act remedy be precluded by the RRRA. The Act was passed with the specific understanding by its supporters that there is "*no way* the Federal Court may assess the taxpayers or this Congress on the judgments of the creditors." *Id.* (J. A. at p. 50). [Emphasis supplied]. This expression is not a mere opinion that the Act does not result in a taking; only the courts can decide that question. Rather, it is an explanation of the fact that the Act, as written, does not envision a remedy in the Court of Claims.

It would seem clear that the Court of Claims was not intended, under the Act, as a forum to adjudicate any matters arising thereunder. Section 209 specifically delineates the process of judicial review. No part of that process is delegated to the Court of Claims. Only the Special Court is permitted to make any determination as to the amount of any further compensation to which the Penn Central estate is constitutionally entitled. Section 303(c)(1)(A) directs the Special Court to find whether the terms of any conveyances are "fair and equitable" to the estate of the railroad. Presumably, this finding must include a determination whether the conveyance in a *broad* sense is fair and equitable; that determination must adequately consider the effects of interim erosion. If the Special Court finds that the transfers are indeed not fair and equitable, then it may either reallocate Conrail's securities among the railroads transferring their properties to Conrail, § 303(c)(2)(A), or order the transfer of other Conrail securities or USRA obligations, § 303(c)(2)(B). The Special Court is finally empowered to enter a deficiency judgment against Conrail if, by use of the first two alternatives, "the lack of fairness and equity *cannot be com-*

pletely cured." § 303(c)(2)(C) [Emphasis supplied]. The absence of any further alternative indicates that the deficiency judgment against Conrail is intended to be the *complete cure* for any failings in the plan's method of compensation. No part is left for the Court of Claims to play; the *exclusive* appeal from any finding under § 303(c) is to the Supreme Court. § 303(d).

Senator Hartke cautioned his colleagues that if they *failed* to enact the RRRA, then a Court of Claims remedy would indeed be available:

> "If we did nothing while continuing to mandate rail service, there is a distinct possibility in view of the prior act of Congress that a number of these people would make a claim against the Government which could be sustained in the Court of Claims. . . .
>
> We met on this matter in February. We had an emergency session of Congress in which we forced them to continue to operate, even though they were in the bankruptcy court. I am not saying that as a matter of law they have an absolute claim but I would be glad to represent them on a contingency fee basis if we do not pass this legislation. Even if it were a small contingency I could go ahead and get a fee that would probably be the biggest that any lawyer has ever gotten in the United States. The claim would be for relief under the due process clause of the Constitution which prohibits making a man continue to dissipate his estate through Government action.
>
> Reorganization is supposed to protect the estate from unconstitutional erosion. If you go in and force them to continue to operate any longer without taking legislative action, you have, in effect, taken property without due process." *Id.* at [23783-23784.]

Members of the House had expressed great fear as to whether the RRRA would jeopardize the public treasury:

> "*Mr. Skubitz.* Mr. Chairman, no one will deny that rail transportation in the Northeast must be maintained—however, I would be derelict in my responsibility as a committee member . . . if I did not add cautionary comments.
>
> * * *
>
> "Mr. Chairman, the administration opposes this bill in its present form because of the mandatory transfer provisions in this act—and the labor protection title.
>
> "The administration argues that a mandatory taking constitutes a taking by eminent domain. Hence the question of fair market value cannot be determined by the Congress as this bill provides but is a matter for the courts to finally determine.
>
> "Our committee ignored the argument of the administration and restored [sic] to a constitutionally questionably legal vehicle by which the properties of bankrupt roads, and roads in reorganization, are to be molded into the new quasi-public Railroad Corporation, which the Congress would saddle upon the American taxpayer at costs that no one can fairly assess.
>
> "In one circumstance these properties may be held to be worth upward of $12 to $14 billion, in another circumstance it may be much less. No one knows, no one can be sure.
>
> "But whether $1 billion or $14 billion, the ultimate drain on the public purse will be great." *Id.* at 9739-9740 (1973).

Mr. Skubitz's concern for the likelihood that the bill would impose heavy burdens on the taxpayer was shared by Mr. Ruppe:

> "I think the taxpayers of this country are going to take a terrible beating when the final determination of values is made. It will likely run into billions of dollars." *Id.* at H. 9742 (1973).

The bill never would have passed without assurances that the taxpayers would not be so burdened. The assurances were explicit that this would not be the case under the provisions of the Act:

> "*Mr. Adams.* '[W]e have limited the amount of government loan guarantees that can be used for acquisition so that taxpayers are protected both by legislative history guided by the determination of the Court and by an absolute limit on the amount of government guaranteed loans that can be used." *Id.* at H. 9732 (1973).
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> * * *
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> "*Mr. Adams.* There is a specific limitation in the final bill which says no more than $200 million of government loan guarantees can be used for acquisition in any event, so if the court in 5 to 10 years should come in with a higher value, the only judgment would be against this new corporation that is there." *Id.* at H. 9742.
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> * * *
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> "*Mr. Shoup.* In my colloquy with the gentleman from the State of Washington (Mr. Adams), the gentleman had stated that the deficiency judgment provided for in Section 502 of the bill would be limited to $200 million for the purpose of acquiring rail assets. How-

ever, as the Court would not be able to permit a bankrupt railroad to be paid any less than the fair and equitable value of the rail assets with which they parted, it would have to either issue deficiency judgment against the corporation itself or require that the assets be returned to the bankrupt railroad. Because a large deficiency judgment against the new corporation might place such a heavy burden upon it as to prevent it from becoming viable the Congress could be called upon to authorize FNRA [now the USRA] to issue obligations beyond the limitation set in this bill in whatever amount would be required to make up that deficiency judgment. Therefore the $200 million limitation on the issuance of obligations by FNRA is not an absolute limitation on the amount of money the taxpayers may be called upon to finance this venture." *Id.* at H. 9742-9743.

It is important to note that Congress carefully insulated the public treasury from creditors of Conrail. A judgment can be had only against Conrail, not against the United States. If the deficiency judgment seriously weakens Conrail, then Congress has provided for increased obligational authority guaranteed by the government; Congress has not, however, provided for any monies to be paid directly to the creditors from the public coffers.

The final version of the Act omitted the specific $200 million dollar figure and instead provided for tighter Congressional control over monies available, requiring that any further obligational authority "shall be made by joint resolution *adopted by the Congress.*" § 210(b) [emphasis supplied]. The Conference Report described the change in terms of the flexibility that the government would now have:

"The conferees deleted a $200 million limitation on obligational authority [from H. R. 9142, § 609(a)]

which could be used by the Corporation for acquisition of property. The conferees believed that the need for obligations for such purposes would be minimal, and the planners should have as much flexibility as possible." Conference Report on H. R. 9142, 119 Cong. Rec. H. 11868 (1973).

The change in the legislation reinforced Congress' intention to maintain complete and absolute control over the amount of money the taxpayers would pay for the Northeast rail reorganization. Furthermore, in § 206(i), Congress enacted that any arrangements in the Final System Plan for terms and conditions for securities to be issued by Conrail "shall not include any form of Federal guarantee of the value of the Corporation stock." *Id.* at H. 11867.

While it is apparent that Congress did contemplate that the Federal Treasury might indeed have to be further tapped, the contingency upon which that further funding would be based is the entry in the Special Court of a deficiency judgment against Conrail—not upon any judgment in the Court of Claims—and any monies from the treasury will go to support the obligational authority of USRA, not to satisfy the claims of the estate directly.

It is with this interpretation of the Act in mind that Representative Adams so confidently asserted that creditors could not have the power to open the door to the Federal Treasury. Against this background of clear legislative intent, the lower court correctly ruled that the Act precludes a Tucker Act remedy. The court forcefully dismissed the government's contention that the Act did not expressly repeal the Tucker Act:

> "For this court to interpret the Act in a manner contrary to its explicit terms, contrary to the express representations of the bill's managers at the conference

committee discussions, and to construe this Act in a manner which will expose the United States Treasury to presently incalculable, but, in any event, substantially formidable claims would be a flagrant violation of the separation of powers doctrine. If we did this, the judiciary would truly have become the 'law-giver' for substantial federal appropriations; this in itself would raise serious constitutional problems.

"To accept the government defendants' contention would require judicial legislation on a grand, if not arrogant, scale. Justice Holmes told us 'I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.' [*Southern Pacific Co. v. Jensen*, 244 U. S. 205, 221 (1917) (Holmes, J., dissenting)]. To read a Tucker Act remedy into the Act would be a movement of the mass and not simply the particulars. We simply lack such power." *Connecticut General, supra* (J. A. pp. 52-53).

Accordingly, the Court held that since the Act results in a taking and does not provide adequate assurances for just compensation, the Act is unconstitutional.

This Court's decision in *Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267 (1932) is not relevant to the instant situation. There, the plaintiff "concede[d] that the act [was] valid." 285 U. S. at 103. Kincaid had no complaints, contractual or constitutional, against the law in question. Here, of course, Penn Central Company and the other plaintiffs have levelled substantial and serious charges against the Rail Act. Penn Central Company's complaint alleges *inter alia* that the Act violates the uniformity provision of Article I, Section 8 of the Constitution; violates procedural due process and Article III, Sections 1 and 2 circumscribing, limiting and denying to plaintiff access to the courts

and judicial review; illegally removes powers vested in the judicial branch to other branches of government; illegally delegates powers vested in Congress to other branches of government; and illegally and unconstitutionally limits the manner in which the rights of plaintiff are to be determined.[25]

Unlike *Hurley*, there is clearly no adequate remedy at law here. Congress has set limits on the amount of compensation to be paid. Congress has ordered that the compensation will be paid in the form of securities in violation of *Almota Farmers Elev. & Whse. Co. v. United States*, 409 U. S. 470 (1973). Congress has prohibited judicial access and review and has applied an unconstitutional non-uniform law to Penn Central. Certainly, the Court of Claims cannot remedy these violations of law. In addition, of course, any monies to be paid in satisfaction of a Court of Claims judgment must be appropriated by Congress. 28 U. S. C. § 2517. See also 31 U. S. C. § 724a. The same Congress that during the debates on the Act recoiled in horror at the idea of handing out hundreds of millions or billions of public dollars for the rail properties of Penn Central and the other lines will certainly not open the key to the Treasury in response to a judgment in the Court of Claims. Therefore, any monetary judgment in the Court of Claims would be illusory. Clearly then, the injunction entered by the lower court is the only manner in which plaintiff Penn Central Company's rights can be adequately protected.

B. The Subsequent Legislative History of the Act Reinforces the Conclusion That Congress Intended to Bar a Tucker Act Remedy.

Subsequent legislative history of the act further buttresses the fact that Congress never intended the consti-

25. *Penn Central Company v. Brinegar*, 74-1149, Complaint at J. A. 341-349. See paragraph 24, J. A. 346-348.

tutionality of the legislation to be saved by a Tucker Act remedy in the Court of Claims. On June 14, 1974, after oral argument before the three-judge court below but before Judge Fullam's 180-day decision, the House Subcommittee on Transportation and Aeronautics conducted oversight hearings on the RRRA. The main focus during the hearings was the deep concern with which members of the subcommittee viewed the government's erroneous representation before the three-judge court as to Congress' legislative intent under the Act:

> "MR. KUYKENDALL. Now we were most concerned when reading some small parts of this massive brief that concessions had been made toward a certain thing, and, that is, that the creditors, who owned the property that was to become part of the system, had the key to the Treasury." Oversight Hearings of the House Subcommittee on Transportation and Aeronautics (June 14, 1974) at 251.
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> "MR. DINGELL. . . . I believe the actions of the Department of Transportation and the Department of Justice, as of this point, are in the gravest error and constitute a clear misconstruction of the intentions of the Congress with regard to the Northeast Rail legislation and constitute what may properly even be charged as a potential throwaway, or giveaway of millions or perhaps even billions of dollars of the taxpayers' money in the clearest defiance of *the express intent of Congress as set forth in the reports, the debate and in the clear language of the legislation,* which we are presently scrutinizing in this gathering here today.

". . . I wish to reiterate my outrage in the situation which I see going on before us. I wish to state that, it is, again, in my view, the clearest and most extraordinary defiance of the clearly expressed intention of the Congress with the portent of perhaps millions or perhaps even billions of dollars of taxpayers' money being dissipated to persons who have no proper and rightful claim on it, either under the constitution or the law.

"I think, for the Department of Justice, or the Department of Transportation to engage in the kind of brief that I have seen here before us today, essentially agreeing with the rape of the public Treasury, is a scandal of the greatest dimension, and I think it may necessarily fall upon this committee or one of our subcommittees to look into and to inquire into why this kind of extraordinary action has been taken in terms of *a total and clear misconstruction of the attitude of the Congress and the intention of the Congress* when we passed the legislation." *Id.* at 253-255 [Emphasis supplied]

Representative Dingell's expressions of dissatisfaction with the government's task before the lower court could not have been more adamant.

Congress never intended a Court of Claims remedy to be available. The only remedy that the Act provides for an inadequately compensated taking is a deficiency judgment against the new corporation under § 303(c)(2)(C):

"MR. DINGELL. Then the ultimate remedy for inadequately compensated creditors or for inadequately compensated taking is a judgment against Conrail and not a judgment against the United States under the language of the legislation." *Id.* at 281.

Certain that those charged with defending the constitutionality of the Regional Rail Reorganization Act were deaf to the intent of Congress that no Tucker Act remedy is available here, Representative Brock Adams and 29 other Members of the Congress felt compelled to speak directly to the judiciary. In their *amici curiae* brief to the Special Court in the appellate proceeding subsequent to Judge Fullam's 180-day decision, the House of Representatives placed on the record its own interpretation of its own legislative intent:

> ". . . [T]he possibility of a deficiency judgment against the U. S. pursuant to the lawful process of this Act was specifically considered and rejected . . . If this court should decide at this time that a mechanism of a deficiency judgment against the United States under the Tucker Act is necessary to make this Act 'fair and equitable' to the estates, then the Act must fall since the legislative history and the language of the Act are clear that no deficiency judgment against the U. S. is authorized." Brief *amici curiae* United States Representatives before Special Court in *In the matter of Penn Central Transportation Co.* (Special Court Docket No. 74-8) at pp. 12-13.

These same Congressmen have expressed the same point in their *amici curiae* brief filed in this action.

The subsequent legislative history makes one thing perfectly clear—the government's contention that Congress intended the public treasury be available for any taking under the Act is a totally groundless contention, with not a single echo of congressional support for its implications. If the Act could have been interpreted to indeed provide for such a remedy, the House Managers of H. R. 9142 never would have brought the bill to the floor for a vote:

"MR. DINGELL. . . . But I want to make it plain that the floor managers, and, Mr. Adams, Mr. Kuykendall and Mr. Staggers over in the House and other members, the language of the bill the Report clearly indicated there was no intention of imposing this kind of contingent liability upon the people with enactment of the Northeast legislation.

". . . I am simply saying that with that kind of contingency possible [i.e., a potential liability of $12 to $14 billion upon the taxpayers], every member of this committee would have had the clearest responsibility to our colleagues to say, 'Look, fellows, we are handling your legislation which has this kind of potential;' and certainly I, or Mr. Adams or Mr. Kuykendall or Mr. Shoup or any of us here, and Mr. Skubitz, would not have gone to the floor.

"MR. SKUBITZ. Will you yield?

". . . That is one point I called attention to on the floor.

"MR. DINGELL. Certainly none of the rest of us would have presented it where we though of further liability on the part of the taxpayers without the clearest kind of warning this was the potential contingency that lay in the bushes as some future peril to the people we serve." *Id.* at 290-292.

A Tucker Act remedy is not available to save the constitutionality of the RRRA. There is no footing amongst the legislative history and the provisions of the Act itself upon which this Court can base any other conclusion. To rule otherwise would be obvious error and would serve only to antagonize the Congress.

C. The Regional Rail Reorganization Act Provides a Specific Remedy and Therefore Excludes the General Tucker Act Remedy.

In the face of the exclusive judicial remedies provided by the Regional Rail Reorganization Act, Supreme Court precedents prevent this Court from resuscitating the Tucker Act for use in the Northeast rail reorganization. The statute is specific legislation; the Tucker Act is general—and as this Court has so often stated, "it is familiar law that a specific statute controls over a general one." *Bulova Watch Co. v. United States,* 365 U. S. 753, 758 (1961).

The government's argument for the availability of a Tucker Act remedy is not the first time a party has attempted to circumvent an express statutory scheme of compensation. In both *Feres v. United States,* 340 U. S. 135 (1950), and *Johnson v. United States Shipping Board Emergency Fleet Corp.,* 280 U. S. 320 (1930), the Supreme Court refused to allow the specific statutes to be emasculated by resort to general compensation legislation. In *Feres,* servicemen attempted to sue the government in negligence for injuries resulting from incidents occurring while they were on active duty in the armed forces. Although the Tort Claims Act does confer jurisdiction upon the district court over negligence claims against the United States, 28 U. S. C. § 1346(b), and provides that "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances," 28 U. S. C. § 2674, the Supreme Court noted that in more specific legislation, the Congress had expressly excluded recovery:

> "No federal law recognizes a recovery such as claimants seek. The Military Personnel Claims Act, 31

> U. S. C. § 2236, now superseded by 28 U. S. C. § 2672, 28 U. S. C. A. § 2672, permitted recovery in some circumstances, but it specifically excluded claims of military personnel 'incident to their service'." *Feres v. United States, supra* at 158.

Moreover, Congress had provided more direct methods than the Tort Claims Act by which servicemen could claim compensation. The Court held that where such remedies existed, the servicemen could not resort to the Tort Claims Act:

> "This Court, in deciding claims for wrongs incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services. [citing 38 U. S. C. § 701; 38 U. S. C. § 718; 38 U. S. C. § 725; 38 U. S. C. § 731; 38 U. S. C. §§ 740, 741]. We might say that the claimant may (a) enjoy both types of recovery, or (b) elect which to pursue, thereby waiving the other, or (c) pursue both, crediting the larger liability with the proceeds of the smaller, or (d) that the compensation and pension remedy excludes the tort remedy. There is as much statutory authority for one as for another of these conclusions. If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provisions to adjust these two types of remedy to each other. The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service." *Id.* at 158.

The applicability of the *Feres* holding to the case at bar is obvious. Congress provided that the specific remedy of the Penn Central estate under the Regional Rail Reorganization Act is, in the end, to obtain a deficiency judgment against Conrail. The Federal Treasury was to be protected from invasion—that principle flows from the fact that Congress made no attempt to reconcile the Regional Rail Reorganization Act with the Tucker Act, showing that "there was no awareness that the Act might be interpreted to permit recovery."

Twenty years earlier, the Supreme Court dealt with a similar situation involving the Tucker Act in *Johnson v. United States Shipping Board Emergency Fleet Corp., supra.* There the court found the remedies under the Suits in Admiralty Act, 46 U. S. C. § 741 et seq., to be exclusive. The Suits in Admiralty Act provides "a complete system of administration" encompassing "venue, service of process, rules of decision and procedure, rate of interest, and periods of limitation." *Johnson, supra,* 280 U. S. at 326. Likewise, the RRRRA provides a complete and *exclusive* system of administration here. The Tucker Act cannot possibly be available. As the Fifth Circuit has stated:

> "The Tucker Act is general in its nature, and must give way to special statutes covering the particular cases. The federal courts, other than the Supreme Court, do not derive their jurisdiction from the Constitution of the United States, but exercise only such powers as Congress, within constitutional limits, confers upon them. So long as it does not expand that jurisdiction beyond such limitations, the Congress may give, withhold or restrict that jurisdiction as it sees fit." *Cook v. United States,* 115 F. 2d 463, 464-465 (5th Cir. 1940).

The government's argument for the availability of the Tucker Act remedy here is groundless. It finds no support in the Regional Rail Reorganization Act itself nor in its legislative history. A decree by this Court that the remedy is indeed available despite the existence of this manifestly exclusive and specific legislation would be contrary to the clear weight of precedent.

An argument that the Act is unclear as to whether a Tucker Act remedy is available and therefore the constitutionality of the Act in this aspect should not be decided or should be upheld cannot stand. First, as pointed out above, the Act is clear by its terms and by its legislative history that a Tucker Act remedy is not available. In addition, the uncertainty itself as to whether there is a Court of Claims remedy is enough for the Court to declare the Act unconstitutional. See *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U. S. 579, 588, 72 S. Ct. 863, 865-866 (1952).

IV. The Act Is a Non-Uniform Law on the Subject of Bankruptcy and Is Therefore Unconstitutional.

A. Decision of the Three-Judge Court as to Uniformity.

Penn Central Company argued before the three-judge constitutional court that the Act violates Article I, Section 8 of the Constitution of the United States. Article I, Section 8 enumerates in detail those powers which are vested in the legislative branch. Clause 4 of Section 8 grants to Congress the authority "To establish uniform laws on the subject of bankruptcy throughout the United States."

The three-judge court held that the Act was not geographically uniform in its application and that it therefore violated the constitutional provision of uniformity. The Court went on to hold, however, that all of the provisions of the Act, save Section 207(b), could be upheld as an ex-

ercise of Congress' powers under the commerce clause even though they could not be upheld under the bankruptcy power. The Court found that Section 207(b) dealing with dismissal of Section 77 proceedings is an exercise solely of Congress' bankruptcy powers and since the Act was not uniform, is unconstitutionally defective. The Court, therefore concluded by holding:

> "That all parties are enjoined from enforcing, or taking any action to implement, so much of Section 207(b) of the Regional Rail Reorganization Act of 1973 as purports to require dismissal of pending proceedings for reorganization under Section 77 of the Bankruptcy Act.
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> * * *
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> "That so much of Section 207(b) of the Regional Rail Reorganization Act of 1973 as requires reorganization courts to dismiss pending proceedings under Section 77 of the Bankruptcy Act under the circumstances set forth in said Section 207(b) is null and void, as violative of Article I, Section 8, Clause 4 of the Constitution of the United States." Order of Court dated June 25, 1974 (J. A. pp. 82-83).

Appellee Penn Central Company concurs in the Court's decision that the Act is not geographically uniform and urges affirmance of its injunction of any implementation of Section 207(b). In addition, Penn Central Company contends that this geographical nonuniformity deficiency renders other sections of the Act similarly unconstitutional and that therefore the lower court's injunction prohibiting certification of a Final System Plan pursuant to Section 209(c) and prohibiting any action enforcing Section 304(f) can and should be sustained on this additional ground.

B. The Act Is Not a Uniform Law on the Subject of Bankruptcy.

1. The Act Fails This Court's Definition of Geographical Uniformity.

The Regional Rail Reorganization Act of 1973, from its very title through each of its provisions, purports to reorganize only certain railroads within a particular region of the country. Section 102 of the Act explicitly limits the scope of the Act to certain designated states. In its "Declaration of Policy," the Act states that:

> "Essential rail service in the midwest and northeast region of the United States is provided by railroads which are today insolvent and attempting to undergo reorganization under the Bankruptcy Act." § 101 (a)(1).

Section 101 continues throughout to address itself solely to the "midwest and northeast region" and declares, *inter alia*, that "the reorganization of railroads in *this region* into an economically viable system capable of providing adequate and efficient rail service to *the region* is central to the purposes of the Act." § 101(b)(2) [emphasis added]. Again, throughout § 206 of the Act, in which the contents of the Final System Plan is outlined, the Act purports to deal solely with "rail properties of railroads in reorganization in the region. . . ." For the purposes of the Act, § 102(13) defines region as:

> ". . . The States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, and Illinois; the District of Columbia; and those portions of contiguous states in which are located rail

properties owned or operated by railroads doing business primarily in the aforementioned jurisdictions . . . ."

Railroads operating within the "region" are affected by the provisions of the Act; those operating outside of the specified region are excluded. It is clear, in light of every judicial decision on this question, that such limitations as to the applicability of the terms of the Act are totally inconsistent with the Constitutional requirement of uniformity.

The only limitation which the Constitution imposes upon the power of Congress to enact bankruptcy laws is that these laws be "uniform." *Louisville Joint Stock Bank v. Radford*, 295 U. S. 555 (1935); *Hanover National Bank v. Moyses*, 186 U. S. 181 (1902); *In re Reichert*, 13 F. Supp. 1 (W. D. Ky. 1936). And it is settled law that the requirement of "uniformity" is a geographic one. *Stellwagen v. Clum*, 245 U. S. 605 (1918); *Hanover National Bank v. Moyses*, 186 U. S.; *In re Chicago, R. I. & P. Ry. Co.*, 72 F. 2d 443 (7th Cir. 1934); *In re Baltimore & O. R. Co.*, 29 F. Supp. 608 (D. Md. 1939), *cert. denied*, 309 U. S. 654 (1940); *In re New York, N. H. & H. R. Co.*, 16 F. Supp. 504 (D. Conn. 1936); *In re Davis*, 13 F. Supp. 221 (E. D. N. Y. 1936). Federal bankruptcy laws have been held constitutional when they treat different classes of persons differently, so long as the distinctions between classes of persons are made on a rational basis and not on a geographic basis. This Court, in *Hanover National Bank v. Moyses, supra*, 186 U. S. at 188, has stated:

> "The laws passed on the subject [of bankruptcy] must, however, be uniform throughout the United States, but that uniformity is *geographical* and not personal." [Emphasis added]

This requirement of geographic uniformity has been followed, without exception, by those courts that have confronted this issue.

The federal courts have held that the requirement of geographic uniformity is not violated because a national bankruptcy law may be affected, either substantively or procedurally, by the provisions of state laws. *In Stellwagen v. Clum, supra,* the Court wrote:

> "Notwithstanding this requirement as to uniformity, the bankruptcy acts of Congress may recognize the laws of the state in certain particulars, although such recognition may lead to different results in different states. For example, the Bankruptcy Act recognizes and enforces the laws of the state affecting power, exemptions, the validity of mortgages, priorities of payments, and the like. Such recognition in the application of state laws does not affect the constitutionality of the Bankruptcy Act, although in those particulars, the operation of the Act is not alike in all stages." *Id.* at 613.

It is clear, however, that provisions of the Regional Rail Reorganization Act themselves dictate that the Act would not apply uniformly. Uniformity is thereby compromised by the Act itself and not through the operation of state laws in connection with the implementation of the Act.

The Court in *In re Baltimore & Ohio Ry. Co.,* 29 F. Supp. 608 (D. Md. 1939) reiterated the requirement of geographic uniformity. That case involved the Chandler Act, 11 U. S. C. § 1200-1255, which provided temporary relief for certain railroads which found themselves in financially embarrassed straits. Constitutional attacks on the Chandler Act failed. The Supreme Court reasoned that,

although only a small number of railroads would be affected by the provisions of the Chandler Act at the time of its enactment and implementation, the Act nevertheless applied uniformly throughout the United States and that if, at some future point in time, other railroads did conform to the classifications established in the Act, they could then take advantage of its provisions.

> "The Act is, however, in general terms and applicable to all railroads conforming to the prescribed conditions of the state and applied uniformly in that respect through the United States." 29 F. Supp. at 621.

Unlike the Chandler Act, the 1973 Act is not uniform throughout the United States. Its geographic application is severely limited and the timetable for implementation which it prescribes forecloses any possibility that other bankrupt railroads, even in the "region" as defined in the Act, may, at some future point in time, be included within its provisions.

The Courts took the opportunity further to refine the uniformity requirement in connection with the Frazier-Lemke Act, 11 U. S. C. § 203(s). Frazier-Lemke was designed to provide relief to farmers during the severe depression of the 1930's. It granted a three-year stay of all bankruptcy proceedings so that farmers, during this interim period and under the supervision of the courts, would have the opportunity to re-establish their financial stability. The Act was an emergency measure and was applied nationally. However, one section of the Act, § 203(s)(6), stated that:

> "If in the judgment of the Court, such emergency ceases to exist in its locality, then the court, in its discretion, may shorten the stay of proceedings herein provided for and proceed to liquidate the estate."

Thus, the possibility existed, under the provisions of Frazier-Lemke, that different courts might reach differing or inconsistent conclusions with regard to the extent of the emergency period within which the Act would be viable. Such action would have resulted in different applications of the Frazier-Lemke Act in various regions of the country.

A number of lower courts held that the Act, as a result of § 203(s)(6), was nonuniform and, therefore, unconstitutional. *See, e.g., U. S. National Bank of Omaha v. Pamp,* 83 F. 2d 493 (8th Cir. 1936); *Wright v. Vinton Branch of Mountain Trust Bank,* 85 F. 2d 973 (4th Cir. 1936). The Supreme Court granted *certiorari* and ruled that the Act was valid. *Wright v. Vinton Branch of Mountain Trust Bank,* 300 U. S. 440 (1937). The Court stated that any differences which would result in the application of the provisions of the Act as a result of § 203(s)(6) would be analogous to differences which resulted from the application of state law. The Court reasoned that such judicial judgments might be necessary given the particular circumstances which might exist in one area. However, such a finding would not be related to the presence or absence of emergency conditions in other areas of the country. And since the legislation itself was found to be *national in scope,* the Court held that it met the requirements of uniformity as required by the Constitution.

But the Regional Rail Reorganization Act is neither uniform nor national in its scope. Different or inconsistent applications of the provisions of the Act would not result from the existence of applicable state law or from the actions of various state tribunals, but would instead be the result of the specific provisions of the Act itself. Congress, by specifically limiting the application of the Act to a particular region of the nation, has clearly violated the uniformity provisions of Article I, Section 8, Clause 4 of the Constitution.

The government cannot seriously contend that the Act is uniform because it applies to all Class I railroads in reorganization and all such railroads are within the region. The Act relates only to railroads in reorganization in the region as defined. If a Class I railroad in California were to have entered reorganization, it is clear that that railroad would not be affected by the Act. See Act §§ 101(a)(1), (b)(2), 102(13). This Act, therefore, is quite different from the Chandler Act upheld in *In re Baltimore & Ohio Ry. Co., supra,* page 34. See Opinion of the Court (J. A. pp. 62-63).

2. This Non-Uniform Act Is a Law on the Subject of Bankruptcies and Penn Central Company Has Standing to Attack It.

No party to these proceedings has seriously questioned the fact that the Act is a law on the subject of bankruptcies.

A law on bankruptcy has been defined by the courts as a statute which provides for the benefit and relief of creditors and their debtors in cases in which the latter are unable or unwilling to pay their debts. *Campbell v. Allegheny Corporation,* 75 F. 2d 947 (4th Cir. 1935). More specifically, a bankruptcy law is one which contemplates: (1) the control and seizure of all of the debtor's property; (2) a distribution of the debtor's property among the creditors; and (3) the discharge of the debtor from further liability on existing debts.

The Supreme Court, in its discussion of early federal bankruptcy statutes, foresaw their primary purposes as being to ". . . relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes" and to provide "a new opportunity in life and a clear field for future effort, unhampered

by the pressure and discouragement of pre-existing debt." *Local Loan Co. v. Hunt,* 292 U. S. 234, 244 (1934).

It cannot be questioned that Section 77 of the Bankruptcy Act, 11 U. S. C. Section 205, which statute is utilized and has been employed by the courts in connection with all railroad reorganizations, is an act in bankruptcy. The history of Section 77 confirms the fact that the bankruptcy clause of the Constitution is the source of Congress' power to control railroad reorganizations and the courts have so ruled. *Continental Illinois National Bank & Trust Co. v. Chicago, R. I. & P. Ry. Co.,* 294 U. S. 648, 673, 675 (1934). Indeed, *Continental Illinois* specifically held that railroad reorganizations came within the ambit of powers conferred by the bankruptcy clause of the Constitution, *Id.* at 675, and five years later, in *Warren v. Palmer,* 310 U. S. 132, 137 (1940), the Court stated:

> "Railroad reorganization in bankruptcy is a field completely within the ambit of the bankruptcy powers of Congress."

This Act in large measure is a supplement to the all encompassing reorganization provisions of Section 77.

The Act purports to deal solely with rail properties of those railroads in reorganization which are the subject of the Act.[26] As a result, the remaining non-rail properties of the debtor railroads remain within the purview of Section 77 and must be reorganized, at some future time, under the

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26. For example, the Final System Plan, as outlined in Section 206 of the Act, would designate only those "rail properties" which are to be transferred to the Consolidated Rail Corporation, or which are to be offered for sale or lease to other profitable railroads in the region or by regional transportation authorities. Indeed, throughout the Act, the text is careful to specify its intention to deal solely with rail properties of the debtor railroads. *See, e.g.,* Sections 101(a), (b); 202(b)(1), (2), (3), (5); 204(a); 205(d)(1), (3); 206; 207(b); 209(a), (c); 301(e); 302(a), (b), (c), (d); and 303.

provisions of Section 77. The Act purports at the same time to override inconsistent provisions of the Bankruptcy Act (§ 601(b)), and in various sections purports to characterize the processes of the RRRA as a form of "reorganization." Section 207(b). Section 209(b) provides:

> "The special court is authorized to exercise the powers of a district judge in any judicial district with respect to such proceedings and such powers shall include those of a reorganization court."

As the court below made clear, Penn Central Company, shareholder and creditors of PCTC, and the other creditors have standing to challenge this lack of geographical uniformity. See Opinion of three-judge court (J. A. p. 62). The estate of the Penn Central Transportation Company is being affected by application of this Act. Thus, the estate's creditors and shareholders are being similarly affected. These parties contend that this is an invalid non-uniform and hence unconstitutional statute being applied to affect their interests. This satisfies even the strictest definition of the standing requirement.

C. This Non-Uniform Law on the Subject of Bankruptcy Can Not Be Upheld Under the Commerce Clause.

Article I, Section 8, grants specific powers to Congress. Clause 4 permits Congress to enact "*uniform* laws on the subject of bankruptcies." Thus, the legislative branch goes beyond its constitutionally authorized power when it enacts a law on the subject of bankruptcies which is not uniform.

The fact that another Section of the Constitution might conceivably apply to this Act which does not contain such a uniformity qualification is irrelevant. Article I,

Section 8, Clause 4 applies and any requirements or qualifications contained therein must be complied with.

A remarkably similar case was before the Supreme Court in 1946. The issue before the Court in *Richfield Oil Corp. v. State Board of Equalization*, 329 U. S. 69, 67 S. Ct. 156 (1946) was whether a tax imposed on exports by the state of California violated Article I, Section 10, Clause 2 which provides in relevant part:

> "No state shall without the consent of the Congress, lay any Imports or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws. . . ."

The state contended that while the California statute might be faulty under Article I, Section 10, Clause 2, it could be sustained as valid under the Commerce Clause. This Court refused to even consider the possible validity of the statute under the Commerce Clause stating:

> "We do not pursue the inquiry as to the validity of the tax under the Commerce Clause. For we are of the view that whatever might be the result of that inquiry, the tax is unconstitutional under Article I, Section 10, Clause 2." 329 U. S. 69 at 75, 67 S. Ct. 156 at 159.

Justice Douglas went on to state that while the courts have read a "discriminatory qualification" into the Commerce Clause, such a similar qualification could not be read into the Import-Export Clause. The Court continued:

> "But the two clauses, though complementary, serve different ends. And the limitations of one cannot be read into the other." 329 U. S. 69 at 76, 67 S. Ct. 156 at 160.

As the Court concluded on this matter:

> " 'In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument that no word was unnecessarily used, or needlessly added. The many discussions which have taken place upon the construction of the Constitution, have proved the correctness of this proposition; and shares the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument, therefore, can be reflected as superfluous or unmeaning;' We cannot therefore, read the prohibition against 'any' tax on exports as containing an implied qualification." 329 U. S. 69 at 77-78, 67 S. Ct. 156 at 161.

Similarly here, the word "uniform" cannot be read out of the Constitution.

It is a rudimentary fact of legal construction that specific terms prevail over general terms contained in the same or another statute without regard to priority of enactment. *Townsend v. Little,* 109 U. S. 504, 512, 3 S. Ct. 357, 362 (1883); *Ginsberg & Sons Inc. v. Popkin,* 285 U. S. 204, 208, 52 S. Ct. 322, 323 (1932); *Fourco Glass Co. v. Transmirra Products Corp.,* 353 U. S. 222, 228-229, 77 S. Ct. 787, 791-792 (1957). Thus while the Commerce Clause obviously has some relationship to a bankruptcy, the requirements of Article I, Section 8, Clause 4 dealing specifically with bankruptcies must be controlling here. As the Court in *In re Sink,* 27 F. 2d 361 (W. D. Va. 1928) stated:

> "A general and uniform statute which deals with or in terms governs one material feature of bankruptcies,

must, *ex vi termini,* be both internally and in intent a law on the subject of bankruptcies." 27 F. 2d at 361.

Therefore, the three-judge court's decision enjoining implementation and effectuation of the Final System Plan can and should be sustained for the additional reason that the Act as a whole violates Article I, Section 8, Clause 4.

D. Other Sections of the Act in Addition to 207(b) Are Derived From Congress' Bankruptcy Powers.

Even if this Court accepts the holding below that only those sections of the Act which can be said to be based solely on Congress' bankruptcy power and not commerce power are unconstitutional, it is clear that more than Section 207(b) are based solely on the bankruptcy powers. While various provisions of the Act are similar to parts of § 77 which is admittedly uniform, the provisions of the Act make significant changes in the § 77 procedures and safeguards.

Section 303 of the Act which permits conveyance free and clear of liens does not contain the procedural safeguards of § 77 mandating that the Trustees of the estate determine that sales are in the best interest of the estate and that the plan of reorganization is fair and equitable. See also Sections 206-209, 303-304 which fail to provide the similar safeguards and procedures found in § 77.

Those sections of the Act, therefore, that change the provisions of § 77 must have been promulgated under Congress' bankruptcy powers. Therefore, these sections are unconstitutional as being non-uniform.

For this additional reason, the lower court's order forbidding certification of a Final System Plan can be sustained.

CONCLUSION.

For the reasons stated above, appellee Penn Central Company requests that the Order of the three-judge court dated June 25, 1974, enjoining the United States Railway Association from certifying a Final System Plan pursuant to Section 209(c) of the Act, enjoining defendants from taking any action to enforce the provisions of Section 304(f) of the Act, enjoining all parties from enforcing or implementing portions of Section 207(b), declaring Section 303 of the Act null and void, declaring Section 304(f) of the Act null and void and declaring portions of Section 207(b) null and void be affirmed.

Respectfully submitted,

DAVID BERGER,
GERALD J. RODOS,
PAUL J. MCMAHON,
EDWARD H. RUBENSTONE,
1622 Locust Street,
Philadelphia, Pa. 19103
Attorneys for Appellee
Penn Central Company.

Of Counsel:
DAVID BERGER, P. A.,
Attorneys-At-Law.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-185, 74-186

ROBERT W. BLANCHETTE, *et al.*, TRUSTEES,
Appellants,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, *et al.*,
Appellees.

RICHARD JOYCE SMITH, TRUSTEE,
Cross-Appellant,

v.

UNITED STATES OF AMERICA, *et al.*,
Cross-Appellees.

On Cross-Appeals from the United States District Court for the Eastern District of Pennsylvania

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BRIEF OF APPELLEE AND CROSS-APPELLEE UNITED STATES RAILWAY ASSOCIATION

Of Counsel:

BARRY E. CARTER
PAUL C. HUDSON
WILLIAM T. LAKE
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

JORDAN JAY HELLMAN
Senior Legal Consultant
United States Railway Association
2100 Second Street, S.W.
Washington, D.C. 20590

LLOYD N. CUTLER
WILLIAM R. PEELER
LOUIS R. COHEN

Attorneys for the United States Railway Association

SEPTEMBER 26, 1974

INDEX

	Page
TABLE OF AUTHORITIES	II
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	7
ARGUMENT	15
I. BOTH THE "PERMANENT TAKING" AND THE "EROSION TAKING" ISSUES ARE PREMATURE	15
A. The "Taking" Allegations Are Not Ripe for Adjudication on the Present Record	17
1. Allegations Relating to the Final System Plan	17
2. Erosion Allegations	22
B. When Plaintiff's "Taking" Allegations Become Ripe for Adjudication, He Will Have Full and Adequate Opportunities To Present Them to a Federal Court	27
II. THE TRANSFER PROVISIONS OF THE RAIL ACT DO NOT VIOLATE THE SUBSTANTIVE RIGHTS OF CREDITORS UNDER THE FIFTH AMENDMENT	33
A. Congress Has Broad Authority To Provide for the Adjustment of Creditors' Claims in Corporate Reorganizations	35
B. The Mandatory Nature of the Transfers Does Not Establish that the Rail Properties Are Being Condemned	40
C. Conrail Will Not be an Instrumentality of the Federal Government	50

INDEX—Continued

	Page
D. Penn Central's Investors Have No Present Constitutional Right to Terminate Service and Liquidate Its Rail Properties	53
E. The New Haven Trustee's Contentions About the "Constitutional Minimum" Are Premature and Erroneous	56
F. This Court's Function Is To Adjudicate the Constitutionality of the Rail Act, Not To Consider Whether Congress Might Improve It by Amendment	70
III. THE RAIL ACT DOES NOT DEPRIVE THE NEW HAVEN TRUSTEE OF PROCEDURAL DUE PROCESS	72
A. Providing for a Vote and Judicial Review of Valuation Before Transfer Would Have Frustrated the Rail Act's Goals of a Prompt Restructuring of Multi-Corporate Operations	73
B. It Is Constitutionally Insignificant Whether the Determination of the Fairness and Equity of the Transfers Precedes or Follows Conveyance of the Properties	75
IV. THE RAIL ACT IS NOT VOID FOR WANT OF UNIFORMITY	79
CONCLUSION	85

TABLE OF AUTHORITIES

CASES: Page

A.L. Mechling Barge Lines, Inc. v. *United States*, 368 U.S. 324 (1961) 16
Armour Packing Co. v. *United States*, 209 U.S. 56 (1908) 83, 84
Arnett v. *Kennedy*, 42 U.S.L.W. 4513 (April 16, 1974) 79
Bauman v. *Ross*, 167 U.S. 548 (1897) 36
Boddie v. *Connecticut*, 401 U.S. 371 (1971) 78
Boston Chamber of Commerce v. *Boston*, 217 U.S. 189 (1910) 67
Brooks-Scanlon Co. v. *Railroad Commission*, 251 U.S. 396 (1920) 23, 24, 25, 53, 56, 60, 64
Cafeteria & Resturant Workers Union v. *McElroy*, 367 U.S. 886 (1961) 78
Consolidated Rock Products Co. v. *DuBois*, 312 U.S. 510 (1941) 36, 47
Continental Bank v. *Chicago, Rock Island & P. Ry.*, 294 U.S. 648 (1935) 25, 38, 39, 47, 54, 55, 61
Eccles v. *Peoples Bank*, 333 U.S. 426 (1948) 15, 16
Ecker v. *Western P.R.R.*, 318 U.S. 448 (1943) 42, 61
Fox Film Corp. v. *Muller*, 296 U.S. 207 (1935) 67
Group of Institutional Investors v. *Chicago M. St. P. & P.R.R.*, 318 U.S. 523 (1943) 61
Hanover National Bank v. *Moyses*, 186 U.S. 181 (1902) 81
Head Money Cases, 112 U.S. 580 (1884) 82, 83
Hecht Co. v. *Bowles*, 321 U.S. 321 (1944) 32
In re Boston & Maine Corp., 484 F.2d 369 (1st Cir. 1973) 23, 63
In re Litigation Under the Regional Rail Reorganization Act of 1973, Docket No. 166 (J.P.M.L. March 1, 1974) 54, 71
In re New York (Fifth Avenue Coach Lines), 18 N.Y. 2d 212, 219 N.E. 2d 410, appeal dismissed sub. nom. *Fifth Avenue Coach Lines* v. *New York*, 386 U.S. 778 (1966) 67, 68, 69

TABLE OF AUTHORITIES—Continued

	Page
In re New York, N.H. & H.R.R., 378 F.2d 635 (2d Cir. 1967)	77
In re New York, N.H. & H.R.R., 16 F. Supp. 504 (D. Conn. 1936)	43
In re New York, N.H. & H.R.R., 289 F. Supp. 451 (D. Conn. 1968)	77
In re Penn Central Transportation Co., 494 F.2d 270 (3d Cir.), petition for cert. filed, 42 U.S.L.W. 3633 (U.S. May 8, 1974) (No. 73-1672)	54, 55
In re Penn Central Transportation Co., 355 F. Supp. 1343 (E.D. Pa. 1973)	6
In re Port Authority Trans-Hudson Corp., 20 N.Y. 2d 457, 231 N.E. 2d 734, cert. denied sub. nom. *Port Authority Trans-Hudson Corp.* v. *Hudson Rapid Tubes Corp.*, 390 U.S. 1002 (1967)	67, 68, 69
In re Witherbee Court Corp., 88 F.2d 251 (2d Cir.), cert. denied, 301 U.S. 701 (1937)	46
Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U.S. 123 (1951)	16
Kennedy v. *Silas Mason Co.*, 334 U.S. 249 (1948)	16
Kimball Laundry Co. v. *United States*, 338 U.S. 1 (1949)	67, 69
Knowlton v. *Moore*, 178 U.S. 41 (1900)	83
Lauf v. *E.G. Shinner & Co.*, 303 U.S. 323 (1938)	63
Louisiana Public Service Commission v. *Texas & New Orleans R.R.*, 284 U.S. 125 (1931)	83
Louisville Joint Stock Land Bank v. *Radford*, 295 U.S. 555 (1935)	44, 45, 46
McGovern v. *New York*, 229 U.S. 363 (1913)	67
Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803)	32
Mitchell v. *W.T. Grant Co.*, 42 U.S.L.W. 4671 (May 13, 1974)	78, 79
Monongahela Navigation Co. v. *United States*, 148 U.S. 312 (1893)	36

TABLE OF AUTHORITIES—Continued

	Page
Morrisey v. *Brewer*, 408 U.S. 471 (1972)	78
New Haven Inclusion Cases, 399 U.S. 392 (1970)	12, *passim*
Nicol v. *Ames*, 173 U.S. 509 (1899)	83
Penn-Central Merger Cases, 389 U.S. 486 (1968)	25, 29, 55, 72
Pennsylvania v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855)	83
Public Affairs Press v. *Rickover*, 369 U.S. 111 (1962)	15, 16
Public Service Commission v. *Wycoff Co.*, 344 U.S. 237 (1952)	16
Reconstruction Finance Corp. v. *Denver & Rio Grande W.R.R.*, 328 U.S. 495 (1946)	25, 38, 42, 43, 47, 55, 61
Roberts v. *New York*, 295 U.S. 264 (1935)	67
Satterlee v. *Matthewson*, 27 U.S. (2 Pet.) 380 (1829)	36
Secretary of Agriculture v. *Central Roig Refining Co.*, 338 U.S. 604 (1950)	84
South Carolina v. *Katzenbach*, 383 U.S. 301 (1966)	63
Stellwagen v. *Clum*, 245 U.S. 605 (1918)	81
United States v. *Cors*, 337 U.S. 324 (1949)	67
United States v. *First City National Bank*, 386 U.S. 361 (1967)	63
United States v. *1,000 Acres*, 162 F. Supp. 219 (E.D. La. 1958)	36
United States v. *Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396 (1949)	69
United States National Bank v. *Pamp*, 83 F.2d 493 (8th Cir. 1936)	81
Van Schaick v. *McCarthy*, 116 F.2d 987 (10th Cir. 1941)	38
Vanhorne's Lessee v. *Dorrance*, 2 U.S. (2 Dall.) 304 (Cir. Ct., Pa. Dist. 1795)	36
Wright v. *Union Central Life Insurance Co.*, 311 U.S. 273 (1940)	44, 45, 46, 47

TABLE OF AUTHORITIES—Continued

Page

Wright v. *Vinton Branch of Mountain Trust Bank*, 300 U.S. 440 (1937) 44, 81, 82

CONSTITUTIONAL PROVISIONS AND STATUTES:

U.S. Constitution:

Article I 3, 14, 82, 83, 84
Article III 3, 14, 83
Amendment V ..... 7, *passim*

Bankruptcy Act:

Section 77, 11 U.S.C. § 205 ..... 13, *passim*

Frazier-Lemke Act:

49 Stat. 943-45 ..... 44, 47, 81

Interstate Commerce Act:

49 U.S.C. § 1 (18) 61
49 U.S.C. § 5 76

Regional Rail Reorganization Act of 1973:

Pub. L. 93-236, 87 Stat. 985, 45 U.S.C. §§ 701-93 ..... 2, *passim*

Tucker Act:

28 U.S.C. § 1491 ..... 2, *passim*

Other Statutes:

12 U.S.C. §§ 1811, 1812 (FDIC) 52
15 U.S.C. § 78 ccc (SIPC) 52
45 U.S.C. § 543 (NRPC) 52

LEGISLATIVE MATERIALS:

H.R. Rep. No. 93-620, 93d Cong., 1st Sess. (1973) .. 27, 32
S. Rep. No. 93-601, 93d Cong., 1st Sess. (1973) 32

TABLE OF AUTHORITIES—Continued

Page

119 Cong. Rec.

H9732 (daily ed. Nov. 8, 1973) 27
H11,876 (daily ed. Dec. 20, 1973) 27

MISCELLANEOUS:

5 Collier on Bankruptcy ¶ 77 (14th ed. rev. J. Moore 1974) 38, 41, 46
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-165, 74-166

ROBERT W. BLANCHETTE, *et al.*, TRUSTEES,
Appellants,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, *et al.*,
Appellees.

RICHARD JOYCE SMITH, TRUSTEE,
Cross-Appellant,

v.

UNITED STATES OF AMERICA, *et al.*,
Cross-Appellees.

On Cross-Appeals from the United States District Court for the Eastern District of Pennsylvania

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BRIEF OF APPELLEE AND CROSS-APPELLEE UNITED STATES RAILWAY ASSOCIATION

Richard Joyce Smith, Trustee of the property of the New Haven railroad ("New Haven Trustee"), has cross-

appealed (No. 74-166) from that portion of the decision of a three-judge United States District Court sitting in the Eastern District of Pennsylvania which rejected in part his attack on the constitutionality of the Regional Rail Reorganization Act of 1973, 45 U.S.C. §§ 701-93 ("Rail Act" or "Act"). The New Haven Trustee appeals from the lower court's ruling that his contention that the transfer provisions of the Act will cause a "permanent taking" of his property was not ripe for adjudication. In this Brief, Cross-Appellee United States Railway Association ("USRA" or "Association") responds to the New Haven Trustee's arguments in that regard.

USRA itself has appealed from that portion of the lower court's decision which held unconstitutional certain sections of the Rail Act because of the possibility that they might cause an "erosion taking" of the property of the New Haven Trustee and other Plaintiffs. We set forth our reasons for believing that the lower court's ruling in that regard should be reversed in our Brief as Appellant in No. 74-167.

The Trustees of the property of Penn Central Transportation Company ("Penn Central Trustees") also have filed an appeal (No. 74-165), seeking reversal of the lower court's ruling that the Rail Act repeals *pro tanto* the Tucker Act, 28 U.S.C. § 1491. The Penn Central Trustees' position on that issue is essentially the same as the position stated in our Brief as Appellant in No. 74-167. However, the Penn Central Trustees take positions similar to those of the New Haven Trustee on other issues; where those positions require separate response, we respond to them in this Brief.

The United States also has filed an appeal (No. 74-168). Since its contentions on that appeal are similar to ours in No. 74-167, they require no response herein.

QUESTIONS PRESENTED

1. Was the court below correct in deciding that the "permanent taking" issues were not ripe for adjudication and did it err in deciding that the "erosion taking" issues were ripe for adjudication, when (a) the record presents no factual basis on which either set of issues can be decided and (b) the New Haven Trustee will have an adequate remedy if and when his claims become ripe?

2. May Congress constitutionally require the transfer of some Penn Central rail properties to Conrail for continued rail use in exchange for a "constitutional minimum" consideration that includes Conrail securities, or must Congress either (a) acquire such properties for cash in condemnation proceedings or (b) permit claimants to liquidate Penn Central immediately?

3. May Congress constitutionally require the transfer of some Penn Central rail properties to Conrail without a vote of Penn Central's creditors and before the properties are valued if it provides for subsequent valuation proceedings in a federal court to determine whether the Penn Central estate has received the "constitutional minimum" consideration?

4. Is the Rail Act void as a nonuniform law on the subject of bankruptcy, or is it (a) uniform and (b) within the powers of Congress under the Commerce Clause and Article III without regard to uniformity?

STATEMENT OF THE CASE

USRA has presented a Statement of the Case in its Brief as Appellant in No. 74-167 and will not repeat that Statement here.[1] However, certain assertions in the

[1] Brief of United States Railway Association, Appellant, in No. 74-167 ("Brief of Appellant USRA") at 5-14. We wish to add that

New Haven Trustee's Statement of the Case require specific comment.

1. The assertions about the reorganization of the New Haven railroad, the inclusion of New Haven assets in the merged Penn Central and the present status of the New Haven Trustee's claims against the Penn Central estate are neither accepted nor disputed by USRA. Any unresolved questions about the nature or validity of these claims are not material to the resolution of the issues before this Court and should not be decided on this appeal.

2. The assertion of the New Haven Trustee that certain deferred payments shown on Penn Central's books represent "a priority administration claim" against the Penn Central estate [2] is not correct. Neither the valid existence nor the priority of any such claim has been adjudicated in the Penn Central reorganization. In particular, the nature and amount of any eventual claim for unpaid leased-line rentals depend on whether Penn Central ultimately affirms the leases, which it has not yet done, and the validity and status of claims for interest accruing on various obligations during the reorganization will present even more complex questions.[3]

3. The New Haven Trustee asserts that the January 1, 1973 and February 1, 1973 Reports of the Penn Central Trustees "acknowledged that reorganization would

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since the Brief of Appellant USRA was filed, USRA has asked Congress to extend by 120 days the deadlines specified in the Rail Act for releasing the preliminary system plan and adopting the Final System Plan.

[2] Brief of Richard Joyce Smith, Trustee of the Property of the New York, New Haven and Hartford Railroad Company, Debtor, Cross-Appellant in No. 74-166 ("Brief of Cross-Appellant") at 6 n. 3.

[3] It is stipulated that the Penn Central estate's actual obligations to the leased lines and for post-bankruptcy interest cannot be determined at this time. See Stipulation ¶¶ 13, 14, Joint Appendix ("JA") 317 at 321-322.

not be possible without a *government grant* (not merely financial assistance by way of loans or guarantees of borrowings) on the order of $600 million to $800 million." [4] This description of those reports is incorrect. The Trustees' January 1, 1973 Report stated:

> "The Trustees have concluded that without government financial assistance for improvement of the railroad, a reorganization of Penn Central cannot be achieved in 1976, as they had considered possible.
>
> "The extent of assistance needed, as well as the forms of assistance which the Trustees will recommend, will be the subject of further advice to the [Reorganization] Court . . . ." [5]

Elsewhere in the same Report, the Trustees characterized their financial problem as a "vicious circle": inadequate cash for equipment expenditures was both the cause and the result of inadequate revenues.[6] As Congress later concluded, Government-guaranteed debt capital could play a significant role in breaking that vicious circle. In the Trustees' February 1, 1973 Report, they stated that the necessary government assistance could be provided "in a number of different [alternative] forms." One of the suggested alternatives was $600 million to $800 million in cash "subsidies." [7] An alternative suggestion made in the same report was that government financial assistance, in apparently the same amount, be provided on a "joint

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[4] Brief of Cross-Appellant at 7 (emphasis in original).

[5] Penn Central Trustees' Interim Report of January 1, 1973, reprinted in the Joint Documentary Submission ("J. Doc.") 8 at 1.

[6] *Id.* at 2, 4.

[7] Penn Central Trustees' Interim Report of February 1, 1973, J. Doc. 9 at 5-7. The word "grant" was not used. It is noteworthy that the Trustees themselves proposed that any such subsidy be accompanied by rail service and expenditure requirements that could have imposed a significant burden on the estate.

venture" basis contemplating ultimate "repayment of the government contribution." [8] On April 3, 1974, after the Rail Act became law, the Penn Central Trustees reported to the Penn Central Reorganization Court that "[t]he basic concept of the Act is, in the Trustees' judgment, sound," and they characterized it as "endors[ing] [in many respects, apparently including the need for financing] the Trustees' prior reports on what conditions would have to be realized as a prerequisite to a viable rail system in the Northeast." [9]

4. The New Haven Trustee quotes at length from a March 1973 opinion of Judge Fullam in the Penn Central reorganization proceeding.[10] In that opinion, Judge Fullam expressed doubt that the Penn Central "could properly be permitted to continue to operate on its present basis beyond October 1, 1973." The New Haven Trustee then asserts that the Penn Central has now continued to operate "on its present basis" for a year beyond that date.[11] This assertion does Judge Fullam a considerable injustice by overlooking his central premise. Judge Fullam recognized explicitly in his March 1973 opinion, as well as in his opinion below in this case, that the right to require continued operations during the reorganization period depends on the prospects for an ultimately successful reorganization. In March 1973, it appeared impossible to reorganize Penn Central without federal help which had not yet been provided, and it was on that "basis" that the propriety of requiring continued operations appeared doubtful. Passage of the

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[8] *Id.* at 6.

[9] Penn Central Trustees' Report on Reorganization Planning (April 3, 1974), J. Doc. 10 at 4.

[10] Brief of Cross-Appellant at 8-9, quoting *In re Penn Central Transp. Co.*, 355 F. Supp. 1343 (E.D. Pa. 1973).

[11] *Id.* at 9 n. 8.

Rail Act wholly changed the basis for continuing operations. If the Rail Act is held unconstitutional, then Penn Central may be required to shut down, but the New Haven Trustee's disregard of the Rail Act simply begs the question.

SUMMARY OF ARGUMENT

I.

This Court has repeatedly held that federal courts should decline to decide issues that are premature. Its decisions establish that both the "permanent taking" and "erosion taking" issues in this case are premature for two reasons: first, those issues could be decided only on a hypothetical basis, since the present record is inadequate to support a holding that anyone will fail to receive the "constitutional minimum" consideration which the Act requires the Final System Plan to provide; second, an adequate legal remedy will be available if and when it becomes possible to establish that the consideration under the Plan will be inadequate.

The lower court correctly ruled that the New Haven Trustee's "permanent taking" contentions were premature. Neither the record on the motions for summary judgment nor any record that could have been made at trial would have permitted the lower court to determine that the Rail Act will cause a transfer of rail properties for less than the "constitutional minimum" prescribed by Section 303 and the Fifth Amendment. There will be an adequate future opportunity for the New Haven Trustee to challenge his treatment under the Final System Plan after that Plan has been developed, when the issues can be framed and decided in a concrete context with the guidance of an adequate record. Thus, it would have been inappropriate for the lower court to decide now, on a hypothetical basis, generalized constitutional questions relating to the transfers of rail properties.

Moreover, the "erosion taking" issues were also premature. As Judge Fullam stated in his separate opinion below, the permissibility of uncompensated interim erosion can be decided only in the light of the constitutionality of the ultimate result which implementation of the Act will produce. The provisions of the lower court's order based on the possibility of an erosion taking were unnecessary and improper in view of the absence of a present basis for determining whether any interim erosion will exceed constitutional limits and the ability of the Special Court or, if necessary, the Court of Claims to provide a remedy should that occur.

The New Haven Trustee's argument that the Final System Plan may require the transfer of Penn Central assets for less than the "constitutional minimum" value was presented to the court below as a wholly abstract and hypothetical proposition. It raises complex constitutional questions relating to the definition of "value" under the Fifth Amendment. The New Haven Trustee sought to have the lower court decide those questions on a record which does not show what assets are involved, what their value is under *any* theory of valuation, or what the value of the consideration provided in the Final System Plan will be.

Similarly, for the lower court to adjudicate the "erosion taking" issues would have required it to define the constitutional limits on interim erosion against the backdrop of a record which does not show whether or to what extent any erosion injury will occur or whether the final consequences of reorganization under the Rail Act will justify any interim burden. The lower court implicitly acknowledged the inadequacy of the record by failing either to define the governing constitutional standard or to make findings which would support a conclusion that unconstitutional erosion is likely to occur. It left those matters to be decided by some other court at some other time.

There was no need for the lower court to adjudicate any of the taking allegations on a speculative basis, because any interested party will be able to bring the issues before a federal court at a later time on a better record and to obtain adequate relief if his claims prove to have merit. Section 303 of the Rail Act will require the Special Court, subject to review by this Court, to review the fairness and equity of the Final System Plan to each railroad estate. The question in that review proceeding will be whether each estate has received the "constitutional minimum" consideration for rail assets transferred, a question which encompasses the issue whether the consideration should reflect the cost of keeping the railroad operational prior to the transfers. The Special Court will have the power to take any such "erosion" burden into account and provide compensation for it if necessary. In the event that the total consideration available to the Special Court is insufficient to pay the constitutional minimum value, any injured party will have a further legal remedy in the Court of Claims under the Tucker Act. Alternatively, he may seek injunctive relief from the court below or another three-judge court after USRA adopts the Final System Plan and before the date set for the transfers; or he may seek to invoke the equitable power of the Special Court to refuse to order conveyances which would violate constitutional rights.

II.

Even if the New Haven Trustee's attack on the transfer provisions were not premature, he would not be entitled to relief on the merits of that attack. The New Haven Trustee asserts a constitutional right to be "cashed out" of his investment in Penn Central rather than to remain an investor in a reorganized entity that will continue some or all of Penn Central's rail operations. That assertion is refuted by decisions of this Court which establish that Congress has broad authority to adjust creditors'

claims in reorganization and that the Rail Act falls within the Fifth Amendment limits on that authority.

The New Haven Trustee argues that the Rail Act is an exercise of the power of eminent domain rather than of the bankruptcy power because each class of creditors of the several railroads subject to the Act will not have an opportunity to disapprove the Final System Plan. However, this Court's decisions under other bankruptcy laws establish that Congress may require reorganization without creditor approval so long as it furnishes safeguards which fully protect creditors to the extent of the value of their claims. The valuation provisions of Section 303 clearly provide such safeguards.

Seeking to strengthen his depiction of the Rail Act as a condemnation law, the New Haven Trustee contends that Conrail will be a Government instrumentality rather than a private corporation. Although the Rail Act establishes Conrail as a for-profit corporation, which will be entirely owned by the rail estates transferring properties under the Final System Plan, Plaintiff suggests that Conrail will not in fact be a private enterprise because the Act provides for temporary Federal representation on its board of directors. To the contrary, the Act's provision for majority federal representation on the board if Government obligations are more than one-half of Conrail's debt is a reasonable measure to protect federal interests in that contingency. Even if the contingency should occur, full control of Conrail's affairs will transfer to its shareholders as soon as Conrail's private borrowing exceeds or replaces its federally guaranteed debt.

This Court should not accept the New Haven Trustee's suggestion that it decide the measure of the "constitutional minimum" value which the railroad estates are entitled to receive in exchange for their rail properties. He argues that the "constitutional minimum" is at least the current net liquidation value of the properties and

may be greater because Penn Central's properties are an "irreplaceable national asset." We submit that the New Haven Trustee is wrong in his assertion that this constitutional issue is ripe for decision and wrong in his suggested resolution of the issue.

The Rail Act gives the Special Court the responsibility to decide what the "constitutional minimum" is when it determines the fairness and equity of the transfers under the Final System Plan. At that time the Special Court will have a factual record on which to decide the issue and a panoply of remedies to redress any unfairness in the exchanges. Moreover, the Tucker Act will be available to remedy any shortfall if the total value available to the Special Court proves inadequate. Therefore, there is nc reason for this Court to disregard Congress' decision that the issues raised by the New Haven Trustee should be determined initially by the Special Court in the statutory review proceedings.

If this Court nevertheless concludes that it should define the "constitutional minimum" it should reject the New Haven Trustee's proposed definition. His assertion that the Penn Central estate is entitled to at least current net liquidation value rests on the premise that Penn Central has a present right to cease operations and liquidate. As noted in our Brief as Appellant, Penn Central has no such right in view of the substantial possibility of successful reorganization under the Rail Act. A franchised common carrier can be required to continue to serve the public as long as its operations are profitable or can be made profitable by reorganization. Therefore, where a railroad can be reorganized to have a substantial going-concern value, that value is the measure of the investors' rights even if net liquidation value would be higher. The rule for which the New Haven Trustee contends would imply that a carrier is constitutionally entitled to cease operations and liquidate whenever the funds it has dedi-

cated to public use could be used more profitably in another enterprise.

This Court did not embrace the New Haven Trustee's theory in *New Haven Inclusion Cases*, as he asserts. In that case, since the New Haven properties had no going-concern value, either separately or as part of Penn Central, the Court did not decide whether a substantial going-concern value would be constitutionally sufficient payment for the properties.

There is no basis for the New Haven Trustee's further suggestion that the Penn Central estate may be entitled to even more than net liquidation value because Penn Central's properties are an "irreplaceable national asset." That contention amounts to an attempt to take advantage of the public need for continued Northeastern rail operations by "holding up" the Government for an amount greater than the value of the properties in the private marketplace. The tactic is an old one, and this Court's decisions condemning it are equally old. Even in a condemnation context, it is firmly established that the measure of compensation under the Fifth Amendment is the owner's loss—measured at private market values—and not the taker's gain.

The New Haven Trustee counters this established doctrine with two state court decisions. Those decisions are authorities under New York, not the Federal Constitution, and they provide no basis for abandoning the consistent federal rule.

The New Haven Trustee invites this Court to strike down the statute Congress enacted and to advise Congress on ways to amend or replace it. However, that is not this Court's role. The Rail Act is Congress' attempt to resolve the Northeast rail problem without resorting to nationalization. The New Haven Trustee would prefer to have vital rail services continued by nationalization, a route he believes would bring him compensation wholly in cash

and possibly in a much higher amount than obtainable in reorganization. However, he has no legal right to have this Court assist him in thwarting Congress' purposes. The Rail Act, while not perfect, is the statute that Congress has enacted and the one that this Court must construe. It should be construed in a way that renders it constitutional if that is possible.

III.

The New Haven Trustee contends that the Rail Act denies him procedural due process. He attacks two aspects of the Act's procedures: first, its failure to give creditors of individual railroads a vote on whether to accept the Final System Plan; and second, its provision deferring judicial review of the consideration received for transferred properties until after the transfers have occurred.

Although these features are departures from the normal practice under Section 77, they create no constitutional infirmities. Rather, the differences between the Rail Act and Section 77 are what give the Act a chance of producing a successful reorganization of the Northeast railroads where Section 77 has proven inadequate. Section 77 deals with the recapitalization of individual railroads whose operations are inherently profitable. It provides neither a means of restructuring rail operations nor a way of coordinating the reorganization of several railroads. By contrast, the basic objective of the Rail Act is to redesign and combine the rail operations of separate entities to make them self-sustaining.

Congress determined that the Rail Act cannot accomplish its purpose if each class of creditors of each rail estate must vote on the Final System Plan. Congress also concluded that the implementation of the Plan cannot await the outcome of the lengthy valuation process. The Rail Act's procedures contain adequate safeguards to insure that all interests will be fairly treated upon comple-

tion of the valuation process. They are designed to provide fair treatment while permitting the accomplishment of the Congress' objectives. Due process requires no more than that.

IV.

The New Haven Trustee renews his contention, essentially rejected by the Court below, that the Rail Act is void as a nonuniform law on the subject of bankruptcy. That contention is wholly academic. The Rail Act operates uniformly with respect to every bankrupt railroad operating in the United States and all creditors of each. Congress was aware that all of these railroads are in fact located in the region defined by the Rail Act, and it would be a purposeless exercise, protecting the rights of no one, for this Court to rule that the Act must be written to avoid any recognition of that fact.

Moreover, the contention of the New Haven Trustee is not even technically correct. The uniformity requirement in the Bankruptcy Clause has been construed to permit Congress to take account of the real differences that exist between parts of the country. Other constitutional provisions containing similar uniformity requirements have been likewise construed.

Finally, the uniformity requirement is only a limitation on the power delegated to Congress in the Bankruptcy Clause. It does not limit Congress' powers under the Commerce Clause and Article III. As the court below held, the features of the Rail Act which the New Haven Trustee attacks can be sustained as an effort based on the Commerce Clause to provide a solution to a problem affecting commerce. The provisions transferring some existing bankruptcy powers to the Special Court are within Congress' power under Article III to define the jurisdiction of the lower courts. The Act is sustainable as a necessary and proper exercise of Congressional powers which are not limited by any requirement of geographical uniformity.

ARGUMENT

I. BOTH THE "PERMANENT TAKING" AND THE "EROSION TAKING" ISSUES ARE PREMATURE

USRA agrees with Judge Aldisert's majority opinion that the "permanent taking" issues are premature. Neither the record before the court below on the motions for summary judgment nor any record that could have been made at trial would have permitted the court to determine that the Rail Act will cause a transfer of rail properties for less than the "constitutional minimum" prescribed by Section 303. The constitutional questions relating to the future transfers of rail properties were therefore presented below on a hypothetical and speculative basis. There will be an adequate opportunity, after the Final System Plan has been developed, for interested parties to present these questions to a federal court at a time when they can be decided in a concrete context with the guidance of an adequate record.

The erosion issues were premature as well. The orders of the court below relating to Sections 303 and 304(f) were essentially circuitous standby orders predicated on a hypothetical future determination of the central issues—including the existence of any actual erosion injury—by some other court.[12]

It is clear that, even in the presence of a case or controversy sufficient to confer jurisdiction, a federal court should decline to decide issues that are premature.[13]

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[12] See Brief of Appellant USRA at 66-74.

[13] Courts should not reach constitutional questions when the existence of injury depends on the "concurrence of . . . contingent events . . . too speculative to warrant anticipatory judicial determinations," *Eccles* v. *Peoples Bank*, 333 U.S. 426, 432 (1948). Courts should avoid "passing on questions of public law even short of constitutionality that are not immediately pressing." *Id.* at 432. Courts do not adjudicate "matters of serious public concern" on a record that is not "adequate and full-bodied." *Public Affairs Press*

There is, however, no bright-line test that separates the cases where the dispute is sufficiently concrete and immediate and the record sufficiently informative to make a decision appropriate from the cases where the dispute is so hypothetical and remote that the issue should be postponed. The statement of Justice Frankfurter quoted by the New Haven Trustee suggests a pragmatic test: "Courts do not review issues, especially constitutional issues, until they have to." [14] Such a need does not exist.

There are two factors that make the "permanent" and "erosion taking" issues premature in the present case. On the present record, the possibility that anyone will receive inadequate consideration under a statute that expressly requires constitutionally adequate exchanges is

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v. *Rickover*, 369 U.S. 111, 112-13 (1962). Nor do courts rest conclusions concerning "an extremely important question . . . on an indefinite factual foundation." *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256 (1948). Where the request is for declaratory or injunctive relief, an incomplete record and the premature posing of issues are particularly compelling grounds for withholding such discretionary remedies. As Justice Frankfurter wrote for the Court in *Eccles* v. *Peoples Bank*,

> "Caution is appropriate against the subtle tendency to decide public issues free from the safeguards of critical scrutiny of the facts, through use of a declaratory summary judgment." 333 U.S. at 434.

To the same effect is the Court's observation in *Kennedy* v. *Silas Mason Co.*, *supra*, that:

> "[S]ummary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice." 334 U.S. at 256-57 (footnote omitted).

See also *Public Affairs Press* v. *Rickover*, *supra*, 369 U.S. at 112; *A.L. Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324, 331 (1961); *Public Service Commission* v. *Wycoff Co.*, 344 U.S. 237 (1952).

[14] *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 154-55 (1951) (concurring opinion), quoted in Brief of Cross-Appellant at 25.

wholly speculative, and the nature and scope of any such inadequacy are unknown at this time.[15] And this is not the last time when the issues raised by that possibility can be adjudicated. If and when the existence of inadequate consideration is demonstrated by a concrete record, a federal court will be available to provide an adequate remedy. There simply is no need for an immediate resolution of the many difficult hypothetical constitutional and statutory questions posed by the New Haven Trustee, which may never actually arise. A federal court will be available to decide the questions, if any, that turn out to be real.

A. The "Taking" Allegations Are Not Ripe for Adjudication on the Present Record

1. *Allegations Relating to the Final System Plan*

The New Haven Trustee contends that the implementation of the Final System Plan will or may require a transfer of Penn Central's property for public use for less than just compensation. He alleges, in other words, that the value of the consideration provided for whatever Penn Central assets are transferred pursuant to the Final System Plan will or may be less than the "constitutional minimum" value required by Section 303 and the Fifth Amendment. Brief of Cross-Appellant at 63. That general allegation involves many complex constitutional questions relating to the definition of "value," including for example the following:

(a) Is the constitutional value of rail properties their value for rail use or for other purposes? Does

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[15] The Penn Central Trustees argue that, since "no one can deny the possibility of unconstitutional erosion," this Court must adjudicate this controversy on the assumption that unconstitutional erosion is inevitable. Brief for Robert W. Blanchette, et al., Appellants, in No. 74-165 ("Brief of Appellants Penn Central Trustees") at 39. The cases on prematurity cited above take just the opposite approach.

the answer depend on whether the railroad continues to have an obligation to provide rail service, and if so to what extent does Penn Central have such an obligation? Does it depend on whether liquidation value for nonrail purposes is higher than value in rail use, and how are these two values to be measured?

(b) Is the consideration for Penn Central rail assets to be valued, for constitutional purposes, at its market price in an existing market, or can an appraisal based on earnings projections be employed by the court that makes the determination? Does the answer depend on the right of railroad investors to liquidate their investment for cash, and if so do they have such a right?

The New Haven Trustee offers his own theoretical answers to these questions as posed in the abstract. He would have this Court adopt his answers now despite the fact that on the present record, regardless of how any of these questions is answered, it cannot be demonstrated that Penn Central will (or is likely to) receive less for its properties than the "constitutional minimum" consideration, or less than Penn Central could obtain by following any alternative course of action.[16] It is stipulated that at present the parties do not know what assets are involved, what their value is on *any* basis, or what the value of the consideration provided in the Final System Plan will be. Many factual questions are therefore open:

(a) The Penn Central rail assets to be transferred pursuant to the Final System Plan are un-

[16] There is only one alternative course of action that even the New Haven Trustee is prepared to advocate: federal condemnation of the Penn Central rail system. But even apart from the political, economic, and competitive problems inherent in nationalization of a single railroad, the New Haven Trustee does not have a constitutional right to have Penn Central's properties condemned. See Part II *infra*.

identified. As stipulated, it is likely that some Penn Central rail assets will be transferred, but it is not known how much of the Penn Central system will be transferred and how much will be left in the estate. Equally important, it is not known which parts of the system will be transferred. If the answer to the constitutional valuation questions depends on whether the assets to be valued have greater value for rail or nonrail purposes, or on how much net income the assets can be expected to generate in rail operations, then it is not possible now even to articulate a useful general principle for valuing the transferred assets. JA 317 at 318-19.

(b) The identity of the transferees of Penn Central assets is also unknown. The Final System Plan may provide for transfers to existing profitable railroads, to state, local, and regional transportation authorities, and to Amtrak, as well as to Conrail. The constitutional questions presented by the New Haven Trustee relate only to transfers to Conrail. It is stipulated, however, that it "will not be possible to ascertain until completion of the planning and approval process required by the Act . . . which rail properties of Penn Central will be designated for transfer or conveyance to Consolidated Rail Corporation . . . ." JA 317 at 319.

(c) Nothing is known about the value of the rail properties to be transferred pursuant to the Final System Plan. It is stipulated that their liquidation value is unknown and cannot be ascertained now. It is further stipulated that their value on any basis other than liquidation is unknown and cannot be ascertained now. *Id.*[17]

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[17] Moreover, very little is known about the value of the whole Penn Central rail system on any basis. The Day & Zimmerman study summarized by the New Haven Trustee is, as he notes, dated near the beginning of the reorganization (December 31, 1970), and its conclusions have not been passed upon by the ICC or any court. Brief of Cross-Appellant at 79. He might have added that the study was not prepared for the purpose of constitutional valuations, and

(d) It is also stipulated that the value of the consideration that will be exchanged for properties transferred to Conrail is unknown and cannot be ascertained now. See *id.* Transferor rail estates can receive up to $500 million in USRA obligations guaranteed by the Federal Government [18] plus all of

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the numerous assumptions made by Day & Zimmerman have not been analyzed in terms of their relevance to the present case. The New Haven Trustee's attempt to construct a concrete factual setting for the "permanent taking" issues underscores their prematurity. There is no reason for this Court to charge into the constitutional thicket by assuming, as the New Haven Trustee invites it to do, that at least 50 percent of the Penn Central system's psysical assets will be transferred to Conrail. *Id.* Such an assumption finds no support in the facts which the parties were willing to stipulate for the purposes of this case. JA 317 at 319. The actual figure may be more, or less; and there is no reason to assume that the value of all assets transferred will be representative of the value of all of the assets studied by Day & Zimmerman.

[18] The New Haven Trustee's repeated assertion that this will require the affirmative approval of Congress is flatly wrong. See Brief of Cross-Appellant at 49, 52, 54, 76 n. 67, 80. Section 210 authorizes USRA to issue bonds, debentures, trust certificates, securities, or other obligations in an amount up to $1.5 billion. It provides that the Secretary of Transportation must guarantee the payment of principal and interest on all such obligations if requested by USRA (Section 210(c)), and authorizes both direct appropriations and the sale of public debt to enable the Secretary to discharge the obligations of the United States thus incurred (Section 210(e),(f)). These authorizations are complete in themselves and are not conditioned on any further congressional action. Under Section 210(b), up to $500 million of the USRA obligations may be made available to Conrail for the acquisition of properties under the Final System Plan. Section 210(b) requires a joint resolution by Congress only for "[a]ny modification to the limitations set forth in this subsection."

Section 206(i), on which the New Haven Trustee relies, does not contradict Section 210. That provision applies only to such securities of *Conrail* as may purport to impose *direct* obligations on USRA (by, for example, purporting to obligate USRA to make payments into a sinking fund). Section 206(i) does not apply to USRA obligations issued under Section 210 independent of Conrail securities. Nor does Section 206(i) apply to Conrail securities which obligate USRA only indirectly (by, for example, being secured by USRA obligations through a collateral trust indenture).

[Footnote continued on next page]

the common stock of Conrail plus other securities of Conrail. The guaranteed obligations will presumably have a market value equal to their stated value. The value of the Conrail stock and securities will obviously depend on the terms of the securities, which are unknown, and on the earning capacity of Conrail, which in turn depends on what assets are transferred to it.

(e) There is no basis today for comparing the consequences to any particular class of claimants of alternative courses of action. In fact, whether anyone will receive less through implementation of the Final System Plan than he would receive from some alternative course of action cannot be determined without examining the positions of particular classes. For example, the $250 million in labor protection benefits provided in Section 509 of the Act may be of considerable relevance to persons whose claims will be primed by labor claims resulting from termination of operations and liquidation of the estate.

The Penn Central Trustees argue that the "permanent taking" issues are ripe for adjudication now because, among other things, the 180-Day Decision has been entered, an event which the court below noted was still *in futuro* when it decided the case. Brief of Appellants Penn Central Trustees at 48-51. Entry of the 180-Day Decision has done nothing to cure the factual inadequacy of the record, or to make possible the framing of con-

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[18] [Continued]

If Congress had intended Section 206(i) to prevent USRA from issuing any obligations without a joint congressional resolution, there would have been no need for Section 210's requirement of a resolution to authorize USRA obligations in excess of the limits there specified. When the two provisions are read together, it is clear that, as long as the obligational limits of the Act are not exceeded, no affirmative approval is required for USRA obligations. The requirement of approval of *Conrail* securities that purport to establish the Association as the direct or primary obligor is an altogether different matter.

crete as opposed to hypothetical legal issues concerning the alleged taking. In fact, to the extent that the 180-Day Decision is relevant to the ripeness of the "permanent taking" issues, that decision makes the issues more hypothetical because the Penn Central 180-Day Decision was against reorganization under the Rail Act.

2. *Erosion Allegations*

The present record is also inadequate, in two respects, to adjudicate the alleged "erosion" taking. In the first place, even if there were agreement on a definition of "erosion" and even if the law defining its constitutional limits were established, the record in this case would be insufficient to indicate whether or to what extent there is or will be any erosion injury to anyone. In the second place, as Judge Fullam recognized, the erosion question can be properly answered only by comparing the present position of the estate with the expected consequences of the reorganization process. Even if creditors had no obligation to the public to stay their hands and risk a decline in their recovery for the period necessary to reorganize into a "self-sustaining rail service system," the existence of any injury to them could be determined only by comparing the consequences of some feasible alternative available now with the consequences of reorganization under the Rail Act.

The first of these points is discussed in Part III of our Brief as Appellant. We argue there that the limited facts of record do not demonstrate that the value of the Penn Central estate available to satisfy pre-bankruptcy claims is declining.[19] We will not repeat that argument

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[19] Brief of Appellant USRA at 75-77, 79-82. The statement in the Brief of Appellants Penn Central Trustees (at 33) to the effect that the Government parties concede that "there has been very substantial erosion" is therefore not an accurate statement of our position.

here. The strongest indication of the inadequacy of the record with respect to erosion is what the court below actually did after it determined that the erosion issue was "ripe for adjudication." The court did not define erosion. It did not define the constitutional limits on erosion. It did not determine whether or to what extent erosion of the Penn Central estate has actually occurred or will occur. The court below simply left these questions to some other court and declared Section 303 of the Rail Act unconstitutional "insofar as" it fails to provide compensation for erosion that some other court may or may not find and determine to be constitutionally compensable.

The Penn Central Trustees argue that, when some court ultimately does make findings on erosion, it will not be entitled to consider appreciation in asset values, particularly the values of non-rail assets. Brief of Appellants Penn Central Trustees at 32-33. Their argument cites only *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396 (1920), whose inapplicability we demonstrate elsewhere, and ignores the contrary authority, *In re Boston & Maine Corp.*, 484 F.2d 369, 373 n. 5 (1st Cir. 1973).

Nothing in reason supports the Trustees' argument. Erosion has two major elements: the continued accrual of post-bankruptcy claims which are entitled to priority over pre-bankruptcy claims, and the decline, if any, in the total value of the estates from which all claims—both pre- and post-bankruptcy—must be satisfied. We fail to understand why a court should not consider increases in the value of assets owned by the estate during the reorganization process, which obviously affect the latter element. Post-bankruptcy claims are against the entire Penn Central estate, and they have a first call on both rail and non-rail assets. To the extent that increases in the value of assets provide dollars which can

satisfy post-bankruptcy claims, these increases reduce any erosion injury to the pre-bankruptcy interests.

The fact that various assets which increase in value may be subject to different mortgages does not mean that increases in these asset values do not cushion erosion. Post-bankruptcy claims have a first call on every asset of the estate, including mortgaged assets. Increments in the value of mortgaged assets are available to satisfy these claims, leaving a greater asset value available to satisfy pre-bankruptcy claims.

Moreover, in any complex railroad reorganization, creditors with different security will be affected differently by erosion, no matter how it is measured. There is an inherent theoretical problem in balancing the interests of creditors secured by properties whose value is allowed to decline in the reorganization process against the interests of others in reorganizing. This problem is neither solved nor exacerbated by taking changes in asset values into account, but doing so provides a more accurate measure of overall injury.

Moreover, while the cushioning effect of an increase in asset values may in fact be different for different pre-bankruptcy claimants, the record before this Court does not permit an analysis of any such differences.

Even if the record were adequate to determine whether the value of the Penn Central estate is declining because of continued operations, the constitutional issue could not be satisfactorily resolved now. The underlying issue is whether Penn Central's creditors have a present constitutional right to realize present liquidation values by forcing the railroad to cease operations and liquidate immediately. Plaintiffs contend that this Court gave them that right in *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396 (1920), holding that owners of a small railroad that was losing money and had no prospect of becoming profitable could not be compelled by a state

to continue rail operations. However, the public also has a right, established in a series of cases under Section 77,[20] to require a railroad to continue its operations pending reasonable efforts to reorganize it to be self-sustaining. The question, therefore, is whether the *Brooks-Scanlon* principle or the reorganization principle is applicable to the present case. The answer to that question depends upon the constitutional adequacy of the transfers pursuant to the Final System Plan and cannot be determined now. As Judge Fullam stated, the erosion issue "cannot be properly decided except in the light of the constitutionality of the ultimate result which implementation of the Act would produce." JA 9 at 60.

Judge Fullam himself escaped from the force of his own argument and concurred in the decision below. He did so, however, by an erroneous reasoning process. He apparently reasoned that the public's right to require continued operations during a reorganization depends upon "reasonable present assurance that the end result of the statutory process would be the receipt of consideration for the assets and other benefits in amounts equaling at least liquidation value plus interim erosion," *id.*; and he joined the majority in concluding that Section 303 of the Rail Act prohibits any compensation for erosion, so that if there is any erosion at all, his test is not met.[21]

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[20] *E.g.*, *Continental Bank* v. *Chicago, Rock Island & P. Ry.*, 294 U.S. 648 (1935); *Reconstruction Finance Corp.* v. *Denver & Rio Grande W.R.R.*, 328 U.S. 495 (1946); *Penn-Central Merger Cases*, 389 U.S. 486 (1968); *New Haven Inclusion Cases*, 399 U.S. 392 (1970).

[21] It is not entirely clear from his concurrence that Judge Fullam read Section 303 as both denying to the Special Court the power to take erosion into account in fixing the consideration for the transfer and requiring the Special Court to award the constitutional minimum for the rail assets transferred. JA 9 at 60. That he so read Section 303 is clear, however, from his 180-Day Decision in the Penn Central case, JA 124 at 149; that the majority of the court below so read Section 303 is clear from the declaratory judgment, JA 9 at 82.

In fact, both premises are wrong. As we argue in Part III of our Brief as Appellant, creditors of a railroad that can be reorganized successfully do not have a constitutional right to be paid for their participation in the reorganization process. As we argue in Part II of that Brief, there was no reason for the court below to construe Section 303, which explicitly requires consideration equal to the "constitutional minimum," as excluding consideration for interim erosion if the Special Court determines that such consideration is constitutionally necessary. Even on Judge Fullam's theory, the ultimate question is whether the value of the federally guaranteed USRA obligations plus the going-concern value of a federally assisted Conrail (which will be wholly owned by the rail estates presently in reorganization) and other benefits will be sufficient to provide the "constitutional minimum" consideration required by Section 303 for the assets transferred to Conrail. If the Special Court determines that what is required is sufficient value to place the pre-bankruptcy claimants in as good a position as they would have been in had they liquidated at some date earlier than the actual transfer to Conrail, neither the Rail Act nor the record demonstrates that the Special Court will be unable to award such consideration.

Judge Fullam resolved his own dilemma by simply construing Section 303 of the Act in a manner that made the section unconstitutional on its face: he construed it to prohibit payment of part of the constitutional minimum the section itself commands. Once that construction of Section 303 is rejected as unwarranted, we are back to his original problem. The record does not even begin to demonstrate that the consequences of implementing the Final System Plan will be worse for any class of claimants than the consequences of any feasible alternative.

B. When Plaintiff's "Taking" Allegations Become Ripe for Adjudication, He Will Have Full and Adequate Opportunities To Present Them to a Federal Court

It is clear that the present record does not permit the adjudication of the "taking" allegations except on a hypothetical and speculative basis requiring the decision of a large number of constitutional and statutory issues many of which may never arise if the facts are allowed to develop. The court below recognized this when it explicitly declared that the issues relating to the transfers under the Final System Plan are premature and left the central issues relating to erosion to be decided by some other court. However, Justice Frankfurter's test (p. 16 *supra*) suggests a second criterion of ripeness: will it be possible for this Plaintiff to bring the issues before a federal court at a later time on a better record and obtain adequate relief if the claims prove to have merit? The answer to that question in this case is yes.

Section 303 of the Rail Act provides that the Special Court, subject to review by this Court, shall review the Final System Plan to determine whether it is "fair and equitable" to the estate of each railroad in reorganization. Both the text of Section 303 and its legislative history [22] make it clear that the question in that review proceeding will be whether each railroad estate has received the "constitutional minimum" consideration for rail assets transferred pursuant to the Final System Plan. The court below notwithstanding, the Special Court will have power, if it determines that the "constitutional minimum" should reflect not only the value of the rail assets on the day of transfer but also the cost of keeping the railroad operational prior to the

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[22] See, for example, H.R. Rep. No. 93-620, 93d Cong., 1st Sess. 2, 31, 43, 54 and 55 (1973) ("House Report"); 119 Cong. Rec. H9732, H11,876 (daily ed. Nov. 8 and Dec. 20, 1973).

transfers, to take any such "erosion" burden into account and provide compensation therefor.[23]

To correct any unfairness in the Plan, the Special Court may reallocate the Conrail securities, order the issuance of additional Conrail securities and USRA obligations (subject to the $500 million limit in Section 210(b)), and if necessary enter a deficiency judgment against Conrail. Section 303(c). These remedies may fully correct any deficiencies in the terms of the transfers.[24] It is therefore altogether possible that the statutory process itself will provide a fully adequate opportunity for a federal court to resolve the issues that Plaintiff has presented here.

The New Haven Trustee objects, however, to the fact that the Special Court's determination of fairness and

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[23] See also Brief of Appellant USRA at 71. The Penn Central Trustees' reliance on a snippet of legislative history to support the argument that the Special Court may not take erosion into account in determining whether the terms of the transfers are fair and equitable is clearly misplaced. Brief of Appellants Penn Central Trustees at 41 n. 14. The committee report quoted obviously misstated the draft bill on which it was commenting, for Section 102(5) of the draft explicitly permitted rail properties to be valued as of a date in advance of conveyance.

[24] The New Haven Trustee suggests that the deficiency judgment against Conrail authorized by Section 303(c) is a worthless remedy. Brief of Cross-Appellant at 53. It may be that such a judgment would be ineffective in correcting any substantial shortfall in the consideration received by the Penn Central estate, since that estate will probably be the largest single holder of Conrail securities. However, the remedy could serve some purposes that additional securities would not serve as well. For example, if properties transferred by one of the smaller estates or one of Penn Central's Secondary Debtors were found to have been unfairly appraised and if the Special Court found that the transferring estate was entitled to the kind of priority over other claimants that a deficiency judgment would represent, the court might award such a judgment. Or, as we note at p. 50 *infra*, a deficiency judgment might provide the means to award the equivalent of cash to estates whose properties are sold by Conrail to Amtrak for cash, if the Special Court concludes that fairness requires such a result.

equity will not occur until after the transfers pursuant to the Final System Plan have taken place. This procedure, which Congress modeled on the procedure approved by this Court in the *Penn-Central Merger Cases*, is obviously not objectionable in itself.[25] When a Final System Plan for self-sustaining rail service has been formulated, it will be sensible to implement the Plan first and turn to the inevitably lengthy valuation process afterwards. Indeed, one of the explicit purposes of the two-step arrangement is to relieve the estates in reorganization of the burden of rail operations as quickly as possible, an objective the New Haven Trustee should be expected to applaud.

What the New Haven Trustee's objection comes down to is the alleged possibility that the total amount available to the Special Court to award—at least $500 million in federally guaranteed USRA obligations plus securities of Conrail and other benefits available under the Act—will not be sufficient to pay the constitutional minimum value of the assets transferred to Conrail.[26] The New Haven Trustee's contention is that the constitutional issues must be decided now, on the hypothetical supposition that the total value will be inadequate, because if the issues are left to the Special Court, it may be too late. To this argument there are several answers.

The first answer is that if the consideration available for property transferred to Conrail under the Final System Plan should prove to be inadequate, Plaintiff will have an adequate remedy in the form of a suit in the Court of Claims under the Tucker Act, 28 U.S.C.

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[25] See *Penn-Central Merger Cases*, 389 U.S. 486 (1968). Nevertheless, the New Haven Trustee contends that the two-step procedure is objectionable in itself. His contentions are answered in Part III of this Brief.

[26] The Brief of Appellants Penn Central Trustees makes essentially the same argument at 41-42, 56-61.

§ 1491. This point has been argued in Part I of our Brief as Appellant, and the argument will not be repeated here.

The second answer is that even if it were determined that no Tucker Act remedy is available, there would remain an adequate opportunity for a federal court to hear Plaintiff's claims, if and when they become ripe, and to provide an appropriate remedy. With respect to the erosion claims, this point requires no demonstration, because it is implicit in the decision below. Since the court below found it necessary to leave to the Reorganization Courts or other federal courts the determination whether erosion of any rail estate has reached constitutional limits, it could and should (in the assumed absence of a Tucker Act remedy) have left it to the same other courts to fashion an appropriate remedy. There was no reason for the court below to grant a remedy for a claim of injury that it did not and could not adjudicate.

With respect to the implementation of the Final System Plan, there will also be an opportunity to present claims to a federal court on a concrete basis after the terms of the Final System Plan are known. On the rationale of the court below, one possibility would be a later suit before the same or a different three-judge court. The text of the Plan will be available at least when it is submitted to Congress by USRA pursuant to Section 208, and the Plan cannot become effective until 60 days have passed during which neither house of Congress has disapproved it. USRA is not required to transmit the Plan to the Special Court until 90 days after this 60-day period has ended, Section 209(c), and transfers of the rail assets need not occur until as much as 20 days thereafter, Sections 303(a), (b). Nothing in the Act prevents Plaintiff or others from seeking a temporary or permanent injunction against the transmittal. Indeed, the court below issued an unqualified permanent

injunction against the transmittal of *any* Final System Plan.[27] On that court's rationale, there is no reason why it could not, at the very least, have delayed this order until it had before it an actual Final System Plan whose constitutionality or unconstitutionality it could adjudicate on the merits.

To be sure, Section 209(a) provides that the Final System Plan is not subject to "review" except in accordance with Section 209, and Section 209(b) provides for the consolidation before the Special Court of all "proceedings with respect to the final system plan." But if enjoining USRA from transmitting a Final System Plan to the Special Court constitutes the type of "review" which courts other than the Special Court are prohibited from engaging in, then the court below lacked jurisdiction to enter the order it entered prohibiting any such transmittal; a federal court cannot gain jurisdiction by deciding, prematurely and in the abstract, issues it would have no jurisdiction to decide in a concrete case.

Moreover, the Special Court will have original or transferee jurisdiction to adjudicate constitutional objections to the Final System Plan after the Plan becomes effective. Section 209(a) provides that:

> "After the final system plan becomes effective under section 208 of this title, it may be reviewed with respect to matters concerning the value of the rail properties to be conveyed under the plan and the value of the consideration to be received for such properties."

If a substantial showing were made to the Special Court of a likelihood that the value of the consideration avail-

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[27] As noted in our Brief as Appellant, the reason why it did so is something of a mystery since it declared the "permanent taking" issues premature and offered no explanation of this particular provision. Brief of Appellant USRA at 73-74.

able was less than the constitutional minimum value of the rail properties to be conveyed, the Special Court could hardly refuse to delay the transfer pending adjudication of the claim on the ground that Congress had directed it to order prima facie unconstitutional transfers. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803).[28]

Finally, the Rail Act should not read as compelling a transfer order under such circumstances. Section 303(b) provides that the Special Court "shall" order conveyance of the rail properties. But the Special Court has the powers of a district judge, including those of a reorganization court, Section 209(b), and the discretion of a court of equity to do justice under the circumstances, *cf. Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944).[29]

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[28] The provision in Section 303(b)(2) that the transfers "shall not be restrained or enjoined by any court" is clearly addressed to any other court that might be asked, once Section 303(b) becomes operative, to enjoin the Special Court from ordering the transfer of rail properties. It is not a limitation on the authority of the Special Court itself to withhold its transfer order if it is not satisfied that the plan is at least *prima facie* fair and equitable. Section 502(f) of the House Committee bill contained, in addition to the ban on injunctions, a provision that "conveyances shall not be deferred by reason of any controversy concerning the value of the rail properties to be conveyed . . . ." House Report at 11. This language, which might have been read as a restriction on Section 209(a) jurisdiction, did not survive passage.

[29] The apparent directive to order transfers first, with valuation to occur later, must also be read against the background of Congress' strong belief that the Final System Plan would be constitutionally adequate, and that each rail estate would receive the "constitutional minimum" for the properties transferred. For example, the House Committee's statement that "no litigation should be permitted to delay the Final System Plan" (House Report at 55) followed a careful analysis of the payment provisions and confident assertions that the statutory plan was without defects and ensured claimants of the "constitutional minimum" consideration. See S. Rep. No. 93-601, 93d Cong., 1st Sess. 6-7 (1973), commenting on the Senate Committee version of Section 303(b), not on Section 209(a).

The language of Section 303(b) that appears to compel the transfers on a date certain can be read literally without creating

There is, of course, no reason now to assume that there will be any constitutional defect in the Final System Plan that would delay or prevent the transfers. The only question now is whether it is appropriate to decide that the Final System Plan will necessarily be constitutionally defective before anyone has seen it. The New Haven Trustee has offered no good reason for doing so.

II. THE TRANSFER PROVISIONS OF THE RAIL ACT DO NOT VIOLATE THE SUBSTANTIVE RIGHTS OF CREDITORS UNDER THE FIFTH AMENDMENT

The Rail Act contemplates that rail properties designated in the Final System Plan for transfer to Conrail will be exchanged for (1) securities of Conrail, (2) up to $500,000,000 of USRA obligations guaranteed by the United States, and (3) "other benefits" conferred by the Act. The New Haven Trustee attacks the provisions authorizing this exchange as a governmental taking of the New Haven's property without just compensation and as a deprivation of property without substantive due

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any constitutional problems if this Court agrees that a Tucker Act remedy would subsequently be available to cure any constitutional deficiency in the consideration furnished under the Rail Act. If this Court concludes that the Tucker Act has been repealed *pro tanto*, we submit that it should read Section 303(b) in a manner that will save its constitutionality and give effect to Congress' concern that the rail estates should receive their constitutional due. The Court can accomplish that by interpreting Section 303(b) to permit the Special Court to decline to order the transfers if, in the exercise of its jurisdiction under Section 209(a), the Special Court concludes that the Final System Plan does not meet a *prima facie* test of constitutional fairness and equity.

The argument made in the Brief of Appellants Penn Central Trustees (at 53) that because the Special Court would have only ten days within which to act, Congress did not intend the Special Court to have discretion to refuse to order a transfer overlooks the fact that there can be as much as 110 days between the effectiveness of the Final System Plan and the date of transfer. See Sections 208(a), 209(a), (c), 303(a), (b).

process of law, both in violation of the Fifth Amendment.[30] He concedes that the public interest probably requires continued operation of a Northeast rail system including many present Penn Central properties, but he asserts a right to withdraw the New Haven's investment in those properties and to be compensated for that investment in cash—in effect, a right to have the railroad in which he is an investor condemned.

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[30] The New Haven Trustee poses as the second "question presented" whether he has standing to assert that certain provisions of the Rail Act, if not enjoined, would cause injury to the New Haven estate. Brief of Cross-Appellant at 3. When the New Haven Trustee challenged the facial constitutionality of the entire Rail Act in the court below, no one disputed his standing, and USRA does not do so here. However, in view of the New Haven Trustee's description of his claims against the Penn Central estate (see, *e.g.*, Brief of Cross-Appellant at 19, 34-35, 68), we are constrained to point out that the nature and validity of these claims are not at issue in this case.

There may well be important unresolved questions about the New Haven Trustee's status as a claimant against the Penn Central estate. Any such questions will exist whether or not the Rail Act is held constitutional and will presumably be resolved in due course by the Penn Central Reorganization Court in proceedings in which the New Haven Trustee, the Penn Central Trustees, and other parties to the Penn Central reorganization will have an appropriate opportunity to be heard. The present litigation should not lead this Court to decide questions about the New Haven Trustee's status that are irrelevant to the constitutionality of the Rail Act, were not put in issue below, and should be resolved in other proceedings.

The fact that the New Haven Trustee's standing to raise the constitutional issues presented has not been challenged does not demonstrate that he would in fact be injured in any respect by the operation of the Rail Act. For example, although the New Haven Trustee says that the Rail Act threatens the "collectibility" of his claims, the record in this case does not demonstrate either that the claims are "collectible" in the absence of the Rail Act or that the claims are uncollectible in the presence of the Rail Act. In fact, the record does not permit even a guess as to the consequences to the New Haven Trustee (or any other claimant) either of proceedings under the Rail Act or of any feasible alternative course of action.

The court below held that the New Haven Trustee's attack on the transfer provisions was premature and declined to adjudicate the issues raised, a ruling we believe was clearly correct.[31] Even if the issues he raises were ripe for decision, we submit that the New Haven Trustee has no constitutional right to be "cashed out" of his investment in Penn Central. The exchange provisions of the Rail Act are a legitimate exercise of the congressional power to provide for the adjustment of claims in bankruptcy and are fully consistent with Fifth Amendment principles governing the exercise of that power.

A. Congress Has Broad Authority To Provide for the Adjustment of Creditors' Claims in Corporate Reorganizations

The New Haven Trustee asserts that Congress cannot, under present circumstances, provide for continued private operation of rail service in the region through corporate reorganization measures, but must resort to the power of eminent domain. Viewing the Rail Act as an exercise of that power, he alleges that Congress has taken his property without paying the "just compensation" required by the Fifth Amendment. He further contends that the Act's provision for an exchange of rail properties for securities of Conrail and other consideration is constitutionally deficient because the Fifth Amendment requires that compensation for a condemnation be in money only.[32]

This attack is unfounded. The New Haven Trustee does not have a constitutional right to be bought out for cash as a condition for the continuation of rail service. Decisions of this Court establish beyond doubt that the Act is a legitimate and constitutionally permissible exercise of the bankruptcy power. There is no occasion for

[31] See Part I *supra*.

[32] Brief of Cross-Appellant at 55-60.

this Court to decide whether, if the Act were instead a condemnation, money would be the required medium of payment.[33]

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[33] It is not at all clear that money would be the only permissible form of compensation even if the Act were a condemnation law. This Court has never held that the Constitution requires compensation in legal tender for an exercise of the power of eminent domain. As the New Haven Trustee notes, two Justices of this Court sitting on circuit in 1795 ruled that compensation for a governmental taking of land must be in money. *Vanhorne's Lessee* v. *Dorrance*, 2 U.S. (2 Dall.) 304 (Cir. Ct., Pa. Dist. 1795). However, that decision construed the Pennsylvania constitution, not the federal, as this Court has since expressly noted. See *Satterlee* v. *Matthewson*, 27 U.S. (2 Pet.) 380, 414 (1829). The New Haven Trustee cites subsequent cases containing dicta to the effect that a property owner is entitled to cash or to "the monetary equivalent" of condemned property. Brief of Cross-Appellant at 56-60. However, none of those cases involved an attempt by Congress to provide compensation in non-monetary form, and the courts' use of the term "monetary equivalent" appears to have been only a shorthand way of saying that the compensation must be equivalent in value to the property condemned.

The New Haven Trustee says that the *Monongahela* case "squarely answered" the question whether the compensation for a condemnation may be in a form other than money. *Id.* at 57. In fact, that case had nothing to do with the question. The issue there was not the *form* of compensation but the *amount* to which the condemnee was entitled. This Court held merely that Congress may not, by disregarding part of the value of the property taken, reduce the amount of compensation received by the owner. *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312 (1893).

In fact, it is established that even in condemnation cases Congress may require an exchange of property for a nonmonetary consideration in appropriate circumstances. For example, the compensation for a taking of property may be reduced by the value of other benefits conferred on the owner, such as increases in the value of adjacent land. *E.g.*, *Bauman* v. *Ross*, 167 U.S. 548, 574-75 (1897); *United States* v. *1,000 Acres*, 162 F. Supp. 219 (E.D. La. 1958). The Rail Act, as noted elsewhere, confers a variety of benefits on the estates of railroads reorganized under it, whose value cannot be determined at this time. And, as we demonstrate in text, in a reorganization the rights of creditors are satisfied if they receive "full compensatory treatment" in nonmonetary form. *Consolidated Rock Products Co.* v. *DuBois*, 312 U.S. 510, 529 (1941). The guiding principle, that the owner is entitled to the full equiva-

Section 77 is strong precedent for the view that creditors of a bankrupt railroad can be compelled to accept securities in a restructured enterprise in exchange for their interests in the bankrupt. Under Section 77, a reorganization court may (a) stay the foreclosure of liens against a railroad's property pending efforts to reorganize the railroad, and (b) confirm a plan of reorganization developed and approved by the ICC, under which the claimants are not permitted to liquidate the debtor but receive interests in a recapitalized corporation which carries on the debtor's railroad operations. Although Section 77 partially reflects the general purpose of the Bankruptcy Act to permit the creditors to share in the debtor's assets, it also

> "reflects a public policy that the operation of railroads as sound, economic units should be achieved

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lent of his property, simply cannot be reduced to a flat rule that money must be the medium of any mandatory exchange.

The Brief of Appellants Penn Central Trustees (at 61 n. 31) questions whether the $250 million in labor benefits provided in Title V, for example, may be taken into account as part of the consideration for the transferred rail properties. If Penn Central cannot now abandon properties without incurring significant labor protection costs, then the statutory scheme providing for $250 million of those costs to be borne by the Government clearly benefits any Penn Central claimant whose claims would be primed by the labor protection claims. At a minimum, the $250 million in labor protection payments would benefit the Penn Central shareholders, for whom the Penn Central Trustees express concern. *Id.* at 56 n. 23.

It is simply not true that "[t]here is . . . but one medium of exchange which is the 'perfect equivalent of the property taken,' namely money." Brief of Cross-Appellant at 58. Under the Rail Act, the transferor estates and their creditors may be granted liens on or other interests in *the transferred properties themselves*, as in any reorganization, supplemented by over $2,000,000,000 of federal assistance and other benefits. See Brief of Cross-Appellant at 48 n. 42. The valuation provisions of Section 303, backed up by the Tucker Act remedy, will ensure that the consideration is equal to the "constitutional minimum."

> for the benefit of the public, regardless of the interests of creditors and stockholders." 5 Collier on Bankruptcy ¶ 77.02, at 469 (14th ed. rev. J. Moore 1974).

In short, the basic goal of Section 77 is "that the reorganized company should, if at all possible, emerge as a 'living, not a dying . . . enterprise.'" [34]

It is beyond question that Section 77 does not violate the taking or due process clauses of the Fifth Amendment by requiring railroad investors to accept securities in a viable recapitalized corporation that continues to meet the public need for rail service, instead of permitting them to liquidate the railroad by enforcing their claims. See *Continental Bank* v. *Chicago, Rock Island & P. Ry.*, 294 U.S. 648 (1935). This Court has specifically upheld the "cramdown" provision—unique to rail reorganizations —which allows the reorganization court to substitute its conclusion that the plan is fair and equitable for the assent of reluctant classes of claimants. *Reconstruction Finance Corp.* v. *Denver & Rio Grande W.R.R.*, 328 U.S. 495, 533 (1946).

Moreover, this Court has stressed that Section 77 does not exhaust the congressional powers in this field. In upholding Section 77 in the *Rock Island* case, the Court reviewed the history of bankruptcy legislation since 1800 and concluded that

> "[f]rom the beginning, the tendency of legislation and of judicial interpretation has been uniformly in the direction of progressive liberalization in respect of the operation of the bankruptcy power.
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> ". . . And these acts, far-reaching though they be, have not gone beyond the limit of congressional

[34] *New Haven Inclusion Cases*, 399 U.S. 392, 421 (1970), quoting *Van Schaick* v. *McCarthy*, 116 F.2d 987, 993 (10th Cir. 1941).

power; but rather have constituted extensions into a field whose boundaries may not yet be fully revealed." 294 U.S. at 668, 671.

The Rail Act constitutes a further extension into that field. The language and legislative history of the Act make it clear that Congress regarded it as a further exercise of the power to legislate with respect to railroad reorganization—creating a new reorganization procedure tailored to meet the regional and national demands of the Northeast rail crisis, rather than condemning the properties of the railroads for public ownership. The Act creates a mechanism whereby the pending Section 77 proceedings may be partially combined and the reorganization of the debtors may be facilitated by merging any or all of their rail properties into a consolidated rail network.

The New Haven Trustee points out that the Rail Act differs in certain respects from Section 77, and he argues that those differences take it beyond the constitutional limits on the power to adjust claims in reorganization—as distinguished from the power to condemn property for public use. The differences between the Rail Act and Section 77 are precisely what give the Act a chance of producing a successful reorganization of the Northeast railroads where Section 77 has proven inadequate.[35] Congress is not tethered to old forms and procedures in solving new reorganization problems; rather, the "capacity of the bankruptcy clause to meet new conditions" is an essential feature of the constitutional grant.[36] As we demonstrate below, each of the features of the transfer provisions to which the New Haven Trustee objects has firm support in judicial decisions under Section 77 and other bankruptcy laws. In light of the flexibility accorded to Congress in its exercise of the bankruptcy power, there is

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[35] See also pp. 72-75 *infra*.

[36] *Continental Bank* v. *Chicago, Rock Island & P. Ry.*, *supra*, 294 U.S. at 671.

little question that the Act is a constitutionally permissible solution to the problem of reorganizing the Northeastern railroads.

B. The Mandatory Nature of the Transfers Does Not Establish that the Rail Properties Are Being Condemned

The New Haven Trustee points out that the Rail Act does not provide for the submission of the Final System Plan to claimants for approval or provide discretion in the Special Court to disapprove the Plan. Rather, the Act directs that, once the Plan has been reviewed by Congress and has become effective, the Special Court is to implement it within 110 days, subject to subsequent review of the fairness of the consideration provided. Sections 209 (c), 303(a), (b).[37] In contrast, as noted above, Section 77(e) requires as a general matter that a reorganization plan be approved by two-thirds of each class of claimants; and it permits a reorganization court to decline to confirm a plan if it finds that the plan is not "fair and equitable." The New Haven Trustee appears to contend that any exercise of the bankruptcy power must retain similar features and that the lack of such features in the Rail Act makes it a condemnation of all properties included in the Final System Plan. In other words, he contends that the claimants against a bankrupt railroad have a Fifth Amendment right to approve a reorganization plan and to invoke the discretion of a court not to implement the Plan.[38]

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[37] Although these sections do not appear on their face to give the Special Court discretion to decline to implement the Plan, we believe they can fairly be read to allow such discretion if such a reading is necessary to preserve the constitutionality of the transfer provisions. See pp. 31-32 & n. 29 *supra*.

[38] Brief of Cross-Appellant at 55-60, 69 n. 59, 74-76. The New Haven Trustee also argues that the Rail Act's departures from usual practices under Section 77 in these respects deny claimants procedural due process. We respond to that argument at pp. 72-79 *infra*.

In the first place, it should be noted that the Rail Act does not take away any of the voting rights provided by Section 77. The Rail Act is not a substitute for Section 77 but an addition to it. The Rail Act provides for a transfer of some properties of the Penn Central estate in exchange for consideration. In this respect, the whole of the Rail Act is very roughly analogous to Section 77(o), which authorizes a reorganization court to order sales of the debtor's property, *without a vote and "free from liens,"* during the reorganization process. The Rail Act, like Section 77(o), changes the character of the assets of the estate but does not determine the new securities to be distributed by the estate or affect the rights of the creditors and shareholders *inter se.*[39] The plan for satisfying claims against the Penn Central estate will remain to be determined, under normal Section 77 procedures including a vote, after the Rail Act's process has run its course. What the New Haven Trustee is asking for here is not a vote on a plan of reorganization of the Penn Central estate, which is what Section 77 provides for and what he will still get in the Penn Central reorganization, but a vote on the transfer of assets of the estate, which Section 77(o) would not have given him.

An understanding of the New Haven Trustee's demand for a vote nevertheless calls for some analysis of the role of voting in Section 77. A Section 77 reorganization plan generally creates a new capital structure based on the estate's projected future earnings. See Section 77(e); 5 Collier on Bankruptcy ¶ 77.18, at 550 (14th ed. rev. J. Moore 1974). The new securities are distributed to creditors and stockholders according to seniority. If the projected future earnings of the estate are not sufficient

[39] In particular, the Rail Act does not affect the rights of creditors to absolute priority over stockholders and does not purport to change either the principles or the procedures (both described in the Brief of Cross-Appellants at 37-39) for determining the rights of different classes of claimants.

to support a capitalization that will permit all claimants to receive new securities, the stockholders and, if necessary, junior creditors are not permitted to participate in the reorganization. This exclusion of junior claimants is justified by the fact that, assuming the correctness of the ICC's valuation of the estate, their claims against the debtor have no value. See *Ecker* v. *Western P.R.R.*, 318 U.S. 448 (1943).

Section 77(e) requires a reorganization court, before confirming a reorganization plan, to submit the plan to each class of security-holders for approval. If approved by two-thirds of each class, the plan may be imposed on the dissenting members of each class. Submission to any class of stockholders or creditors may be omitted if the ICC finds and the court affirms that the interests of such class "will not be adversely and materially affected by the plan," or that the interests or equities of such class are of "no value." *Id.* Moreover, under the "cramdown" provision, the court may confirm the plan despite the disapproval of any class of claimants if the court determines that the plan is fair and equitable to the rejecting classes and that the rejection "is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts . . . ." *Id.*

The argument that this limited opportunity to vote is constitutionally required even in a Section 77 reorganization runs counter to authorities both in the field of railroad reorganization and under other bankruptcy laws. The long-standing provisions that permit a reorganization plan to be imposed on the dissenting minority of any class of claimants and, under the "cramdown" authority, on dissenting classes of claimants are, as already pointed out, clearly constitutional. *Reconstruction Finance Corp.* v. *Denver & Rio Grande W.R.R., supra.*

These provisions in Section 77(e) have a firm historical base. In equity receiverships it was an accepted

practice—even in the absence of an authorizing statute —for the court to impose a plan of reorganization upon objecting creditors. Section 77(e), by codifying that practice, "serves merely to confer upon the District Court in its bankruptcy part a power theretofore existing in its equity part." *In re New York, N.H. & H.R.R.*, 16 F. Supp. 504, 509-12 (D. Conn. 1936).

This Court in upholding the "cramdown" provision did not suggest that its constitutionality depends on the fact that the dissenting class had a prior opportunity to vote for or against its treatment. *Reconstruction Finance Corp.* v. *Denver & Rio Grande W.R.R., supra*, 328 U.S. at 533. And no reasonable argument can be made that Section 77 would be unconstitutional if, instead of authorizing a reorganization court to overrule a negative vote by claimants, it authorized the court to adopt a plan which it found to be fair and equitable to all parties without first submitting the plan to the claimants for a vote. The Fifth Amendment requirement of fairness does not slice that fine. The "cramdown" provision amply protects the creditors by requiring a judicial determination of the fairness and equity of the plan. Similarly, the Rail Act requires a judicial determination that the estates whose properties are transferred under the Final System Plan are receiving fair and equitable treatment. Therefore, there is no constitutionally significant distinction between the "cramdown" feature of the Rail Act and the "cramdown" provision of Section 77.[40]

This conclusion is reinforced by decisions outside the sphere of railroad reorganizations. The New Haven

[40] Insofar as the New Haven Trustee's objection rests on the fact that the Rail Act requires the rail properties to be transferred before the judicial determination of fairness and equity is made, this Court's decision in *New Haven Inclusion Cases* supports the constitutionality of prior transfer as long as fairness can thereafter be assured, as the availability of a Tucker Act remedy guarantees. See pp. 72-79 *infra*.

Trustee suggests that this Court's decisions invalidating the original Frazier-Lemke Act and upholding the amended Act establish that mandatory transfers such as those contemplated by the Rail Act are a deprivation of property without due process.[41] To the contrary, those very cases support the opposite conclusion.

In *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555 (1935), this Court struck down the first Frazier-Lemke Act, which authorized a farmer who defaulted on his mortgage to remain on his property for five years and then to buy the land, free of lien, for its appraised value at the later time. The Court held that the statute took the mortgagee's property without just compensation by depriving him of the right to obtain the market value of the property through a forced judicial sale. However, this aspect of *Radford* was effectively overruled five years later in *Wright* v. *Union Central Life Insurance Co.*, 311 U.S. 273 (1940), where the Court upheld an amended Frazier-Lemke Act which again authorized a farmer-debtor to buy mortgaged farm property at its appraised value at the end of a three-year, rather than a five-year moratorium.[42]

The statute upheld in *Wright* v. *Union Central* permitted neither the creditor to reject nor the court to disapprove the exchange of the creditor's lien for the appraised value of the property three years later—which might well be much lower than appraised value at the time of default. In that respect, it was more mandatory than the trans-

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[41] Brief of Cross-Appellant at 74-75.

[42] In an interim decision, the Court had construed the amended statute to entitle the mortgagee to insist on a public sale if he was not content to receive the appraised value of the property. *Wright* v. *Vinton Branch of Mountain Trust Bank*, 300 U.S. 440 (1937). The Court reconstrued the statute to deny the mortgagee that right in *Wright* v. *Union Central Life Ins. Co.*, *supra*, and upheld the statute as reconstrued.

fer provisions of the Rail Act.[43] Nonetheless, this Court held that, even though the creditor had a lien on the property, he could constitutionally be denied the right to enforce it by judicial sale and be compelled to suffer a three-year decline in appraised value, as long as he received the value of the property at the end of the three-year period. The Court said: "Safeguards were provided to protect the rights of secured creditors . . . to the extent of the value of the property . . . . There is no constitutional claim of the creditor to more than that." 311 U.S. at 278. *Wright* v. *Union Central* thus establishes that, notwithstanding *Radford*, Congress may impose the burden of declining values on creditors for a reasonable period, and may use methods other than foreclosure and

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[43] As noted in our Brief as Appellant Section 207(b) of the Rail Act permits each Reorganization Court to decline to order reorganization under the Act if it determines "that this Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization." Brief of Appellant USRA at 8-10. Thus, any interested parties who believed that the Act's reorganization process would be unfair to the railroad estates have been permitted at least one opportunity to secure a judicial exit from further proceedings under the Act. The orders of the Reorganization Courts under Section 207(b) are presently under review by the Special Court.

The New Haven Trustee states that a ruling by the Special Court that the Rail Act provides a fair and equitable process for Penn Central would be an "order compelling Penn Central to convey its property." Brief of Cross-Appellant at 55. To the contrary, even after a Section 207(b) ruling favorable to further proceedings under the Act, opportunities will exist to prevent any transfer of properties if it can be shown that transfer would violate constitutional rights. As noted earlier, the court below could entertain a request for an injunction after USRA has released a Final System Plan, if a sufficient showing of unconstitutionality could be made. In addition, if constitutionally necessary, Section 303 may be read to permit the Special Court to review the Final System Plan for irremediable constitutional defects before ordering the transfers of properties. See pp. 31-32 & n. 29 *supra*.

judicial sale to assure secured creditors the value of their claims.[44]

The Second Circuit in an intervening decision had anticipated this Court's recognition in *Wright* v. *Union Central* that secured creditors receive their constitutional due as long as they are assured the "equivalent" of their security:

> "Although the sale of property is often the best way to find its value—in a sense it is its value—we are not prepared to say it is the only permissible method. Any other reasonable method of ascertainment should serve as well; *the essential thing is to give the mortgagee the benefit of that value.* Reasonable methods of ascertaining it are obviously open to Congress without infringing the Fifth Amendment. An illustration may be found under sections 77 and 77B (as amended [11 U.S.C.A. § 205, 207]) in the provisions requiring a minority bondholder to accept securities under a plan which has been accepted by two-thirds of his class and approved by the court. *A dissenting secured creditor is thus deprived of his security without a public judicial sale at which he may bid, yet it can hardly be doubted that such a method of ascertaining the value of his security and giving him its equivalent is constitutional.*" [45]

These decisions show that Congress, without committing a "taking" of property for public use, may exercise its bankruptcy power to *require* a secured creditor to

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[44] "The result is that [the *Wright* v. *Union Central*] decision seems largely to negate any conclusions drawn from the *Radford* case . . . ." 5 Collier on Bankruptcy ¶ 77.17, at 545-46 (14th ed. rev. J. Moore 1974).

[45] *In re Witherbee Court Corp.*, 88 F.2d 251, 253 (2d Cir.), *cert. denied*, 301 U.S. 701 (1937) (emphasis added). In railroad reorganizations, where the public interest in continuing rail service comes into play, not even a favorable vote of a class is constitutionally necessary, since the "cramdown" power may constitutionally be employed.

surrender his lien and accept the judicially determined value of his security. Moreover, in railroad reorganizations, as the *Denver & Rio Grande* case makes clear, whole classes of claimants may be required against their will to accept payment in securities of a reorganized corporation. There is no basis for the New Haven Trustee's claim that the mandatory conveyance called for by the Rail Act takes it outside the constitutional ambit of reorganization legislation.

The New Haven Trustee argues that the *Rock Island* and *Wright* v. *Union Central* decisions, although upholding Section 77 and the Frazier-Lemke Act, "explored the outer limits of Congress' power to pass laws for the relief of debtors"; he asserts that they established "[b]y implication" that any bankruptcy law "which deprives a pledgee or mortgagee to a greater extent [than the statutes involved there] is a violation of the Due Process clause of the Fifth Amendment." [46] Those decisions contain no such implication. As the Court said in *Rock Island*, "these acts, far-reaching though they be, have not gone beyond the limit of congressional power; but rather have constituted extensions into a field whose boundaries may not yet be fully revealed." 294 U.S. at 671. One searches the cited decisions in vain for a suggestion that the congressional power to innovate in the bankruptcy field was exhausted by 1940. The decisions establish instead that secured creditors may be required to defer their claims for a reasonable period and that, as long as they are assured protection "to the extent of the value of the property" [47] at the end of the deferral period, Congress may devise new reorganization solutions for new economic problems as they arise.

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[46] Brief of Cross-Appellant at 74, 75.

[47] *Wright* v. *Union Central Life Ins. Co.*, *supra*, 311 U.S. at 278. See also *Consolidated Rock Products Co.* v. *DuBois*, *supra*, 312 U.S. 510, 529 (1941).

In sum, where Congress exercises its bankruptcy power to adjust claims in reorganization, no governmental taking of property for public use is involved unless the value of the interests received by claimants is less than the constitutional minimum value of their previous property rights. Should the value received by claimants fall short of the constitutional minimum, the result may be a governmental taking, but only to the extent of the shortfall; and only to that extent, if at all, need cash payment be made. No taking would ordinarily occur in a Section 77 reorganization, since that statute does not authorize a reorganization court to require continued rail operations beyond the constitutional limit of erosion or to require a transfer of interests if the consideration received by claimants is inadequate. Rather, before it permits either an "erosion taking" or a "permanent taking" to occur, a Section 77 reorganization court must dismiss the reorganization proceeding or disapprove the offending reorganization plan.

The situation may be different under the Rail Act in one respect. If the Rail Act is read to contain (1) a directive to USRA to require continued operations beyond the constitutional limit of erosion, or (2) a directive to the Special Court to order the transfers even if the total consideration available is constitutionally inadequate, or both, then Congress may be deemed to have taken property for public use to whatever extent the consideration under the Rail Act may ultimately be found to be insufficient. In that event, a Tucker Act remedy will be available in the amount of the taking—that is, in the amount by which the results of reorganization under the Rail Act have fallen short of constitutional requirements. As long as the Tucker Act remedy is available, the possibility of a shortfall in the value produced through the reorganization process does not render the Rail Act unconstitutional; nor, certainly, does

the possibility of a shortfall make the Act a condemnation of all rail properties included in the reorganized system.

The New Haven Trustee claims that the Penn Central Reorganization Court held one feature of the Rail Act to be an attempted exercise of eminent domain without provision for payment in money.[48] That feature is the Act's treatment of the "Northeast Corridor" between Boston and Washington. The Rail Act provides that some or all of the properties making up the Corridor, if transferred to Conrail under the Final System Plan, may be sold or leased to the National Railroad Passenger Corporation (Amtrak) for improvement to achieve the statutory goal of better high-speed passenger service. The Reorganization Court acknowledged the clear public purpose of these provisions,[49] but appears to have concluded that they amount to an indirect exercise of eminent domain for the benefit of Amtrak, which is impermissible unless any cash payment by Amtrak is passed on by Conrail to the present owners of the property. That conclusion is incorrect.

In the first place, the Rail Act contemplates that Amtrak may lease the Corridor rather than buy it from Conrail, in which case Conrail will receive only rental payments from Amtrak, which will inure to the benefit of Conrail securityholders. Moreover, should Conrail sell the Corridor to Amtrak, that sale would not harm any of the estates from which the properties were originally transferred. Since those estates will have received their full constitutional due in Conrail securities and other consideration, the sale of the Corridor by their new enterprise in exchange for cash that will be used for the benefit of the enterprise will not diminish the value of their interests any more than would Conrail's sales of

[48] Brief of Cross-Appellant at 59-60; see JA 153 at 155.

[49] JA 153 at 155.

any other rail properties—sales which it will be entitled to make subject to the legal limitations applicable to any carrier.

The possible acquisition and resale of Corridor properties by Conrail might stand in a different light if the properties were to be liquidated for nonrail use. However, the Act contemplates that Amtrak will continue to devote the properties to the public transportation purposes to which the debtors originally dedicated them.

Even if the Reorganization Court were correct that the debtors would be constitutionally entitled to receive the cash proceeds of a resale by Conrail of Corridor properties to Amtrak, that conclusion would not render unconstitutional the provisions of the Act relating to the Corridor. Those provisions are wholly permissive, and if the Special Court on review of the Final System Plan determines that a sale to Amtrak would be unfair to any estate, it may refuse to approve the transaction unless some or all of the proceeds are paid in cash to the rail estate. The Special Court could use the deficiency judgment against Conrail authorized by Section 303(2)(C) as a means to require such a cash payment to the appropriate estates.

C. Conrail Will Not Be an Instrumentality of the Federal Government

The New Haven Trustee argues that the Rail Act effects a condemnation, rather than a reorganization, of the debtors' properties because the enterprise that will emerge from the Final System Plan will not be a private corporation as in a Section 77 reorganization but a government instrumentality. He states that "[t]he common stock of Conrail has been stripped of all the normal attributes of ownership of stock in a private enterprise." [50] That is not so.

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[50] Brief of Cross-Appellant at 72.

The Act establishes Conrail as a for-profit corporation and declares that it "shall not be an agency or instrumentality of the Federal Government." Section 301(b). Conrail will not be federally chartered but will be established under the laws of "a state," with its principal office in Philadelphia. Although its incorporators are officials of USRA, their association with Conrail will cease when the securities of Conrail are distributed to the estates of the railroads in reorganization. The only unusual elements of federal control that will continue beyond the moment when the estates become the owners of Conrail are:

1. As long as 50 percent or more of Conrail's outstanding indebtedness consists of obligations of USRA or other debts guaranteed by the United States, a majority of the 15-member board of directors will be USRA officials or other presidential appointees, and Conrail will be subject to federal audit under the Government Corporation Control Act; and
2. Conrail will be required to submit an annual report to Congress and the President detailing its activities and accomplishments. Section 301(d), (f), (g).

The provision for temporary federal representation on the board of directors does not destroy the private character of the new corporation. Since Conrail will be a profit-making corporation established under the corporation statute of some state, all of its directors—including the federal appointees—will bear a fiduciary responsibility to Conrail's shareholders.[51] Moreover, the federal representation will exist only if Government obligations constitute more than one-half of Conrail's debt—an event which may not occur if Conrail issues debt securities to the rail estates as well as common stock. Even if it

[51] See 42 Op. Att'y Gen. No. 11, at 5-6 (1962) (Presidentially appointed directors of Communications Satellite Corporation have responsibilities of ordinary business directors).

should occur, the federal representation will cease as soon as the Government obligations are retired or their amount is exceeded by other debt issued by Conrail. Therefore, full control of Conrail's affairs will ultimately transfer to its shareholders through retirement or refinancing of the original debt or through additional borrowing.

Interim federal representation would be a reasonable measure to protect the interests of the United States, if, at the outset, it is a majority creditor of Conrail or guarantor of its debt. Should the provision for federal representation reduce the value of Conrail's securities in any way, the Special Court will be free to take that into account in assessing the fairness of the exchanges under the Final System Plan.

The New Haven Trustee likens Conrail to the Federal Deposit Insurance Corporation, Securities Investor Protection Corporation, and Amtrak, which he terms "nominally" private corporations engaged not in private enterprise but in "government enterprise."[52] In fact, a comparison of Conrail to those entities demonstrates how slight will be the federal presence in Conrail's management. The Federal Deposit Insurance Corporation and Securities Investor Protection Corporation are both federally chartered nonprofit organizations, whose boards of directors are permanently composed wholly of presidential appointees.[53] Amtrak is a federally subsidized entity created to relieve the private railroads of their chronically unprofitable passenger operations. Of the 17 members of its board of directors, ten must be presidential appointees, ensuring permanent federal control.[54]

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[52] Brief of Cross-Appellant at 70.

[53] See 12 U.S.C. §§ 1811, 1812 (Federal Deposit Insurance Corporation); 15 U.S.C. § 78ccc (Securities Investor Protection Corporation).

[54] See 45 U.S.C. § 543.

It can scarcely be argued that Conrail's obligations to submit to federal audit and to prepare an annual report compromise its status as a private corporation. Conrail would face many similar requirements under federal securities laws and state laws in any event.

D. Penn Central's Investors Have No Present Constitutional Right To Terminate Service and Liquidate Its Rail Properties

The New Haven Trustee argues that Penn Central has a constitutional right to cease operations and liquidate its properties now. He construes the Rail Act as preventing him from exercising that right, and contends that the Act therefore deprives him of property without due process of law.[55] This asserted constitutional right to liquidate is also the underpinning of the "erosion taking" arguments of the Plaintiffs in these cases and of the New Haven Trustee's contention, answered below, that the "constitutional minimum" to which the estates will be entitled under the Final System Plan is present net liquidation value or more.[56]

We have already shown that the claimed present right to liquidate is based on a misapplication of this Court's decision in *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396 (1920).[57] *Brooks-Scanlon* held only that railroad investors are entitled to liquidate when their rail operations are unprofitable and the railroad lacks any means, internal or external, of restoring them to a self-sustaining basis. The New Haven Trustee himself concedes that the *Brooks-Scanlon* rule applies only to a railroad which has "no reasonable present prospect" of

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[55] Brief of Cross-Appellant at 84-87.

[56] See pp. 56-70 *infra*.

[57] See Brief of Appellant USRA at 82-84, 94-97.

producing income in excess of operating expenses.[58] Although Penn Central is incapable of an ordinary Section 77 reorganization, the "heroic" [59] exertion of Congress in the Rail Act creates a very reasonable prospect that vital Northeastern rail operations can be made profitable again. This Court's decisions from *Rock Island* through *New Haven Inclusion Cases* establish that continued operations may constitutionally be required for the period reasonably necessary to achieve reorganization under the Act.

The New Haven Trustee and the Penn Central Trustees purport to find contrary authority in the Third Circuit's recent opinion in the *Columbus Option Appeals*.[60] However, that case did not involve an asserted constitutional right to liquidate. The issue there was whether specific Penn Central properties could be sold, where the sales would reduce the amount of property securing senior liens and marshaling was not available. The court held that the sales were permissible only under conditions protecting junior lienholders.

The New Haven Trustee quotes a passage from *Columbus Option* which he claims demonstrates that *Brooks-Scanlon* was not overruled by *New Haven Inclusion Cases*.[61] We agree. *Brooks-Scanlon* and *New Haven Inclusion Cases* were addressed to different problems. *Brooks-Scanlon* determined the rights of investors in a railroad with no hope of future profitability. It did not

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[58] Brief of Cross-Appellant at 84; Brief of Appellants Penn Central Trustees at 30, 36.

[59] *In re Litigation Under the Regional Rail Reorganization Act of 1973*, Docket No. 166, Opinion and Order dated March 1, 1974, at 3 (Judicial Panel on Multidistrict Litigation).

[60] *In re Penn Central Transp. Co.*, 494 F.2d 270 (3d Cir.), petition for cert. filed, 42 U.S.L.W. 3633 (U.S. May 8, 1974) (No. 73-1672).

[61] Brief of Cross-Appellant at 84-85.

consider whether a railroad with prospects of successful reorganization may be kept running while efforts are made to realize those prospects. That question has repeatedly been answered in the affirmative, first in *Rock Island* and most recently in *New Haven Inclusion Cases.*

The *Columbus Option* opinion contains dicta which suggest that railroad creditors cannot be made to suffer any economic burden as a consequence of the effort to preserve rail operations. In the course of those dicta, the Third Circuit read the *Rock Island* case as turning on an assumption or finding that creditors were fully protected against loss from interim operations. As we have shown, that reading of *Rock Island* is simply mistaken.[62] Any implication in *Columbus Option* that the public's right to make reasonable efforts to preserve important rail operations on a self-sustaining basis depends on full compensation of railroad investors for any interim losses plainly conflicts with this Court's holdings in *Rock Island, Denver & Rio Grande, Penn-Central Merger Cases,* and *New Haven Inclusion Cases* and should be disregarded.

Moreover, the New Haven Trustee is wrong in asserting that the Rail Act prevents his exercising a constitutional right to liquidate if and when such a right matures. As we stated in our Brief as Appellant, if this Court holds that the Rail Act repeals the Tucker Act *pro tanto* and thus destroys the availability of an adequate remedy at law for any erosion beyond constitutional limits, Section 304(f) of the Act should then be read to permit USRA to require continued operations only where such operations are constitutionally permissible without compensation.[63] Such a reading of Section 304(f) would not strain the statutory language and

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[62] See Brief of Appellant USRA at 85 n. 106.

[63] Brief of Appellant USRA at 64-66.

would enable this Court to hold that section constitutional even as applied to a hypothetical future situation in which the prospect of successful reorganization offered by the Rail Act does not materialize and Penn Central's plight becomes as hopeless as was the railroad's in *Brooks-Scanlon*.

E. The New Haven Trustee's Contentions About the "Constitutional Minimum" Are Premature and Erroneous

The New Haven Trustee seeks to have this Court, in deciding the facial validity of the Rail Act, determine the central issue which the Act assigns to the Special Court for decision on review of the Final System Plan: the measure of the "constitutional minimum" consideration to which the railroad estates are entitled in exchange for their rail properties. He further argues that the measure of that "constitutional minimum" is the "highest and best use value" of the properties, a value that he says is at least current net liquidation value and may be greater because Penn Central's properties are an "irreplacable national asset." [64] We submit that the New Haven Trustee is wrong in his assertion that this constitutional issue is ripe for decision and wrong in his suggested resolution of the issue.

As we have shown above, there is no reason why this Court need decide the fundamental valuation question before the Final System Plan is even prepared. The Rail Act does not in terms promise any particular measure of compensation, whether highest and best use value, net liquidation value, going-concern value, or any other. What it does promise, in Section 303(c), is that the

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[64] Brief of Cross-Appellant at 61-68. The Penn Central Trustees do not press this Court to define the "constitutional minimum" as the New Haven Trustee does; nevertheless, they support the "highest and best use value" concept. Brief of Appellants Penn Central Trustees at 54-55 & n. 22.

consideration will equal the "constitutional minimum," as that minimum is determined by the Special Court on review of the Final System Plan and ultimately by this Court on review of the Special Court's decision. Section 303(c) makes it clear that an important element of the fairness and equity of the Final System Plan—the "constitutional minimum"—should not be decided in a vacuum. It is to be decided by the Special Court in light of the specific factual record developed in Section 303 proceedings. The Special Court will have available to it a panoply of remedies to redress any unfairness in the exchanges, and, as we have demonstrated elsewhere,[65] the Tucker Act is available to remedy any shortfall if the total value available to the Special Court proves constitutionally inadequate. Therefore, there is no reason for this Court to adjudicate now the New Haven Trustee's theories about valuation. As the court below held, and as we have argued above, strong considerations of judicial administration argue against premature decision of such an important constitutional issue.

If this Court nevertheless concludes that it should define the "constitutional minimum," we submit that it should reject the definition proposed by the New Haven Trustee. In the context of this case, there are at least four ways of determining the value of any rail properties which Penn Central may transfer to Conrail under the Final System Plan. First, the properties might be assigned their net liquidation value. That value would represent the highest amount that could be received through open market sales of the properties for non-rail use. The value estimated on that basis would, of course, have to be reduced by the expenses of liquidation and discounted to present value. Second, the properties could be valued according to their earning potential in their present railroad use. In the case of Penn Central, this

[65] See Brief of Appellant USRA at 40-60.

present going-concern value cannot be determined. Penn Central as a whole is suffering continuing operating losses, and the Penn Central Reorganization Court has held that the railroad is not capable of separate reorganization on an income basis within a reasonable time; but the parts of the system that will eventually be transferred to Conrail may have significant present going-concern value in the sense that they contribute favorably to Penn Central's operating results. Third, assuming that USRA is successful in designing a viable Conrail, the properties transferred to Conrail could be valued according to their contributions to its going-concern value. In view of the substantial resources made available by the Rail Act and the emphasis placed by that Act on producing a profitable system, Conrail's going-concern value may be substantial and the contribution of the transferred rail properties to that going-concern value may exceed the net liquidation value of the properties. Fourth, as noted below, the New Haven Trustee argues that because Penn Central's rail properties are an "irreplaceable national asset," they should be assigned a value greater than net liquidation value—possibly as much as the cost of reproducing them new, less depreciation.

Contrary to the New Haven Trustee's assertions, this Court's prior decisions do not establish what valuation theory is appropriate for review of a hypothetical Final System Plan. No case has held that investors universally have a constitutional right to liquidation value (or any other measure of value) in a reorganization. The issue was certainly not decided in *New Haven Inclusion Cases*, *supra*. All parties in that litigation, as well as the reorganiaztion court, proceeded on the premise that the price for the New Haven properties should be net liquidation value, because the New Haven had "long been dry of earning power." 399 U.S. at 436. As this Court explained, a liquidation price "hypothesizes a shutdown

of [the railroad] followed by a sell-off of its assets at their highest and best value." *Id.* at 489. Since the New Haven properties concededly had no going-concern value, either separately or as part of Penn Central, this Court agreed with the lower court that liquidation value was the "fair and equitable" price called for by Section 77. Therefore, the Court did not find it "necessary to consider the bondholders' claim that anything less than full liquidation value would amount to an uncompensated taking in violation of the Fifth Amendment." *Id.* at 490.[66] Although the New Haven lines were clearly an important national asset in the sense that the public interest would be greatly harmed if they ceased operation, this Court rejected the bondholders' argument that that fact entitled them to something more than liquidation value. *Id.* at 482-83 n. 80.

New Haven Inclusion Cases thus does not provide a rule to govern valuation under the Rail Act. Far from it, this Court's opinion shows not only that the applicable constitutional principles remain largely undetermined but also that the dictates of the Fifth Amendment may depend heavily on the specific facts and circumstances of an individual case. Even if this Court had held—which it did not—that liquidation value was the constitutional minimum for a railroad, such as the New Haven, that had no present or potential going-concern value, that holding would not dispose of the issue here. This Court should follow the precedent of *New Haven Inclusion Cases* in refusing to adjudicate the Fifth Amendment valuation issue where decision of that issue is unnecessary and

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[66] However, as we have noted, the Court awarded a liquidation value not as of the date when the New Haven became "dry of earning power" but as of a date several years later; and it further required the claimants to suffer uncompensated erosion for two years after the valuation date. See Brief of Appellant USRA at 87-93.

where the factual predicate for such a decision does not exist.

The Penn Central Reorganization Court in its 180-Day Decision held that Penn Central's investors are constitutionally entitled to liquidation value if that value exceeds going-concern value.[67] That court based its holding on the *Brooks-Scanlon* rule that a carrier with no reasonable expectation of future profits has a constitutional right to cease operations. The court reasoned that, since such a carrier would realize the net liquidation value of its properties when it went out of business, that value places a minimum on the value that a carrier may receive even in an income-based reorganization. As the court correctly observed, its rationale implies that investors in *any* railroad—even one which is profitable and has never entered bankruptcy—are entitled to liquidate and reinvest their money elsewhere whenever they can show that a higher return can be realized from some other use of their capital. In other words, the court rejected "the premise that the government can properly require [even profitable] railroads to operate indefinitely." [68]

The Penn Central Reorganization Court's reliance on *Brooks-Scanlon* reflects its failure to distinguish between the rights and duties of investors in a "hopelessly unprofitable" railroad, as outlined in that case, and those of investors in a carrier that is profitable or can be made profitable by reorganization. *Brooks-Scanlon* held only that a railroad with no future as a railroad must be allowed to liquidate and its properties put to other uses. It did not hold that a profitable franchised common carrier, or a carrier which can be reorganized to be profitable, must be allowed to liquidate merely be-

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[67] *Penn Central* 180-Day Decision at 15-21, JA 124 at 140-46.

[68] *Penn Central* 180-Day Decision at 18, JA 124 at 143.

cause the net liquidation value of its rail properties—that is, their value based on their earning power in some other use—exceeds the railroad's going-concern value based on projected profits from rail operations. Nor has any other case ever so held. This Court has never held that, after investors dedicate their property to public use as a federally franchised carrier, they may rescind that dedication whenever liquidation and transfer of the funds to another enterprise look more profitable.

Both Section 77 and the Interstate Commerce Act embody the principle that a rail common carrier may be required, once it begins franchised service, to continue that service as long as the public convenience and necessity require, provided that the service can be furnished profitably. As noted above, the chief criterion of value in a successful Section 77 reorganization is future earning power. This Court's decisions upholding that method of valuation neither decided nor expressly assumed that going-concern value based on future earnings exceeded liquidation value.[69] Rather, stressing the public interest in continuation of rail service, they implicitly held that this public interest justifies requiring investors in a railroad to continue their investment as long as the rail operations are profitable.

The same principle is embodied in Section 1(18) of the Interstate Commerce Act, which forbids discontinuance or abandonment of rail operations "unless and until there shall first have been obtained from the [Interstate Commerce] Commission a certificate that the present or future public convenience and necessity permit of such

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[69] We have examined the briefs and records in the leading cases in this Court under Section 77—*Rock Island, Ecker*, and *Denver & Rio Grande, supra*, and *Group of Institutional Investors* v. *Chicago, M., St. P. & P.R.R.*, 318 U.S. 523 (1943). In none of those cases was it proved, argued, or expressly assumed by any party that going-concern value exceeded liquidation value.

abandonment." [70] The validity of that provision is unquestioned. Yet the holding of the Penn Central Reorganization Court would imply that the ICC is constitutionally compelled to authorize abandonment whenever liquidation value exceeds going-concern value. On that view, a new constitutional issue would be injected into every ICC abandonment proceeding—that is, the issue whether a higher return could be made by diverting the capital once dedicated to public use to some other investment. The holding of the Penn Central Reorganization Court, if endorsed by this Court, would abolish the concept of a common carrier's duty to serve the public.

The Penn Central, unlike the New Haven and the railroad in *Brooks-Scanlon*, is on the verge of having at least some of its operations made profitable again by reorganization along with the other railroads in the region under the Rail Act. A viable Conrail with a substantial going-concern value is the primary statutory goal of the Act, and there is no basis now for an assumption that the machinery of the Act will fail in achieving that goal. The New Haven Trustee suggests that, since his proposed reorganization of Penn Central was found not to be viable, USRA will be unsuccessful in planning a profitable combined system.[71] However, a much firmer basis would be necessary to support a conclusion that the Rail Act will be unsuccessful. As a plaintiff seeking an injunction against implementation of a federal statute, the New Haven Trustee bore the burden of proving that the statute would violate his constitutional rights. The courts have held that the burden of proving that the continuation of a railroad reorganization would result in an unconstitutional taking of property rests on

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[70] 49 U.S.C. § 1 (18).

[71] Brief of Cross-Appellant at 44.

the opponents of reorganization.[72] Since the New Haven Trustee's contention amounts to an assertion that Congress was wrong in determining that the Rail Act provides at least a reasonable prospect of accomplishing its major goal, the burden he bore was a heavy one. He has utterly failed to sustain that burden.[73]

The Penn Central Reorganization Court declined the New Haven Trustee's invitation to second-guess Congress' judgment that the resources of the Rail Act would be adequate to produce a viable Conrail. That court held:

> "I agree with the contention of the government that it would be both premature and inappropriate for this Court to express a judgment as to Conrail's prospects for viability.
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> ". . . [I]t is obviously beyond the power of a district judge to substitute his own assessment of the feasi-

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[72] *New Haven Inclusion Cases*, 399 U.S. 392, 492-93 (1970); *In re Boston and Maine Corp.*, 484 F.2d 369, 372-75 (1st Cir. 1973). There is nothing unconstitutional or even unusual in placing the burden of proof on those opposing the operation of a remedial statute, or in defining issues under the statute in a way that has the same practical result. See *United States* v. *First City National Bank*, 386 U.S. 361 369-70 (1967); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 330 (1966); *Lauf* v. *E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938).

[73] The New Haven Trustee asserts that "the responsibility for an inadequate record does not belong to the Penn Central claimants since Congress has ordered that an irrevocable decision to convey or not to convey Penn Central's rail assets to Conrail be made in advance of any valuation hearings." Brief of Cross-Appellant at 80 n. 75. The "irrevocable decision" to which he refers appears to be the 180-day decision under Section 207(b) whether Penn Central should continue in reorganization pursuant to the Rail Act. As we have demonstrated, an affirmative decision at that point is not "an irrevocable decision to convey . . . Penn Central's rail assets to Conrail." See p. 45 n. 43 *supra*. Since the New Haven Trustee was not required to bring an injunctive suit challenging the facial validity of the Act before the implementation of the Act had scarcely begun, he cannot escape responsibility for failing to produce a record that sustains his claims.

bility of a legislative program for that of Congress. Any such attempt would be squarely contrary to the concept of a tripartite form of government.

> "The task of designing a financially viable rail system, and therefore of making at least the initial assessment of its viability, has been committed to USRA, and not to this Court. . . . The task of evaluating Conrail's stock and other securities has been committed to the Special Court, and is to be performed at a time when all concerned will have more of the necessary information than is now available. It is proper to assume that, if USRA finds it impossible to design a profitable system, it will say so. In any event, the validity of its viability assessment can be tested before the Special Court at the appropriate time." [74]

Thus, the Rail Act must be regarded as creating a reasonable prospect that Penn Central and the other railroads in reorganization will be successfully reorganized. It rescues them from the hopeless condition which is the premise of the *Brooks-Scanlon* rule. The Penn Central Reorganization Court was wrong in relying on *Brooks-Scanlon* to support a rule that transferring railroads must receive liquidation value for properties transferred under the Final System Plan even if those properties have substantial going-concern value as part of Conrail.

The New Haven Trustee suggests that the Penn Central estate may be entitled to an amount even greater than the net liquidation value of transferred properties, because Penn Central's properties are an "irreplaceable national asset." [75] That contention is difficult to take seriously. All parties concede that, apart from the resources made available by the Rail Act, Penn Central as a whole is unprofitable and cannot be made profit-

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[74] *Penn Central* 180-Day Decision at 9-10, JA 124 at 133-34.

[75] Brief of Cross-Appellant at 63-65, 80, 82, 91.

able.[76] If Conrail achieves a going-concern value greater than the liquidation value of the properties included, the estates that contributed the properties are entitled to their proportionate share of that value. However, the New Haven Trustee would have the Court hold that, regardless of whether the properties are more valuable for rail or non-rail use, Conrail should be required to pay a price which exceeds the economic value of the properties for *any* use. The New Haven Trustee's reference to Penn Central as an "irreplaceable national asset" reveals his rationale for this contention: Because the public interest requires that vital rail operations be continued by one means or another, Penn Central's owners have an opportunity to exploit this public need by "holding up" Conrail or the Government for any amount up to what it would cost to build a complete substitute system.

The Penn Central Trustees support this approach to valuation, and they are more explicit about the rationale for it. They argue that the "constitutional minimum" must include value created "by a demand for reasons other than profitability, such as a public-interest need determining offers by public bodies." Brief of Appellants Penn Central Trustees at 54-55 n. 22.

The New Haven Trustee is reticent about what he believes is the general magnitude of Penn Central's "highest and best use value." However, he strongly implies that the approach used to develop the $13.5 billion figure stated in the Day & Zimmerman Report (J. Doc. 40) is the constitutionally required approach to valuation of Penn Central. Brief of Cross-Appellant at 63-67, 79-80. That figure is the result of a process aimed at determining the value of the Penn Central system if devoted to continued rail operations. The report valued physical assets (other than real estate and

[76] See *id.* at 67.

materials and supplies) on the basis of reproduction cost new as of December 31, 1970, less depreciation. Real estate, including parcels which may have been acquired a century or more ago, was valued at the estimated cost of acquiring it at fair market value as of December 31, 1970. J. Doc. 40 at 5-8.

Startling anomalies would result from adoption of the New Haven Trustee's "highest and best use value" approach, as can be seen from the Day & Zimmerman figures. Properties which together have no value as an operating system under private ownership would suddenly increase in value to $13.5 billion as an operating system if they were to be nationalized and operated publicly. Properties which may have a net liquidation value of not more than $1.9 billion would have the potential to increase in value overnight by more than 650% even though their physical condition did not change a bit. And Penn Central's shareholders, whose claims may actually have been wiped out long before the passage of the Rail Act, would suddenly find themselves holding a rich $13.5 billion bonanza against which valid pre-bankruptcy claims may total no more than $2.7 billion. *See* Brief of the United States of America, Appellant, in No. 74-168, at 71-72.

The New Haven Trustee turns to condemnation decisions to support his theory. However, federal condemnation decisions expressly reject the tactic that he is employing. In many condemnation contexts, the public need for the condemned property is so great that the taking authority would be willing, if necessary, to pay a greater price than any private purchaser would pay on the open market. In order to prevent owners from exploiting this public need, this Court has firmly established that the measure of compensation under the Fifth Amendment for property taken is the owner's loss —measured at private market values—and not the taker's

gain.[77] "It is not fair that the government be required to pay [an] enhanced price which its demand alone has created."[78] Where the highest commercial value of a property is as scrap, the public cannot justly be required to pay a greater amount to retain the property in a less lucrative public use. "Substantial prices are not paid for the privilege of conducting a business at a loss."[79]

The New Haven Trustee asks this Court to overturn this established axiom on the basis of two state court decisions. *In re New York (Fifth Avenue Coach Lines)*, 18 N.Y. 2d 212, 219 N.E.2d 410, appeal dismissed sub. nom. *Fifth Avenue Coach Lines* v. *New York*, 386 U.S. 778 (1967); *In re Port Authority Trans-Hudson Corp.*, 20 N.Y. 2d 457, 231 N.E. 2d 734, cert. denied sub. nom. *Port Authority Trans-Hudson Corp.* v. *Hudson Rapid Transit Tubes Corp.*, 390 U.S. 1002 (1968). Those decisions provide no basis for such a legal upheaval.

In the first place, although the opinions of the New York Court of Appeals in both cases mention the Federal Constitution and discuss some federal authorities, both decisions were based on the just compensation clause of the New York State Constitution and state decisions construing it.[80] Therefore, both decisions rested on an independent and adequate state ground which insulated them from review by this Court,[81] and they lack pre-

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[77] *E.g. Boston Chamber of Commerce* v. *Boston*, 217 U.S. 189, 195 (1910); *McGovern* v. *New York*, 229 U.S. 363, 371-72 (1913); *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 5 (1949); see 1 L. Orgel, Valuation Under the Law of Eminent Domain § 81, at 353 (2d ed. 1953).

[78] *United States* v. *Cors*, 337 U.S. 325, 333 (1949).

[79] *Roberts* v. *New York*, 295 U.S. 264, 282 (1935).

[80] See 219 N.E. 2d at 414-15; 231 N.E. 2d at 739-41; *Id.* at 742, 746-47 (Burke, J., dissenting).

[81] *See, e.g., Fox Film Corp.* v. *Muller*, 296 U.S. 207 (1935).

cedential value as interpretations of the Fifth Amendment.

Moreover, the *New York* decisions do not support the proposition for which the New Haven Trustee contends. In the *Fifth Avenue* case, New York City had condemned two private bus companies operating in the city which, though unprofitable under the rates prescribed by city authorities, would have been profitable if allowed to charge the reasonable rates to which they were entitled under state law. The New York court was required to decide whether the owners should receive only liquidation value, on the ground that their operations were presently unprofitable, or going-concern value based on the profits they would have been making under the rates to which they were legally entitled. The court held that they were entitled to going-concern value, reasoning that the city should not be permitted to take advantage of the diminishment in the companies' value which resulted from the city's *illegal* suppression of their rates. The decision did not depart from the principle that the owners' loss determines the measure of compensation, but merely included as part of the owners' loss the diminishment in value caused by the taker's previous illegal conduct.

In the *Hudson Rapid Tubes* case, the New York courts relied on *Fifth Avenue* to reach a result supported by neither the prior case nor any other authority. The case involved the condemnation by the New York Port Authority of a private transit company whose properties included four railway tunnels under the Hudson River between New York and New Jersey. The liquidation value of the tunnels was concededly negative, since they had no market value and it would cost money to plug them up. The tunnels had cost $32,000,000 to build and would have cost $400,000,000 to replace. The state court recognized that the owners would be entitled to no compensation for the tunnels under the established rule, because

they had no market value either for their present use or any other use. However, because the commuter line of which the tunnels were a part was "an essential public facility," which the Port Authority planned to operate at a loss in the public interest, the court concluded without explanation that the owners should receive the tunnels' depreciated original cost, or $30,000,000. In a forceful dissent, the author of the *Fifth Avenue* opinion noted the illogic of basing an award on original cost when the current market value did not reflect that cost.[82] As the dissenter observed, this Court had previously rejected the approach of the majority as a proper standard under the federal Constitution.[83] This Court has subseqeuntly refused to follow the *Hudson Rapid Tubes* decision in *New Haven Inclusion Cases*, where it rejected the argument that the New Haven estate should receive more than liquidation value because New Haven's rail properties would continue to be operated in the public interest rather than being scrapped.[84]

In short, this Court's prior decisions indicate that the "constitutional minimum" to which the transferring estates will be entitled under the Final System Plan may be their share of the going-concern value of Conrail, assuming that that value is substantial, or at most liquidation value, if greater. However, that question should not be answered in the abstract now but when the specific facts of the Final System Plan have been determined and the complexities of valuation under that Plan are before the Special Court. The New Haven Trustee has not shown that the facial constitutionality

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[82] 231 N.E. 2d at 742-43, 745 (Burke, J., dissenting).

[83] "Original cost is well termed the 'false standard of the past' where, as here, present market value in no way reflects that cost." *United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 403 (1949); *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 5 (1949).

[84] 399 U.S. at 481-83 & n. 80.

of the Rail Act depends on a choice of one or another valuation theory. Since only the Act's constitutionality is before this Court, it should not decide the valuation question at this time.

F. This Court's Function Is To Adjudicate the Constitutionality of the Rail Act, Not To Consider Whether Congress Might Improve It by Amendment

The New Haven Trustee has given the Court a detailed outline of the statute he wishes Congress had enacted instead of the existing Rail Act.[85] He invites this Court to rule that the statute Congress enacted is constitutionally defective and then to advise Congress on how to amend or replace it. However, that is not this Court's role.

Congress last year finally took a decisive step to resolve the Eastern rail crisis, after decades of public and private mismanagement. In the imaginative statute under review, it exercised its bankruptcy and commerce powers to devise a novel procedure, both administrative and judicial, for structuring a new private entity out of the several bankrupt North-Eastern railroads. To assist that process, it authorized over $2,000,000,000 of federal assistance, with an indication in the legislation that more may be authorized if it proves to be necessary.

Perhaps the most creative aspect of the Rail Act is its planning process, which breaks the interminable procedural log jam for devising and approving railroad reorganization plans that has plagued the ICC and the judiciary for decades under Section 77. The new planning process permits a rational and coordinated decision of which rail lines should continue in operation and permits prompt abandonment of lines not chosen for inclusion.

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[85] See Brief of Cross-Appellant at 88-92.

The central argument that is advanced against the process of the Act appears to be that the situations of the Northeast railroads have become so desperate that their rail operations can no longer be constitutionally saved by use of the commerce and bankruptcy powers. The only solution, the New Haven Trustee asserts, is outright nationalization and public ownership with all the higher costs and inefficiencies that public ownership implies.

Congress has made a sincere and "heroic" [86] attempt to resolve the Northeast rail problem without resorting to nationalization. The Rail Act represents its attempt to minimize the expense to the public treasury by exercising the bankruptcy power to require the bankrupt rail estates to continue devoting their properties to public service in exchange for the minimum consideration required by the Constitution when the bankruptcy power is so employed and an amount payable at least in substantial part in the securities of the reorganized entity rather than in cash.

The New Haven Trustee appears to recognize that the public interest requires continuation of vital rail services in the Northeast. However, he would prefer to have that accomplished by nationalization, a process he believes will constitutionally entitle him to compensation wholly in cash, and possibly in a much higher amount than obtainable in reorganization. If he can stymie Congress' effort to resolve the rail crisis now by providing the constitutional minimum in a bankruptcy context, he may be able to force Congress to take the course he prefers. However, he has no legal right to have this Court assist him in that endeavor.

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[86] *In re Litigation Under the Regional Rail Reorganization Act of 1973*, Docket No. 166, Opinion and Order dated March 1, 1974, at 3 (Judicial Panel on Multidistrict Litigation).

The Rail Act resulted from an intensive period of congressional study and compromise. In its necessary complexity, it may not be a perfect statute or one that could not be improved by amendment. But it is the statute that Congress has enacted and the one that this Court must construe. It should be construed in a way that renders it constitutional if that is possible.

The transfer provisions of the Rail Act are an innovative response to a modern problem. Although novel, they involve no radical departure from previous bankruptcy legislation, and they comport with established Fifth Amendment principles applicable to such legislation. This Court should decline the New Haven Trustee's invitation to construe the transfer provisions in a way that creates, rather than avoids, constitutional problems, and to decide hypothetical constitutional issues before they arise. The New Haven Trustee has not shown that he is entitled to an injunction preventing the implementation of the Act.

III. THE RAIL ACT DOES NOT DEPRIVE THE NEW HAVEN TRUSTEE OF PROCEDURAL DUE PROCESS

Eight major railroads are now in reorganization. To solve this problem, Congress created machinery to devise and carry out a comprehensive program for restructuring rail operations to meet modern economic and competitive conditions. To permit timely implementation of the Final System Plan, Congress adopted a "two-step" approach similar to that used (and upheld by this Court[87]) in the inclusion of the New Haven's rail assets into the merged Penn Central: restructure the rail operations first, and conduct the inevitably protracted valua-

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[87] *Penn-Central Merger Cases*, 389 U.S. 486 (1968).

tion proceedings afterwards. The New Haven Trustee's procedural-due-process objections to this approach amount to a contention that the present rail crisis simply cannot be resolved, at least without nationalizing Penn Central.

A. Providing for a Vote and Judicial Review of Valuation Before Transfer Would Have Frustrated the Rail Act's Goals of a Prompt Restructuring of Multi-Corporate Operations

The New Haven Trustee asserts that two features of the Rail Act deprive him of procedural due process. First, the Rail Act does not give creditors of individual railroads a vote on whether to accept the Final System Plan. Second, the Rail Act does not provide for judicial review of the consideration received for transferred properties until after the transfers have occurred. These features of the Rail Act are, as the New Haven Trustee alleges, departures from the normal procedure under Section 77(e), where a plan of reorganization may be "crammed down" over objection but only after a vote and only after a judicial determination that the plan is fair and equitable and that its rejection by the creditors is not reasonably justified in the light of their rights and interests.

These departures from Section 77 procedures, however, are part of the very essence of the new congressional approach to a problem that Section 77 was inadequate to solve. Section 77 was designed to facilitate recapitalization of individual railroads whose operations were basically healthy. It does not provide any means of restructuring rail operations, much less of coordinating the restructure of the operations of several railroads. The long period of time involved in formulating, evaluating, voting upon, and adopting a Section 77 plan of reorganization is, if not desirable, at least inevitable and tolerable when what is needed is not a fundamental

change in rail services but the valuation of properties and the restructuring of capital. By contrast, the basic objective of the Rail Act in the interests of both the public and the estates and creditors of the individual railroads, is to redesign rail operations to make them self-sustaining. Congress determined, with good reason, that this simply cannot be done if each class of creditors of each rail estate must vote on the Final System Plan: the essence of the planning process is the ability to consider the available rail properties comprehensively, and the designation of the rail properties of a particular estate to be included in the Final System Plan depends upon the future use of rail properties of other railroads. Nor, for obvious reasons, should the implementation of the Plan await the outcome of the valuation process: the restructuring of rail operations that will make the system viable if implemented in 1975 may become inadequate if implementation is delayed to permit a valuation process after the Plan has been formulated.

The New Haven Trustee's "you-can't-get-there-from-here" approach to the rail crisis is not only unhelpful but unwarranted. The Penn Central estate and its creditors have an undoubted constitutional right (recognized explicitly in Section 303 of the Rail Act) to receive for rail properties the "constitutional minimum" consideration as determined by a federal court. The creditors do not, however, have a constitutional right to vote on the kind of rail service system the region needs or can support, or on the need to include Penn Central properties in the system. The decision not to include provision for such a vote does not, as already pointed out,[88] make the Rail Act a condemnation statute. For essentially the same reasons, transfer of rail properties without such a vote would not deny Plaintiff procedural due process.

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[88] See pp. 40-50 *supra*.

Equally without merit is Plaintiff's principal procedural due process argument, namely that the estate or the creditors have a constitutional right to have rail properties valued in advance of transfer pursuant to the Final System Plan.

B. It Is Constitutionally Insignificant Whether the Determination of the Fairness and Equity of the Transfers Precedes or Follows Conveyance of the Properties

The Act provides that after the Final System Plan has been delivered to the Special Court, that Court shall promptly require the transfer of the properties designated for conveyance under the Plan. Section 303 (b). The Special Court is then required to determine whether the terms of the conveyances are fair and equitable to the estate of each railroad in reorganization. That determination is to be made "in accordance with the standard of fairness and equity applicable to the approval of a plan of reorganization or a step in such a plan under section 77 of the Bankruptcy Act." Section 303(c)(1)(A). If the Special Court finds that the terms of one or more exchanges are not fair and equitable, it is authorized to reallocate the Conrail securities, order the provision by Conrail of other Conrail securities or USRA obligations, or enter a judgment against Conrail as necessary to cure the lack of fairness and equity. Section 303(c)(2).

The Special Court's review of fairness and equity will follow, rather than precede, the transfer of properties under the Plan.[89] This distinction has no constitutional

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[89] Section 303(c) of the Act differs from Section 77 also in that the Special Court is to determine only whether the exchanges are fair and equitable "to the estate of each railroad in reorganization"; to ensure fairness to each class of claimants against each estate is not one of the Special Court's functions. See Section 77(e). However, the Conrail securities and other consideration received by

significance. Deferral of the determination of fairness and equity until after the conveyance of the properties does not prejudice the estates or claimants against those estates, since at the time of the conveyance there will be full assurance that adequate judicial remedies will be available to redress any lack of fairness or equity in the exchanges.

There is no constitutional rule that the terms of treatment of all creditors must be determined with finality before any portion of a reorganization plan is implemented. The reorganization of the New Haven estate by inclusion in the Penn Central system provides a close precedent for the multi-step reorganization process established by the Rail Act. After deciding that the New Haven railroad should be included in the Penn Central system, the ICC developed a two-step reorganization plan under which it would first determine the total compensation to be paid to the New Haven estate and, after certifying that aspect of the plan to the reorganization court, would proceed to determine how the compensation should be distributed among the claimants against the estate. The Commission certified the first step of the plan to the reorganization court, and its terms were ultimately approved, with modifications, by this Court on review of decisions of the reorganization court and a three-judge district court which reviewed the merger under Section 5 of the Interstate Commerce Act. See *New Haven Inclusion Cases*, *supra*. Meanwhile, *before* the total compensation due to the New Haven estate had been finally determined, the reorganization court ruled that the New Haven should transfer all of

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each estate under the Act will be subject to distribution among the claimants against that estate as determined by the several Reorganization Courts. Fair and equitable treatment of each class of claimants will therefore be assured in the individual reorganization proceedings just as it would be in a traditional Section 77 reorganization.

its assets to Penn Central by January 1, 1969, *"leaving the price and the other terms of the inclusion to be determined later."* [90] In accordance with the court's ruling, the ICC ordered Penn Central to take over the New Haven's operations on the date specified.

When this Court upheld step I of the New Haven reorganization plan, with modifications, it did not suggest that the transfer of the properties before the final determination of the total price and before the determination of the distributive aspects of the plan was a departure from proper procedure in a Section 77 reorganization. It approved the features of the plan which provided for payment primarily in Penn Central securities and for evaluation of those securities on the basis of projected future earnings.[91] The Court observed that the early transfer of the New Haven's properties actually benefited the estate by ending the period in which the estate was required to bear the operating losses—a benefit which will also accrue to the estates of railroads such as the Penn Central from the provisions of the Rail Act requiring an early conveyance of properties to Conrail. 399 U.S. 415-16, 490-91. See also *In re New York, N.H. & H.R.R.*, 378 F.2d 635, 637 (2d Cir. 1967).

Key to the approval of the two-step approach of the ICC in the *New Haven* case was the existence of grounds for assurance that the New Haven estate would ultimately

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[90] *In re New York, N.H. & H.R.R.*, 289 F. Supp. 451, 458-59 (D. Conn. 1968) (emphasis added).

[91] This Court further approved an underwriting plan devised by the reorganization court, which called for additional compensation if the Penn Central stock failed to reach the value assigned to it under the plan within ten years. However, in view of the filing of a Section 77 reorganization petition by the Penn Central one week before the Supreme Court's decision was announced, the Court remanded the case for additional proceedings before the ICC and the reorganization court to devise modified payment arrangements. 399 U.S. at 488-89.

receive fair and equitable treatment as determined by the courts. Those grounds for assurance were thought to be provided by the Penn Central's commitment to pay the amount ultimately determined by the Commission and the courts to be fair and equitable. See 399 U.S. at 409-10, 412-13. Here, the fairness and equity of the transfers is to be reviewed by the Special Court and on appeal by this Court. Congress' waiver of sovereign immunity in the Tucker Act provides a forum for the debtor railroads to assert any claim they may have, after the Special Court proceedings are completed, that their property has been transferred for less than the "constitutional minimum" to which they are expressly entitled. They have no constitutional claim to more than that.

There is no question that the procedural due process requirements of the Fifth Amendment apply to the Rail Act. But due process depends on the particular circumstances presented. Whether a hearing is required and, if so, what kind of hearing and when it must be afforded are questions whose answers depend on the particular case. See *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961). If a hearing is required, the "formality and procedural requisites . . . can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Boddie* v. *Connecticut*, 401 U.S. 371, 378 (1971) (footnote omitted). As expressed in a recent due process decision by this Court

> "The requirements of due process of law 'are not technical, nor is any particular form of procedure necessary.' *Inland Empire Council* v. *Millis*, 325 U.S. 697, 710 (1945). Due Process of law guarantees 'no particular form of procedure; it protects

substantial rights.' *Labor Board* v. *Mackay Co.*, 304 U.S. 333, 351 (1938)." *Mitchell* v. *W. T. Grant Co.*, 42 U.S.L.W. 4671, 4674 (May 13, 1974) (White, J.).

See also *Arnett* v. *Kennedy*, 42 U.S.L.W. 4513, 4519 (April 16, 1974) (Rehnquist, J.).

Due process requires that a hearing be held "at a meaningful time and in a meaningful manner," but content must be given to that general principle in a particular case by balancing the Government's interests against those of the person or persons affected. *Arnett* v. *Kennedy*, *supra*, 42 U.S.L.W. at 4524 (Marshall, J., dissenting); see *Mitchell* v. *W.T. Grant Co.*, *supra*, 42 U.S.L.W. at 4679 (Powell, J., concurring). In this case, the hearings on valuation questions that will be provided in the Special Court and, if necessary, the Court of Claims, will fully protect the estates and claimants while permitting the vital task of restructuring rail operations to proceed without lengthy delay.

In short, neither a vote nor pre-transfer judicial review is necessary to assure the New Haven Trustee all that he may constitutionally claim. A vote and pre-transfer judicial review would, however, make it impossible to solve the rail crisis on any basis other than nationalization, the result which the New Haven Trustee is clearly seeking.[92]

IV. THE RAIL ACT IS NOT VOID FOR WANT OF UNIFORMITY

The New Haven Trustee has renewed here his contention, essentially rejected by the Court below,[93] that the

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[92] Brief of Cross Appellant at 88-92.

[93] USRA has not appealed from the decision below holding the dismissal requirement in the third sentence of Section 207(b) void for want of uniformity. That limited holding has no material effect on the implementation of the Rail Act.

Rail Act is unconstitutional on its face because it exceeds Congress' power to enact "uniform Laws on the subject of Bankruptcies." The most striking thing about this contention is that it is wholly academic. The Rail Act in fact operates uniformly with respect to bankrupt railroads and their creditors throughout the United States, and the New Haven Trustee's objection—if it had any merit at all—could be met by deleting the word "regional" from the title of the legislation and a few places in the text without changing the operation of the statute in any material way.

The Rail Act applies, uniformly, to every operating railroad in reorganization in the United States. Congress was aware and this Court can take judicial notice of the fact that every operating railroad in reorganization on the date of enactment and today is in fact located in the region defined by the Rail Act.[94] The Rail Act also applies uniformly to every creditor of any particular railroad, wherever that creditor may be situated. Thus, the words "regional" and "region" could be stricken every place they appear in the Rail Act without changing the rights of any debtor or creditor. The only effects of these words are to give statutory focus to the needs of the region in USRA's rail planning process, and to prohibit profitable railroads outside the region from acquiring rail properties pursuant to the Final System Plan. Neither of these effects has anything to do with the rights of any debtor or creditor.

The New Haven Trustee's response to this point is, in essence, that Congress was just lucky this time and

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[94] Section 77(a) requires any railroad filing a Section 77 petition to file a copy of the petition with the ICC, where it is reflected on that agency's Finance Docket. The Finance Dockets show that every operating railroad in reorganization in 1974 in the United States (including both Class I and Class II railroads) is located in the region. The only railroad in reorganization outside the region is a Class II railroad which ceased all operations in 1968 and sold substantially all of its lines in 1969.

should not be permitted to get away with a statute whose uniform operation is only an accident. If there *were* one small operating railroad in reorganization outside the region, then (according to his argument) Congress would be powerless to conclude that eight major interconnecting and competing railroads in reorganization in a single region present a special regional problem calling for comprehensive solution based on the needs and resources of the region. The words "uniform laws," which have never been successfully invoked to strike down a public law,[95] suddenly present an awesome (though purposeless) roadblock to the efforts of Congress to provide for the needs of the nation's commerce.

Even on a technical level, however, the contention of the New Haven Trustee is without merit. It is clear that even when it is acting under the bankruptcy power Congress can take account of the real differences that exist between different parts of the country. National bankruptcy legislation may accommodate itself to diverse state laws relating to such matters as dower, exemptions, validity of mortgages, priorities, and foreclosure proceedings. *Stellwagen* v. *Clum*, 245 U.S. 605 (1918); *Hanover National Bank* v. *Moyses*, 186 U.S. 181, 189-90 (1902). More importantly, a bankruptcy statute may explicitly provide that the statute is not to be applied throughout its life in each locality of the country. It may constitutionally authorize the bankruptcy court to decide whether the statute should continue to be applied within the geographic area over which the bankruptcy court exercises jurisdiction. Such a provision in the amended Frazier-Lemke Act was held to meet the uni-

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[95] What appears to have been the only holding adverse to constitutionality, that of the Court of Appeals for the Eighth Circuit in *United States National Bank* v. *Pamp*, 83 F.2d 493 (1936), striking down the Frazier-Lemke Act on uniformity grounds, was explicitly rejected by this Court in the *Vinton Branch* case discussed below in the text.

formity requirement in *Wright* v. *Vinton Branch of Mountain Trust Bank*, 300 U.S. 440, 463 n. 7 (1937), where this Court stated:

> "This provision [permitting bankruptcy courts to determine whether the Act should continue to apply in particular localities] is not inconsistent with the constitutional requirement that laws established by Congress on the subject of bankruptcies shall be uniform throughout the United States. The problem dealt with may present significant variations in different parts of the country. By paragraph 6 the Bankruptcy Act adjusts its operation to these variations, as under other provisions it has adjusted its operation to the differing laws of the several States affecting dower, exemptions, and other property rights. The authority granted by paragraph 6 does not exceed limits of authority familiarly exercised by courts." [Citations omitted.]

The reorganization provisions of the Rail Act are consistent with the principles of uniformity set forth above. In enacting this legislation Congress has not purposefully discriminated against particular States. It has instead applied the Act to every locality in the United States where the condition of multiple major railroad reorzanizations exists.

The Bankruptcy Clause, insofar as uniformity is concerned, is similar to the clause giving Congress the power to lay and collect taxes, duties, imports, and excises (Article I, Section 8, Clause 1), which requires that "all Duties, Imposts and Excises shall be uniform throughout the United States." The courts have repeatedly held that the uniformity required by this clause is satisfied when the same class of items is taxed at the same rate wherever such items are found throughout the United States. For example, in the *Head Money Cases*, 112 U.S. 580 (1884), where a tax on shipowners for each passenger

landed from a foreign port was upheld even though its operational impact was confined to the Port of New York, the Court stated:

> "The tax is uniform when it operates with the same force and effect in every place where the subject of it is found. The tax in this case . . . is uniform and operates precisely alike in every port of the United States where such passengers can be landed." 112 U.S. at 594.

See also *Knowlton* v. *Moore*, 178 U.S. 41 (1900); *Nicol* v. *Ames*, 173 U.S. 509, 521 (1899).

Nor does the uniformity requirement preclude incidental, nonuniform operation of otherwise proper statutes. In interpreting the "port-preference" clause (Article I, Section 9, Clause 6), which prohibits any regulation that gives "Preference . . . to the Ports of one State over those of another," this Court has required only that Congress not enact legislation which purposefully and directly discriminates against particular ports. *Armour Packing Co.* v. *United States*, 209 U.S. 56, 79-80 (1908). Congress is still free to benefit particular ports by legislating improvements in commerce such as bridges, lighthouses, and roads even though the impact of such legislation results in a preference for the ports of one state over those of another. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855); see also *Louisiana Public Service Commission* v. *Texas & New Orleans R.R.*, 284 U.S. 125, 131 (1931).

The Rail Act can also be upheld against the "uniformity" challenge on the theory selected by the majority of the court below. The words "uniform laws" are not a special "Equal Protection Clause" for bankrupts. They merely limit the power delegated to Congress in the Bankruptcy Clause; they do not limit Congress' powers under the Commerce Clause and Article III, neither of which contains any requirement of uniformity.

The railroads affected by the Rail Act were already in reorganization when the Act was passed. The hands of their creditors had already been stayed by orders of the Reorganization Courts, which have not been disturbed by the Rail Act. The Rail Act (like much of Section 77 and like the ICC's use of powers derived from the Commerce Clause to require the bankrupt New Haven to be included in the merged Penn Central) is an effort based on the Commerce Clause to provide a solution to a problem affecting commerce. Commerce Clause legislation is not required to be uniform, *e.g.*, *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U.S. 604, 616 (1950), and is not invalid merely because it incidentally affects bankrupts in a nonuniform manner. *Cf. Armour Packing Co.* v. *United States*, 209 U.S. 56 (1908). The authority to create USRA, to direct it to formulate a Final System Plan, to provide for the creation of Conrail, and to provide financial assistance to Conrail and other railroads clearly falls within the commerce power. The transfer of some existing bankruptcy powers to the Special Court is within Congress' power to define the jurisdiction of the lower federal courts, and no more violates "uniformity" than do the geographical venue provisions throughout the Bankruptcy Act. The power of a Reorganization Court to order transfers of property free and clear of liens already exists in Section 77, and such procedural changes as are effected by the Rail Act are clearly necessary and proper to the essentially commercial objective of providing an adequate and self-sustaining rail service system in the Northeast/Midwest Region.

CONCLUSION

For the reasons stated in this Brief and in our Brief as Appellant, it is respectfully submitted that the judgment of the court below should be reversed, except as to paragraphs 3 and 4c, and that the court below should be directed to enter an order granting Defendants' motions for summary judgment.

Respectfully submitted,

LLOYD N. CUTLER
WILLIAM R. PERLIK
LOUIS R. COHEN

Attorneys for the United States Railway Association

Of Counsel:

BARRY E. CARTER
PAUL C. HUDSON
WILLIAM T. LAKE
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

JORDAN JAY HILLMAN
Senior Legal Consultant
United States Railway Association
2100 Second Street, S.W.
Washington, D.C. 20590

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TABLE OF CONTENTS

	Page
Table of Citations	(iv)
Constitutional Provisions and Statutes Involved	3
Counter-Statement of Questions Presented	5
Counter-Statement of the Case	6
Summary of Argument	20
Argument:	
I. THERE IS NO "ADEQUATE REMEDY AT LAW" TO ASSURE COMPENSATION FOR THE TAKING OF PENN CENTRAL'S RAIL PROPERTIES CAUSED BY IMPLEMENTATION OF THE RRRA	25
A. Congress Has Not Provided for Just Compensation for the Taking of Private Property Mandated by the RRRA	30
B. There Is No Original Jurisdiction in the §2284 Court to Enter a Declaratory Judgment that, if Implementation of the RRRA Results in an Inadequately Compensated Taking, the United States Will Be Liable in the Court of Claims	33
C. In the RRRA, Congress Intended to Preclude Any Substantive Cause of Action for Money Damages Against the United States in the Event that the Consideration Specified in the RRRA Was Adjudged to Be Constitutionally Inadequate	38
D. The Doctrine of Adequate Remedy at Law Requires that the New Haven Trustee Have an Independent Cause of Action Against the United States Under the Theory of the Armstrong Decision	65
E. A Deficiency Judgment Against the United States for a Short Fall in Consideration Would Not Guarantee Receipt of Just Compensation or Constitute an Adequate Remedy at Law, Particularly Where There Is No Assurance that Congress Would Appropriate the Funds Necessary to Pay a Judgment of the Court of Claims	67

Page

F. This Court Should Not Render an Advisory Opinion that a Tucker Act Remedy Saves the Constitutionality of the RRRA if Congress Does Not Repeal or Amend the Act 76

II. THE COURT BELOW WAS CORRECT IN HOLDING THAT THE RRRA COMPELS PENN CENTRAL TO CONTINUE RAIL OPERATIONS PAST THE POINT OF UNCONSTITUTIONAL EROSION, AND IN ISSUING AN INJUNCTION AGAINST §304(f) AS APPLIED TO DISCONTINUANCE OF RAIL SERVICE AND THE CERTIFICATION OF A FINAL SYSTEM PLAN UNDER §209(c) 78

A. This Court's Decisions, as Interpreted and Applied by the Third Circuit in the Columbus Option Case, Govern the Interim Erosion Issue 78

B. The New Haven Reorganization Does Not Furnish Precedent for the Government's Contention that Creditors of Penn Central Must Continue to Endure Further Uncompensated Erosion Without Limit in Time or Amount 86

C. The Rock Island and Denver & Rio Grande Cases Do Not Furnish Support for the Government's Theory 98

D. The Court Below Correctly Construed §304(f) of the RRRA to Require the Affirmative Assent of USRA to any Termination of Rail Operations 104

E. The Court Below Was Correct in Enjoining USRA from Attempting to Implement §304(f) 107

F. The Court Below Was Correct in Adjudging §303 of the RRRA Void for Failure to Provide Just Compensation for the Interim Takings Mandated by §304 108

G. The Court Below Was Correct in Enjoining Certification of a Final System Plan Pursuant to §209(c) of the RRRA .. 109

Page

H. The Court Below Was Correct in Concluding That Erosion of the Penn Central Estate Has Been Substantial and Is Continuing During the Planning Processes of the RRRA 112

Conclusion 119

Appendix: Letter dated November 14, 1973 from Secretary of Transportation Brinegar to Senators Magnuson and Cotton relative to "Senate Working Paper No. 1" and attachments A-1

TABLE OF CITATIONS

Cases:	Page
Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470 (1973)	28, 67
Aptheker v. Secretary of State, 378 U.S. 500 (1964)	105-06
Armstrong v. United States, 364 U.S. 40 (1960)	21, 64, 65, 66
Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970)	85
Baker v. Carr, 369 U.S. 186 (1962)	77
Baltimore & Ohio R.R. v. United States, 389 U.S. 372 (1967)	89, 90, 93
Brooks-Scanlon Co. v. Railroad Commission, 251 U.S. 396 (1920)	14, 84
Bullock v. R.R. Commission of Florida, 254 U.S. 512 (1921)	84
Case v. Los Angeles Lumber Products Co., 308 U.S. 106 (1939)	103
Catlin v. United States, 324 U.S. 229 (1945)	59
Central Railroad Co. of New Jersey v. Manufacturers Hanover Trust Co., 421 F. 2d 604 (3d Cir.) *cert. denied*, 398 U.S. 947 (1970)	79-80, 82, 83, 84
Clark v. Uebersee Finanz Korporation, 332 U.S. 480 (1947)	49
Consolidated Rock Products Co. v. DuBois, 312 U.S. 510 (1941)	103
Continental Ill. Nat. Bank v. Chicago, R.I. & Pac. Ry., 294 U.S. 647 (1935)	14 *et passim*
Dugan v. Rank, 372 U.S. 609 (1963)	59-60
Eastport S.S. Corp. v. United States, 372 F. 2d 1002 (Ct. Cl. 1967)	38-40
Epperson v. Arkansas, 393 U.S. 97 (1968)	104
Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944)	84, 118
Flast v. Cohen, 392 U.S. 83 (1968)	79, 85
Fort Berthold Reservation v. United States, 390 F. 2d 686 (Ct. Cl. 1968)	53-54

	Page
Glidden Co. v. Zdanok, 370 U.S. 530 (1962) ...	29, 34, 72-73
Goldberg v. Daniels, 231 U.S. 218 (1913)	56
Goltra v. Weeks, 271 U.S. 536 (1926)	56, 57, 61
Hooe v. United States, 218 U.S. 322 (1910)	43, 48
Hurley v. Kincaid, 285 U.S. 95 (1932)	21 *et passim*
In re Boston & Maine Corp., 484 F. 2d 369 (1st Cir. 1973)	79
In re Boston & Maine Corp. (D. Mass. No. 70-250 M., May 2, 1974)	79
In re City of New York (Fifth Avenue Coach Lines), 18 N.Y. 2d 212, 219 N.E. 2d 410, *appeal dismissed sub. nom. Fifth Avenue Coach Lines v. City of New York*, 386 U.S. 778 (1966)	70
In re New York, N.H. & H.R.R., 378 F. 2d 635 (2d Cir. 1967)	90
In re New York, N.H. & H.R.R. (Order No. 441), 281 F. Supp. 65 (D. Conn. 1968)	90, 93, 97
In re New York, N.H. & H.R.R. (Decision on Reorganization Plan), 289 F. Supp. 451 (D. Conn. 1968)	92, 94-95, 101
In re New York, N.H. & H.R.R. (Decision on Price to be Paid for Debtor's Assets), 304 F. Supp. 793, 304 F. Supp. 1136 (D. Conn. 1969)	68
In re Penn Central Transportation Co. (Columbus Option Appeals), 494 F. 2d 270 (3d Cir. 1974), *petition for cert. filed*, 42 U.S.L.W. 3633 (May 8, 1974), No. 73-1672	79-84, 85, 101
In re Penn Central Transportation Co. (Order No. 124), 325 F. Supp. 302 (E.D. Pa. 1971) ...	6
In re Penn Central Transportation Co. (Opinion in Support of Order No. 830 re Crew-Consist Dispute), 347 F. Supp. 1356 (E.D. Pa. 1972)	7, 14
In re Penn Central Transportation Co. (Order No. 1137), 355 F. Supp. 1343 (E.D. Pa. 1973) .	7-8, 12
In re Penn Central Transportation Co. (Order No. 1189), 358 F. Supp. 154 (E.D. Pa. 1973) ..	118

	Page
In re Port Authority Trans-Hudson Corp., 20 N.Y. 2d 457, 231 N.E. 2d 743, *cert. denied sub nom. Port Authority Trans-Hudson Corp. v. Hudson Rapid Tubes Corp.*, 390 U.S. 1002 (1968)	70
In re Third Avenue Transit Corp., 198 F. 2d 703 (2d Cir. 1952)	79-80, 82, 83, 84
Ivanhoe Irrigation District v. McCraken, 357 U.S. 275 (1958)	60
Jacobs v. United States, 290 U.S. 13 (1933)	59
Land v. Dollar, 330 U.S. 731 (1947)	54, 56, 57, 61
Land v. Dollar, 184 F. 2d 245 (D.C. Cir. 1950)	71
Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949)	21 *et passim*
Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935)	65, 84
Lynch v. United States, 292 U.S. 571 (1934)	33, 75
Malone v. Bowdoin, 369 U.S. 643 (1962)	57-59, 61
Mine Safety Appliances Co. v. Forrestal, 326 U.S. 371 (1945)	33
Mitchell v. United States, 287 U.S. 341 (1925)	48
New Haven Inclusion Cases, 399 U.S. 392 (1970)	2 *et passim*
Northern Pacific Ry. v. Boyd, 228 U.S. 482 (1913)	103
Olsen v. United States, 292 U.S. 246 (1934)	67
Penn Central Merger Cases, 389 U.S. 486 (1968)	14 *et passim*
Pewee Coal Co. v. United States, 341 U.S. 114 (1951)	63
Pine Hill Coal Co. v. United States, 259 U.S. 191 (1922)	19
Pocono Pines Assembly Hotels Co. v. United States, 69 Ct. Cl. 91 (1930)	74
Poe v. Ullman, 367 U.S. 497 (1961)	104
Railroad Commission v. Eastern Texas R.R., 264 U.S. 79 (1924)	84

	Page
Reconstruction Finance Corp. v. Denver & R.G.W. R.R., 328 U.S. 495 (1946)	14 *et passim*
Reeside v. Walker, 52 U.S. (11 How.) 271 (1850)	29, 73, 74
Roe v. Wade, 367 U.S. 497 (1961)	104
Silesian American Corp. v. Clark, 332 U.S. 469 (1947)	27, 48, 49, 50
Tempel v. United States, 248 U.S. 121 (1918)	48
United States v. Ansonia Brass & Copper Co., 218 U.S. 452 (1910)	65
United States v. Candelaria, 271 U.S. 432 (1926)	71
United States v. Candelaria, 16 F. 2d 559 (8th Cir. 1926)	71
United States v. Causby, 328 U.S. 256 (1946)	26 *et passim*
United States v. Dickinson, 331 U.S. 745 (1947)	59
United States v. Dollar, 196 F. 2d 551 (9th Cir. 1952)	71
United States v. Fruehauf, 365 U.S. 146 (1961)	77
United States v. King, 395 U.S. 1 (1969)	26 *et passim*
United States v. Lee, 106 U.S. 196 (1882)	56, 57, 61
United States v. National Dairy Products Corp., 372 U.S. 29 (1963)	105
United States v. Nixon, 42 U.S.L.W. 5237 (U.S., July 24, 1974)	77
United States v. North American Transp. & Trading Co., 253 U.S. 330 (1920)	48
United States v. Raines, 362 U.S. 17 (1960)	105
United States v. Reynolds, 397 U.S. 14 (1970)	67
United States v. Sherwood, 312 U.S. 584 (1941)	26 *et passim*
United States v. United Mineworkers, 330 U.S. 258 (1947)	63-64
United States v. Zazove, 334 U.S. 617 (1948)	19
Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304 (Circuit Court Pa. 1795)	67
Yazoo & Mississippi Valley R.R. v. Jackson Vinegar Co., 226 U.S. 217 (1912)	105
Yearsley v. W.A. Ross Construction Co., 309 U.S. 18 (1940)	26, 42, 55
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)	20 *et passim*

	Page
ADMINISTRATIVE DECISIONS:	
New York, N.H. & H.R.R., Second Supplemental Report, 331 I.C.C. 643 (Nov. 16, 1967)	94
Pennsylvania R.R.—New York Central R.R., Report on Merger, 327 I.C.C. 475 (April 6, 1966)	88
Penn Central Transportation Co. Reorganization, Report on Reorganization Plans, Finance Docket No. 26241 (Sept. 28, 1973)	8
CONSTITUTIONAL PROVISIONS AND STATUTES:	
Constitution of the United States:	
Article I, Sec. 8, Cl. 3 (Commerce Clause)	3
Article I, Sec. 8, Cl. 4 (Bankruptcy Clause)	3, 11
Article I, Sec. 9, Cl. 7	3 *et passim*
Amendment V (Due Process and Takings Clauses)	3 *et passim*
Statutes:	
Act to Establish Indian Claims Commission, August 13, 1946, §24; 60 Stat. 1049	54
Act of June 1, 1910; 36 Stat. 455	54
Bankruptcy Act:	
Section 77, 11 U.S.C. §205:	
§77(c)	6, 115
§77(d)	8
§77(e)	47
§77(g)	9, 99
§77(o)	23, 107
Emergency Rail Service Act of 1970, §3, 45 U.S.C. §662	80-81
Interstate Commerce Act, 49 U.S.C. §§1 *et seq.*:	
§1(18)	107
Judicial Code, 28 U.S.C.	
§293(a)	73
§1255	34
§1491 (Tucker Act)	4 *et passim*
§1495	40

	Page
§1505	54
§2201	33
§§2282, 2284	9 *et passim*
§2501	54
§2513	40
§2517	5, 27
§2518	5, 73, 100
Railway Labor Act, 45 U.S.C. §§151 *et seq.*	7
Regional Rail Reorganization Act of 1973, Public Law 93-239, 87 Stat. 985, 45 U.S.C. §§701 *et seq.*:	
§206	27 *et passim*
§207(b)	10 *et passim*
§208	22, 76, 110
§209(a)	16-17, 27, 28, 42
§209(c)	10 *et passim*
§210	28, 53
§213	16, 21, 29
§214	16
§215	28
§302(b)	109
§303	10 *et passim*
§304(c)	104
§304(f)	10 *et passim*
§601(b)	53
§601(d)	107
Senate Joint Resolution No. 59, Public Law 93-5, 87 Stat. 5 (Feb. 9, 1973)	7
Title 31, U.S.C.:	
§724a	4, 27, 29, 72
Trading with the Enemy Act, 50 U.S.C. App. §§1 *et seq.*:	
§9(a)	27 *et passim*
§7(c)	49-50
LEGISLATIVE MATERIALS:	
119 Cong. Rec. S 23783-4 (daily ed. Dec. 21, 1973) (Remarks of Sen. Hartke)	46-47, 53, 66
119 Cong. Rec. H 11876 (daily ed. Dec. 20, 1973) (Colloquy between Reps. Adams and Kuykendall)	18, 42
120 Cong. Rec. S 11619 (daily ed. Sept. 16, 1974) (Introduction of S. 4003 to amend Regional Rail Reorganization Act of 1973)	110

	Page
MISCELLANEOUS:	
Letter dated Nov. 14, 1973 from Secretary of Transportation Brinegar to Senators Magnuson and Cotton, and attachments	A1-A10
Note, *Takings and the Public Interest in Railroad Reorganizations*, 82 Yale L.J.1004 (1973) ...	101
Note, *The Court of Claims: Judicial Power and Congressional Review*, 46 Harv. L. Rev. 677 (1933)	73-74
Staff Report of the Securities and Exchange Commission to the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce, *The Financial Collapse of the Penn Central Company* (August, 1972)	88
The Steel Seizure Case, House Doc. No. 534 (82d Congress, 2d Sess.) (U.S. Gov't Printing Office, 1952)	43, 62-63

In The
Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-165; 74-167; 74-168

REGIONAL RAIL REORGANIZATION CASES

UNITED STATES OF AMERICA, *et al.*, Appellants

v.

CONNECTICUT GENERAL INS. CORP., *et al.*, Appellees

(No. 74-168)

UNITED STATES RAILWAY ASSOCIATION, Appellant

v.

CONNECTICUT GENERAL INS. CORP., *et al.*, Appellees

(No. 74-167)

ROBERT W. BLANCHETTE, RICHARD C. BOND and JOHN H. McARTHUR, as Trustees of the Property of Penn Central Transportation Company, Debtor, Appellants

v.

CONNECTICUT GENERAL INS. CORP., *et al.*, Appellees

(No. 74-165)

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF THE NEW HAVEN TRUSTEE, AS APPELLEE

This brief is submitted on behalf of Appellee Richard Joyce Smith, Trustee of the Property of The New York, New Haven and Hartford Railroad Company, Debtor (the "New Haven Trustee" and "New Haven," respectively). Since July, 1961, the New Haven has been in reorganization under §77 of the Bankruptcy Act, 11 U.S.C. §205, United States District Court for the District of Connecticut, No. 30226. However, since December 31, 1968, New Haven's former railroad has

been operated by Penn Central Transportation Company ("Penn Central"), pursuant to the inclusion approved by this Court in *New Haven Inclusion Cases*, 399 U.S. 392 (1970). The Court (399 U.S. at 483-89) declared that the New Haven Reorganization Court (Anderson, J.) was correct in concluding that a plan which allowed payment of a portion of the purchase price for New Haven's assets in the form of common stock of Penn Central valued at a price of $87.50 per share was not fair and equitable; stated that Judge Anderson's solution to this problem, a provision whereby Penn Central would be required to "underwrite" the $87.50 value of the 950,000 shares, was conceptually sound but had become "unrealistic" by virtue of Penn Central having filed for reorganization some eight days prior to the Court's decision; and accordingly remanded the case to the Interstate Commerce Commission ("ICC") and the appropriate federal courts for further proceedings in accordance with its opinion. The New Haven Trustee takes the position that the only reasonable interpretation of the Court's opinion is that the New Haven estate is to be treated as having a secured claim as to the full unpaid amount of the purchase price of the assets conveyed on December 31, 1968, secured by such assets. The issues on the remand have yet to be adjudicated.[1] The New Haven Trustee is presently owed $123,809,404 by Penn Central, exclusive of interest, out of a total purchase price, approved by this Court in the *New Haven Inclusion Cases*, of $174,635,899. The New Haven Trustee's standing in this case is predicated upon his unpaid secured claim for the balance of the purchase price for the assets conveyed to Penn Central on December 31, 1968.

The New Haven Trustee, together with other appellees here, prevailed in the court below as to certain

[1]See New Haven Trustee's Brief as Cross-Appellant (in No. 74-166), dated August 28, 1974, at 81-82, n. 76, for a discussion of the procedural history of the remand issue in the ICC and the federal courts.

of the constitutional questions presented for decision.[2] The New Haven Trustee's present brief as Appellee is in support of those portions of the order below which enjoined the United States and USRA from enforcing certain provisions of the Regional Rail Reorganization Act of 1973.[3]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

These cases involve the following constitutional provisions and statutes:

United States Constitution:

Article I, Section 8, Clauses 3 (Commerce Clause) and 4 (Bankruptcy Clause)
Article I, Section 9, Clause 7
Fifth Amendment (Due Process and Takings Clauses)

Pertinent extracts of the foregoing provisions are set forth in Appellants' briefs, except for Article I, Section 9, Clause 7, which reads in pertinent part as follows:

[2]The appellants and their briefs to which this is addressed are as follows:

1. United States Railway Association ("USRA"), Appellant in No. 74-167, brief dated August 28, 1974;

2. United States of America, *et al.* ("United States"), Appellants in No. 74-168 (includes appeals filed by the United States, the ICC, the Chairman of the ICC, and the Secretary of the Treasury), brief dated August, 1974; and

3. Robert W. Blanchette, Richard C. Bond and John H. McArthur, as Trustees of Penn Central ("Penn Central Trustees"), Appellants in No. 74-165, brief dated August 23, 1974.

This brief also addresses, where appropriate, the separate contentions of U.S. Representative Brock Adams (on behalf of 36 Congressmen) contained in his *Amicus Curiae* Brief and Motion for Leave to file *Amicus Curiae* Brief, dated August, 1974. The New Haven Trustee consented to the filing of such Brief.

[3]The New Haven Trustee's cross-appeal (No. 74-166) is from so much of the order below as denied in part his claim for injunctive relief against enforcement of certain provisions of the Regional Rail Reorganization Act of 1973, 45 U.S.C. §701 *et seq.*, on the ground that such provisions were repugnant to the Constitution.

"No money shall be drawn from the Treasury but in Consequence of Appropriations made by Law. . . ."

Statutes of the United States:

Regional Rail Reorganization Act of 1973, Public Law 93-236, 45 U.S.C. §§701 *et seq.* (JA 491-531[4]) (hereinafter cited as "RRRA").

Section 77 of the Bankruptcy Act, 11 U.S.C. §205 (Appendix to New Haven Trustee's brief as Cross-Appellant in No. 74-166, at A1-A12).

Tucker Act, 28 U.S.C. §1491 (Appendix to brief of Penn Central Trustees, at 1a-2a).

In addition to the foregoing statutory provisions, pertinent extracts of which are found in the Joint Appendix or in the appendices to the briefs of Appellants, the following additional statutory provisions are necessarily involved in the decision of these cases to the extent that the Tucker Act, 28 U.S.C. §1491, is relied upon by Appellants:

31 U.S.C. §724a reads, in pertinent part, as follows:

"§724a. Appropriations for payment of judgments and compromise settlements against the United States

"There are appropriated, out of any money in the Treasury not otherwise appropriated, and out of the postal revenues, respectively, such sums as may on and after July 27, 1956 be necessary for the payment, not otherwise provided for, as certified by the Comptroller General, of final judgments, awards, and compromise settlements (not in excess of $100,000, or its equivalent in foreign currencies at the time of payment, in any one case) which are payable in accordance with the terms of

[4]"JA" followed by a page reference refers to the Joint Appendix of Appellants and Appellees in these cases lodged in this Court. A Joint Documentary Submission ("J.D.S.") has also been so lodged, and documents therein are referred to by "J.D.S." followed by the number of the document.

sections 2414, 2517, 2672, or 2677 of Title 28, together with such interest and costs as may be specified in such judgments or otherwise authorized by law. . . ."

28 U.S.C. §2517 reads as follows:

"§2517. Payment of judgments

"(a) Every final judgment rendered by the Court of Claims against the United States shall be paid out of any general appropriation therefor, on presentation to the General Accounting Office of a certification of the judgment by the clerk and chief judge of the court.

"(b) Payment of any such judgment and of interest thereon shall be a full discharge to the United States of all claims and demands arising out of the matters involved in the case or controversy."

28 U.S.C. §2518 reads as follows:

"§2518. Certification of judgments for appropriation

"The Secretary of the Treasury shall certify to Congress for appropriation only such judgments of the Court of Claims as are not to be reviewed or are entered upon mandate of the Supreme Court."

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Is there an adequate remedy at law under the Tucker Act (28 U.S.C. §1491) for an otherwise uncompensated taking for public use of Penn Central's rail properties and the New Haven Trustee's liens thereon such that the constitutional issues posed by the RRRA need not be reached?

2. If there is no such adequate remedy at law, was the court below correct in enjoining enforcement of the RRRA on the ground that, in failing to provide just compensation for an interim taking for use, the RRRA was repugnant to the Fifth Amendment to the Constitution?

COUNTER-STATEMENT OF THE CASE

Penn Central filed for reorganization under §77 of the Bankruptcy Act on June 21, 1970. The early stages of Penn Central's §77 proceedings were devoted to an effort by the Penn Central Trustees to identify the problems which had to be overcome in order to achieve an earnings-based reorganization. The initial cash crisis was temporarily alleviated by orders of the Penn Central Reorganization Court permitting deferrals of interest on debt (other than equipment debt), of most leased line rentals and of real estate taxes.[5] In addition, acting pursuant to §77(c)(3), the Penn Central Reorganization Court approved issuance of $100 million of Trustees' Certificates which, in order to be marketable, required the guarantee of the United States. See *In re Penn Central Transportation Co. (Order No. 124)*, 325 F. Supp. 302 (E.D. Pa. 1971).

A series of ten reports of the Penn Central Trustees[6] disclose the history of the Trustees' efforts to achieve a private earnings–based reorganization of Penn Central. The Trustees began by asserting that Penn Central could be reorganized if certain conditions. not within their control, were met.[7] Sub-

[5]Through December 31, 1973, the following amounts had been deferred: interest, $104 million; leased line rentals, $101 million; taxes, $241 million. Stipulation as to Factual Matters (printed at JA 317-24; hereinafter cited as "Stip. Fact"), ¶¶12, 13, 14. The total of such deferrals was $446 million as of December 31, 1973, and represents a priority administration claim. This total does not include $57 million of interest on $300 million of notes secured by pledge of Penn Central's stock interest in Pennsylvania Co., a non-rail subsidiary. If the interest on the notes secured by the Pennsylvania Co. stock is included, deferrals amounted to $503 million as of December 31, 1973.

[6]The earliest report is dated February 10, 1971, and the latest April 3, 1974; they are reproduced in J.D.S. 1 through 10.

[7]The New Haven Trustee on March 10, 1972 advised the Penn Central Reorganization Court that in his opinion the Penn Central Trustees' predictions as to reorganizability of Penn Central on an earnings basis were unduly optimistic. See J.D.S. 11.

sequent reports spelled out a lack of success in achieving these conditions. Finally, in their January 1, 1973 and February 1, 1973 reports, the Trustees acknowledged that reorganization would not be possible without a *government grant* (not merely financial assistance by way of loans or guarantee of borrowings) on the order of $600 to $800 million.

There followed an attempt by the Trustees to put into effect certain crew-consist changes (which had been the subject of exhaustive, but unproductive, proceedings under the Railway Labor Act), that resulted in a strike by the United Transportation Union on February 8, 1973. Congress responded by enacting Senate Joint Resolution No. 59, which imposed a 90-day moratorium on both the work-rule changes and the strike.[8]

Shortly thereafter, acting *sua sponte*, the Penn Central Reorganization Court entered an opinion and order regarding the status of reorganization efforts. *In re Penn Central Transportation Co.*, 355 F. Supp. 1343 (E.D. Pa. 1973). Judge Fullam on March 6, 1973 concluded as follows:

> "Whether the constitutional limit [of erosion] has been exceeded depends primarily upon how the remaining assets are to be valued; and this in turn may well depend upon how those assets are to be used at the conclusion of this reorganization. Un-

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[8]Public Law 93-5, 87 Stat. 5 (February 9, 1973). Following that action by Congress, the Trustees never again attempted to effectuate the work-rule changes. For a discussion of the factual and legal background of the crew-consist dispute prior to Senate Joint Resolution No. 59, see *In re Penn Central Transportation Co. (Opinion in Support of Order No. 830 re Crew—Consist Controversy)*, 347 F. Supp. 1356 (E.D. Pa. 1972). Contrary to the inference conveyed by USRA's brief (at 31), Senate Joint Resolution No. 59 was in response to the emergency created by the strike, and was not primarily a response to the Penn Central Trustees' Reports dated January 1 and February 1, 1973.

der any view of the matter, *it seems clear that the point of unconstitutionality is fast approaching, if it has not already arrived.*

* * *

"The essence of §77 of the Bankruptcy Act is that the legal remedies normally available to creditors may be held in suspension for a *reasonable time* in order to permit rehabilitation of the enterprise. Whenever it appears that there is *no genuine likelihood of ultimate success, the legal and constitutional justification for restraining creditors from exercising their normal remedies disappears.*

* * *

"By the same token, however, this Court cannot ignore the realities of the Debtor's situation. On the basis of the record to date, it appears *highly doubtful that the Debtor could properly be permitted to continue to operate on its present basis beyond October 1, 1973.*" *Id.* at 1344-46 (emphasis added).[9]

There then followed proceedings before the ICC in August, 1973 upon proposed plans of reorganization of Penn Central filed by the New Haven Trustee in June, 1973, and subsequently by the Penn Central Trustees and Penn Central Company. The ICC's Report dated September 28, 1973 rejected on various grounds all plans submitted for the reorganization of Penn Central,[10] and declined to certify to the Reorganization Court any plan of reorganization under §77(d), essentially adopting the position urged by the United States that reorganization of Penn Central had to await a "solution" for the Northeast that would, in turn, require Congressional action.

On October 9, 1973, the New Haven Trustee filed a motion to dismiss Penn Central's §77 proceedings

[9]Thus, by the time this appeal has been heard, Penn Central will have been "permitted to operate on its present basis" for more than one year beyond the date of "highly doubtful" constitutionality.

[10]The ICC's Report dated September 28, 1973 is J.D.S. 54. Extracts from the testimony in the ICC proceedings are set forth in J.D.S. 38-53.

pursuant to §77(g), and sought a liquidating receivership, on the ground, *inter alia*, that the point of unconstitutional erosion of the Penn Central estate had commenced not later than January 1, 1973,[11] the date of the Penn Central Trustees' Report (J.D.S. 8).

On January 2, 1974, the RRRA was signed into law by the President.[12]

On January 25, 1974, the New Haven Trustee filed a complaint asserting that the RRRA was unconstitutional on its face and as applied to Penn Central. Named as defendants were the United States, USRA, and Secretary of Transportation Brinegar (herein sometimes referred to collectively as the "Governmental Defendants"). The action was filed in the United States District Court for the District of Columbia, and was subsequently transferred, by consent, to the Eastern District of Pennsylvania, where other cases concerning the constitutionality of the RRRA were pending. Pursuant to 28 U.S.C. §§2282 and 2284, a three-judge district court, consisting of Circuit Judge Ruggero J. Aldisert and District Judges John P. Fullam and Louis C. Bechtle, was constituted to hear all these cases. The Penn Central Trustees, who intervened as defendants, answered that the RRRA was constitutional by virtue of the alleged existence of a "Tucker Act remedy" under 28 U.S.C. §1491 to "un-

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[11]J.D.S. 13. As is noted in greater detail in Part II-A of the Argument, this Motion and a related petition seeking an equity receivership have not been decided. No hearing was held on the §77(g) Motion until May 6, 1974. A previously filed petition of the New Haven Trustee, seeking, *inter alia*, the fixing of a date for termination of operations (J.D.S. 12) filed March 16, 1973, was never set down for hearing. By Order No. 1648, further proceedings have been conducted on the §77(g) Motion and related petitions, including a further hearing on September 19, 1974.

[12]Public Law 93-236, codified as 45 U.S.C. §§701 *et seq.* Section references to the RRRA are to the Section numbers in Public Law 93-236, and not to the codification in 45 U.S.C.

derwrite" any constitutional deficiency in the RRRA. After joinder of issue, the New Haven Trustee on April 29, 1974 filed a motion for summary judgment as to certain of the legal issues raised by his complaint. The Governmental Defendants and the Penn Central Trustees each then filed counter-motions for summary judgment.[13]

The issue below was whether an injunction should issue restraining the enforcement of various sections of the RRRA on grounds of repugnance to the Constitution. The court granted, in part, the motion of the New Haven Trustee and other plaintiffs for summary judgment, and issued an order dated June 25, 1974 ("Order"; JA 82-83) which enjoined USRA from certifying a final system plan to the Special Court pursuant to §209(c) of the RRRA, and enjoined all defendants from taking any action to enforce the provisions of §304(f) of the RRRA with respect to any abandonment, cessation or reduction of railroad service determined by a court of competent jurisdiction to be necessary for the preservation of rights guaranteed by the Constitution (Order, ¶¶1, 2; JA 82). In addition, the court enjoined all parties "from enforcing, or taking any action to implement, so much of Section 207(b) of the RRRA as purports to require dismissal of pending proceedings for reorganization [of Penn Central] under Section 77 of the Bankruptcy Act" (Order, ¶3; JA 82).[14] Finally, the court entered a declaratory judgment that §303 of the RRRA is null and void insofar as it fails to provide compensation for interim erosion pending final implementation of the final sys-

[13]The factual record was then completed by a Stipulation as to the Record in the Penn Central Reorganization Proceedings (identical to JA 197-99) and a Stipulation as to Factual Matters (JA 317-23; hereinafter cited at "Stip. Fact-").

[14]This portion of the Order was entered *sua sponte*, none of the plaintiffs having sought this relief.

tem plan contemplated by the RRRA, and that §304(f) of the RRRA is null and void as violative of the Fifth Amendment to the Constitution insofar as it would require continued operation of rail services at a loss in violation of the constitutional rights of the owners and creditors of Penn Central (Order, ¶¶4a, 4b; JA 82-83). The court also declared a portion of the third sentence of §207(b) of the RRRA to be null and void as violative of Article I, Section 8, Clause 4 of the Constitution for the reason that the RRRA is not uniform geographically throughout the United States and, to the extent that the RRRA amends §77 of the Bankruptcy Act, it is a law on the subject of bankruptcies within the meaning of Article I, Section 8, Clause 4 (Order, ¶4c; JA 83).

Insofar as the Order denied in part, on grounds of alleged prematurity, the injunction sought by the New Haven Trustee against the implementation of the compulsory conveyance provisions of the RRRA as constituting an uncompensated taking in violation of his Fifth Amendment rights, the New Haven Trustee filed a cross-appeal.[15]

The instant appeals (docketed as Nos. 74-165, 74-167 and 74-168) concern an issue which the court below found was ripe for constitutional adjudication,[16] namely, whether the RRRA produces an uncompensated, or inadequately compensated, governmental taking of private property for use by reason of compelling deficit rail operations to continue notwithstanding the erosion of Penn Central's estate. The court considered that the evidence established that

[15]Docketed as No. 74-166. See Jurisdictional Statement filed August 23, 1974, and Brief of New Haven Trustee as Cross-Appellant dated August 28, 1974.

[16]Apparently the Appellants in these cases do not challenge the determination of the court below that the interim taking and "Tucker Act remedy" issues are indeed ripe for adjudication.

substantial erosion of the Penn Central estate had taken place in four years of operations under §77, that it was continuing, and would inevitably unconstitutionally erode the interests of one or more of the classes of claimants represented by plaintiffs, who include secured creditors, unsecured creditors and stockholders of Penn Central.[17] The court quoted with approval the following appraisal and estimate of the erosion issue made by the Penn Central Trustees:

> "*Growth in priority claims against the estate.* Deprived of an adequate cash flow, the Penn Central estate has accumulated substantial priority claims ahead of all pre-bankruptcy interests. Conservatively estimated, these priority claims already aggregate at least $300 million. On a status quo assumption, another $100 million would be added in 1973. As a result, the value of the estate has already been substantially eroded and the Trustees are presently unable to prevent continuing erosion." (Penn Central Trustees' Interim Report of January 1, 1973, J.D.S. 8 at p.4; quoted at JA 38-39, n. 21).

The court also quoted with approval an estimate of erosion made in March, 1973 by the Penn Central Reorganization Court:

> "Erosion. While the precise calculations have not been fully developed, the record justifies the conclusion that post-reorganization deferrals and unpaid administration claims have already eroded the Debtor's estate to the extent of about $500 million." *In re Penn Central Transportation Company*, 355 F. Supp. 1343, 1344 (E.D. Pa., 1973) (quoted at JA 40).

The court concluded:

> "Cognizant of massive operational losses of

[17]The court below was not required to, and did not, make findings as to the *amount* of erosion, the *class* of persons now affected by erosion, or the *time* at which erosion would be unconstitutional under the decisions of this Court interpreting the Fifth Amendment.

> $851,000,000 during the present reorganization proceedings, and cognizant also that unsecured creditor as well as secured creditor interests are squarely before this court, we are persuaded that a significant possibility exists that a point of erosion either has been or may soon be reached so that it can be said that plaintiffs' contention of interim unconstitutional taking by continued loss operations is ripe for adjudication." (JA 40).[18]

Reaching the merits of the interim taking issue, the court first noted that the defendants acknowledged that the RRRA "does not explicitly provide for the payment of just compensation" (JA 41) in the event that the point of unconstitutional erosion of the Penn Central estate is determined by the Reorganization Cou . to have been passed. On the issue whether there is a constitutional limit on the permitted erosion of a railroad's estate by reason of required deficit rail operations, and the factors which enter into the determination of whether that limit had been passed, the court quoted a portion of the following observations of the Penn Central Reorganization Court:

> "Underlying the provisions of Section 77 of the Bankruptcy Act is the principle that, in order to vindicate the public interest in continued rail service, the normal rights of creditors and investors may be held in suspension for a reasonable time in order to achieve reorganization, and upon reorganization may be drastically altered if necessary.

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[18]The $851,000,000 of losses covers only the period from June 21, 1970 to December 31, 1973. In addition, for the first six months of 1974, Penn Central suffered a net loss of $103,579,392 (Trustees' Report dated August 5, 1974). Thus the total deficit of the Penn Central system during four years of operations under §77 is some $955 million. This loss is *after* employing in rail operations Penn Central's *non-rail income* of $157 million (Stip. Fact. ¶11). Thus, rail operations alone during the four years have produced deficits totaling some $1.1 billion. This amount includes deferred interest and leased line rentals in default in excess of $500 million. The deficit in income available for fixed charges as the result of railroad operations is accordingly some $600 million.

> Nevertheless, there are limits beyond which this public interest cannot be served without violating the constitutional prohibition against appropriation of private property for public use without just compensation. New Haven Inclusion Cases, 399 U.S. 392, 90 S.Ct. 2054, 26 L.Ed.2d 691 (1971); *cf.* Brooks-Scanlon Co. v. Railroad Commission of Louisiana, 251 U.S. 396, 40 S.Ct. 183, 64 L.Ed. 323 (1920). These limitations are measured both in terms of the amount of erosion of the Debtor's estate which can be permitted to occur before impairing liquidation value, and in terms of the length of time that is reasonable for assessing the ultimate prospects of achieving sufficient profitability to support a valid recapitalization of the enterprise." *In re Penn Central Transportation Co. (Opinion in Support of Order No. 830 re Crew-Consist Dispute)*, 347 F. Supp. 1356, 1366 (E.D. Pa. 1972); quoted in part at JA 41.

The court below fully concurred in the doctrine thus expressed, for which unqualified authority exists in decisions of this Court,[19] that the "normal rights of creditors and investors [in a railroad] may be held in suspension for a reasonable time in order to achieve reorganization," so as to "vindicate the public interest." The decision of the court was based on the corollary of that proposition: that the rights of railroad creditors and investors may not be held in suspension for more than the "reasonable" time required to determine whether a successful reorganization can be achieved. USRA conceded below that if "a point might be reached before consummation of the new [final system] plan in which the constitutionally permissible point of erosion had been reached," unless a Tucker Act remedy existed and provided an adequate remedy

[19] *Continental Ill. Nat. Bank v. Chicago, R.I. & Pac. Ry.*, 294 U.S. 648 (1935) (hereinafter cited as *"Rock Island"*); *Reconstruction Finance Corp. v. Denver & R.G.W. R.R.*, 328 U.S. 495 (1946) (hereinafter cited as *"Denver & Rio Grande"*); *Penn Central Merger Cases*, 389 U.S. 486 (1968); *New Haven Inclusion Cases, supra.*

at law, "the Act as a whole would probably be unconstitutional." (Colloquy between counsel and Judge Aldisert, JA 42). In the light of this concession, and pertinent factual stipulations (JA 317-323), the court reasonably concluded that the RRRA's constitutionality as respects the interim taking issue would necessarily depend on the availability and adequacy of a Tucker Act remedy which would provide compensation to the Penn Central estate in respect of the interim taking of its rail properties for public use.

The court disposed of the Appellants' Tucker Act remedy argument by a detailed analysis totally at variance with Appellants' characterizations in their briefs here.[20] Although the court's opinion discusses arguments made below by the Appellants and certain of the Appellees, as to whether the RRRA should be construed as an implied repeal of the Tucker Act, the court's opinion did not decide which of the views is correct, presumably because a resolution of these questions was not necessary to its decision.[21]

Rather, the court held that the issue of "adequate remedy at law" necessarily turned on statutory interpretation of the RRRA itself. That is, the issue was

[20]See e.g., USRA's brief at 41, asserting that the court ruled "that the Court of Claims would not have jurisdiction over any claim for a taking allegedly caused by the Rail Act because the Rail Act does not explicitly make a Tucker Act remedy available." This incorrectly states the court's opinion, as indicated in the text. Moreover, the New Haven Trustee argued below that the RRRA does not withdraw any jurisdiction conferred by 28 U.S.C. § 1491; his argument here (as it was below) is based on lack of a *substantively valid* cause of action even assuming the Court of Claims has jurisdiction. See Part I of Argument herein.

[21]JA 44-50. While the court's opinion contains an elaborate explanation of the respective jurisdictional contentions of USRA and the Penn Central Trustees, on the one hand, and of certain of the plaintiffs below, on the other, the court seems to have found it unnecessary to decide which of these conflicting views was correct. The New Haven Trustee, having stated below that the *jurisdiction* of the Court of Claims is unimpaired by the RRRA, argued that a resolution of this issue was unnecessary.

whether it was the intent of Congress to create a statutory scheme which was all-inclusive in the sense that, except by following its prescribed procedures with regard to judicial review, claimants to the estate of a railroad were to have no substantive cause of action in the Court of Claims for the changes effected in their property rights by implementation of the RRRA. The court held that this was the effect of the RRRA on these grounds:

(a) The provision of Article I, Section 9, Clause 7 of the Constitution that "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law" (JA 50) requires that Congress, not the federal courts, make the decisions as to whether, when and in what amounts monies of the United States Treasury shall be expended.

(b) The express ceilings on appropriations (§§213(b) and 214) and on obligations of USRA (§210) preclude, as a matter of statutory construction, the possibility that Congress was willing to appropriate money to compensate any railroad's estate for interim erosion. (JA 50-51).

(c) The specificity of the delineation of judicial review contained in §§209(a) and 303 of the RRRA (JA 51) precludes, as a matter of statutory construction, that Congress granted the Special Court the power to adjudicate, as part of its §303(c) proceedings, that a constitutional "short fall" in consideration provided by the RRRA is to be made up by a monetary judgment against the United States which could be asserted in a subsequent Court of Claims action.

The first sentence of §209(a) provides in pertinent part:

> "*Notwithstanding any other provision of law*, the final system plan . . . *is not subject to review by any court* ex-

> cept in accordance with this section." (Emphasis added.)

By citing this section (JA 51), the court interpreted §209(a) to preclude any substantive cause of action surviving the judicial review provided for in the second sentence of §209(a), which reads as follows:

> "After the final system plan becomes effective under section 208 of this title, it may be reviewed with respect to matters concerning the value of the rail properties to be conveyed under the plan and the value of the consideration to be received for such properties."

It is reasonably clear (even if not explicitly stated) that the "review" referred to in the second sentence of §209(a) is solely that provided in §303(c) by the Special Court, and in §303(d) by this Court on review of the Special Court's judgment. The difficult problem of statutory construction is whether, in light of the first sentence of §209(a), Congress intended that a person aggrieved by the §303(c) judgment (as reviewed by this Court under §303(d)) could seek to litigate essentially the same issues again in the context of a suit for money damages against the United States in the Court of Claims. To answer that question, the court resorted to the legislative history.

The legislative history confirmed the court's interpretation of §209(a) that Congress did not intend that a disappointed claimant at the conclusion of the proceedings in the Special Court and this Court, as contemplated by §§303(c) and (d) could start new litigation by asserting a claim for money damages against the United States in the Court of Claims, a claim which might, if sustained, aggregate hundreds of millions or billions of dollars with respect to the Penn Central claimants. The court particularly noted the following colloquy between the two "Managers on the

Part of the House" in the debate on the Conference Committee Report:

> *Mr.* [Dan] *Kuykendall.* "Mr. Speaker, I would like to ask the gentleman from Washington one point, and that is the matter of the deficiency judgment. There was a lot of colloquy in the original debate which expressed fears that the Federal Court had the key to the Treasury.
>
> "Will the gentleman give us his interpretation of the guarantees we have to keep that from happening in the court proceedings?"
>
> *Mr.* [Brock] *Adams.* "Mr. Speaker, there is a definite limitation on the total amount that can be authorized under this bill. Any amounts that go beyond that, or the shifting of the way in which it is spent, is to be approved by an Act of Congress, to be signed by the President. . . . [I]t was the clear intent of the managers that any amount other than common stock [of Conrail] was to be at the lowest possible limit to meet the constitutional guarantees."
>
> * * *
>
> *Mr. Kuykendall.* "There is no way the Federal Court may assess the taxpayers or this Congress on the judgments of the creditors, is that correct?"
>
> *Mr. Adams.* "The gentleman is correct."
>
> *Mr. Kuykendall.* "There is no way they can assess the Congress for the money."
>
> *Mr. Adams.* "The gentleman is correct." (119 Cong. Rec. H. 11876 (1973), JA 49-50).

The court below concluded:

> "We are persuaded that the legislative history supports the conclusion that Congress intended that financial obligations be limited to the express terms of the Act." (JA 50).[22]

[22]It is a well-accepted canon of statutory construction that where liability of the United States is involved, the Court will require a clear and

(footnote continued on next page)

Concluding that the financial obligations of the United States were intended by Congress to be "limited to the express terms of the Act," the court was compelled to find that the asserted availability of an adequate remedy at law, to wit, a Tucker Act action for a constitutional "short fall" at the conclusion of the judicial proceedings under §§303(c) and (d), did not in fact exist. It was in this context that the court observed:

> "To read a Tucker Act remedy into the Act would be a movement of the mass and not simply the particles. We simply lack such power." (JA 53).

From this conclusion, and the Appellants' concessions below that the RRRA itself provided for no compensation for the taking for interim use which would inevitably (on the basis of the stipulated facts) occur during the minimum of two or more years of deficit rail operations mandated by the RRRA, the court concluded:

> "Accordingly, we hold that Section 304(f), in requiring mandatory interim operations without providing a legal remedy to furnish fair and just compensation for an erosion of property beyond constitutional limits, offends the Fifth Amendment; that Section 303, the only provision of the Act pertaining to valuation of the railroad estate, in failing to provide a remedy for any unconstitutional erosion caused by mandatory interim operations under Section 304(f), is also defective . . . and that because of these conclusions the United States Railway Association must be enjoined from certifying a Final System Plan to the Special Court pursuant to Section 209(c)." (JA 53).

(footnote continued from preceding page)

unambiguous expression of Congressional intent to support a reading which will subject the Treasury to a large liability. See *Pine Hill Coal Co. v. United States*, 259 U.S. 191, 196 (1922) (Holmes, J.); *United States v. Zazove*, 334 U.S. 602, 617 n. 24 (1948) (Vinson, C. J.).

SUMMARY OF ARGUMENT

Two main issues are presented by these appeals:

1. Is there an adequate remedy at law under the Tucker Act such that the constitutional issues posed by the RRRA need not be reached?

2. If there is no such adequate remedy at law, was the court below correct in enjoining enforcement of the RRRA for repugnance to the Fifth Amendment to the Constitution?

I.

On the first issue, the New Haven Trustee, as Appellee, submits that the court correctly disposed of Appellants' Tucker Act remedy arguments:

A. The RRRA on its face clearly excludes any intent on the part of Congress to subject the United States to monetary liability for the takings of private property mandated by the RRRA.

B. No court has jurisdiction to render a declaratory judgment that, upon a certain set of facts ensuing, the United States will be liable to plaintiffs in an action invoking the jurisdiction of the Court of Claims under the Tucker Act.

C. Not all cases over which the Court of Claims has jurisdiction to consider the merits involve valid causes of action. A valid cause of action under the theory of "inverse eminent domain" requires a statute which expressly authorizes the exercise of the eminent domain power. The RRRA is not such a statute. The decision of this Court in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1953) is controlling precedent to the effect that the remedy in the Court of Claims exists only

if the statute is constitutional and authorizes the exercise of eminent domain powers. Such an interpretation of *Youngstown* is necessary in order to reconcile *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) and subsequent post-*Larson* cases with *Hurley v. Kincaid*, 285 U.S. 95 (1932) and other "inverse eminent domain" cases.

D. The doctrine of adequate remedy at law requires that the New Haven Trustee have an independent cause of action against the United States under the theory of the Court's decision in *Armstrong v. United States*, 364 U.S. 40 (1960). Such a cause of action would be based on divestment of the New Haven Trustee's liens as a result of the implementation of §303(b)(2) of the RRRA, and need not await the Special Court's proceedings under §303(c).

E. A deficiency judgment against the United States for the "short fall" in the consideration provided by the RRRA would not in any event be an *adequate* remedy at law since takings require payment of just compensation entirely in money or its perfect equivalent. Moreover, judgments entered by the Court of Claims in amounts in excess of $100,000 cannot be enforced against the United States Treasury without Congressional appropriation. The legislative history of the RRRA shows that Congress did not intend to permit the United States to pay any additional amounts of government money to railroad estates beyond the $500 million of potentially available debt obligations of USRA backed by possible United States guarantees and the $85 million of grant funds authorized by §213 of the RRRA.

F. If the Court is in doubt as to whether the RRRA is intended to be an eminent domain statute, it should not render an advisory opinion that it may be sus-

tainable on the theory advanced by the Penn Central Trustees that Congress has adequate time, if it disagrees with the judicial interpretation, either to repeal the RRRA or to vote to prevent any final system plan from becoming effective pursuant to §208(a) of the RRRA.

II.

The court below was correct in holding that the RRRA requires Penn Central to devote its private property to a public use without assurance of receiving just compensation therefor:

A. Although railroad creditors may properly be restrained for a reasonable time in the exercise of their contractual foreclosure or other remedies, it is not constitutionally permissible for Congress to defer the exercise of those remedies endlessly. The court below was correct in rejecting the Government's interpretation of *New Haven Inclusion Cases* and *Penn Central Merger Cases, supra,* and in following the reasoning of the Third Circuit Court of Appeals relative to the issue of when a further restraint upon creditors amounts to an intentional uncompensated taking.

B. The New Haven reorganization, when correctly analyzed in the light of the facts of that proceeding, the positions of the New Haven creditor parties, and the procedural context in which the various judicial decisions, including *New Haven Inclusion Cases, supra,* were rendered, does not support the Government's principal theory in support of the constitutionality of the RRRA.

C. The Court's decisions in the *Rock Island* and *Denver & Rio Grande* cases, *supra,* under §77, when correctly interpreted in the light of the facts of those cases, do not support the constitutionality of the RRRA.

D. Section 304(f) of the RRRA, properly interpreted, requires USRA, during the interim period preceding the effective date of a final system plan under the RRRA, to deny Penn Central permission to terminate rail operations on, or abandon, any rail segments which might be included either in a final system plan for conveyance to Conrail, or in lines as to which any States or regional transportation authority will be prepared to commit public funds for a rail service continuation subsidy beginning within a few months after the effective date of the final system plan. Pending the effective date of a final system plan, the scope of permissible discontinuances and/or abandonments under §304(f) is negligible or non-existent. Prior decisions of the Court indicate that a statute cannot be rewritten to limit its applicability to a narrow area where it might be constitutional. This rule is applicable *a fortiori* where the plaintiffs below demonstrated that the RRRA as written is unconstitutional as applied to them.

E. Section 304(f) of the RRRA withdraws the jurisdiction of the reorganization court under §77(o) to order abandonments of rail properties of a debtor railroad and withdraws the court's equity jurisdiction to order cessation of rail operations when necessary to protect constitutional rights. Because of the policies underlying 28 U.S.C. §§2282 and 2284, only a court as there constituted can prevent this unconstitutional application of §304(f) by enjoining its enforcement.

F. The court was correct in adjudging §303(c) of the RRRA unconstitutional for failure affirmatively to provide payment of just compensation for the erosion being suffered by Penn Central during the period required to carry out the planning processes of the RRRA.

G. The court was correct in enjoining USRA from certifying a final system plan to the Special Court in view of its holding on interim erosion and the failure of §303(c) of the RRRA to provide just compensation therefor. If USRA proves to be able to devise a final system plan which does in fact provide just compensation for the interim erosion suffered by Penn Central during the period of the planning process, it can apply to the §2284 court for appropriate modification of the injunction in the light of the evidence then presented to such court.

H. The evidence was more than sufficient to support the conclusion that the Penn Central estate has already suffered substantial erosion during the four years of §77 proceedings, and that substantial erosion is continuing during the planning process of the RRRA. The court was not required to calculate the amount of erosion with mathematical precision, or to determine what claimants to the Penn Central estate are currently being affected by erosion, because one or more of the plaintiffs below are currently being injured by erosion. Substantial deficits in income available for fixed charges, plus substantial accrual of priority administration claims that have accrued during four years of §77 proceedings and are continuing to accrue, are highly probative of massive on-going erosion of the Penn Central estate. The Government introduced no evidence that appreciation of the value of balance sheet assets, even if *arguendo* such appreciation is deemed a proper offset to erosion, has been realized in amounts substantial enough to offset the erosion which has occurred and is continuing.

ARGUMENT

I

THERE IS NO "ADEQUATE REMEDY AT LAW" TO ASSURE COMPENSATION FOR THE TAKING OF PENN CENTRAL'S RAIL PROPERTIES CAUSED BY IMPLEMENTATION OF THE RRRA

The New Haven Trustee agrees with Appellants that the central issue in these cases is whether Congress intended that a litigant in proceedings pursuant to §§303(c) and (d) of the RRRA could, if disappointed by the final judgment of the Special Court, as affirmed or modified by this Court, start all over again by suit against the United States in the Court of Claims. Appellants contended below and contend here that the Tucker Act creates a remedy both for an uncompensated taking for interim use, and for an inadequately compensated permanent taking, of Penn Central's rail properties. Thus, Appellants assert that the Appellees have an "adequate remedy at law."

In summary, the New Haven Trustee's position on the availability of a Tucker Act remedy issue is as follows:

(i) The Tucker Act confers jurisdiction upon the Court of Claims in an action for money damages by a private person against the United States; and thereby constitutes a waiver, but limited to the express terms of 28 U.S.C. §1491, of the historic common law doctrine of sovereign immunity.

(ii) No court other than the Court of Claims has original jurisdiction to decide that the United States is liable in money damages for a taking of private property under the Fifth Amendment. The bar to such declaratory judgments is the doctrine of sovereign im-

munity itself, as stated by the Court in the *Sherwood*[23] and *King*[24] cases. In fact, under the *King* decision, not even the Court of Claims itself has jurisdiction to render such a declaratory judgment.[25]

(iii) The RRRA is silent as to any intent of Congress partially to repeal 28 U.S.C. §1491 in cases arising under the RRRA. No such repeal is necessary, however, to support the judgment below. That judgment is based on there not being sufficient assurance that a substantively valid cause of action would exist against the United States for an "implied taking" to make applicable the doctrine of "adequate remedy at law." The New Haven Trustee submits that the RRRA cannot fairly be interpreted as allowing a *substantively valid cause of action* to be asserted in the Court of Claims to recover the constitutional "short fall" which the RRRA itself fails to provide.

(iv) Cases such as *Hurley v. Kincaid, supra, Yearsley v. W. A. Ross Construction Co.*, 309 U.S. 18 (1940), *United States v. Causby*, 328 U.S. 256 (1946), and other cases cited by Appellants[26] are inapposite because they did not arise in a context where Congress had specifically provided for *another court* to render judgment as to the value of the property being taken and the value of the consideration provided under the law as compensation therefor. The "implied takings" cases, of which the *Causby* case, *supra*, is the most celebrated example, are based on a theory of "inverse eminent domain," and are irrelevant to the decision of the issue here. The question in the instant case is whether Congress in-

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[23] *United States v. Sherwood*, 312 U.S. 584 (1941).

[24] *United States v. King*, 395 U.S. 1 (1969).

[25] Although the United States has not cited the *Sherwood* and *King* cases in its brief as Appellant, it argued below that the Penn Central Trustees' cross-motion for summary judgment based on the Tucker Act remedy was barred by the *Sherwood-King* doctrine.

[26] See, e.g., cases cited in brief of USRA at 43-47.

tended, in §§209(a) and 303(c) of the RRRA, that *all issues* concerning the value of rail properties required to be conveyed under §303(b), and the consideration therefor specified in the final system plan pursuant to statutory guide lines contained in §206 of the RRRA, should be definitively adjudicated solely by the Special Court (§303(c)) and, on appeal from its judgment (§303(d)), by this Court. If that question is answered in the affirmative, there is no adequate remedy at law; if in the negative, there could be a remedy at law for an implied taking under the "inverse eminent domain" theory. On the latter assumption only, a valid cause of action could be asserted in the Court of Claims under 28 U.S.C. §1491. In that event, the only remaining issues would be whether such a remedy is adequate (i) as to the amount and (ii) in view of 31 U.S.C. §724a, 28 U.S.C. §2517, and Article I, Section 9, Clause 7 of the Constitution, as to collectibility of the judgment.

(v) The court below concluded that there was no Tucker Act remedy, relying on both the express words of §209(a) and the legislative history. That decision was correct. It is entirely consistent with the decision of the Court in *Silesian American Corp. v. Clark*, 332 U.S. 469 (1947), involving a statutory scheme under the Trading with the Enemy Act,[27] whereby Congress prescribed a taking of property of persons whose enemy alien status was yet to be determined, and prescribed an elaborate administrative and judicial review procedure to be followed by persons claiming to be non-enemy aliens entitled to just compensation under the Fifth Amendment. A litigant, such as the plaintiff in the *Silesian American* case, who pursued the administrative and judicial proceedings of §9(a) of the Trading with the Enemy Act and, if disappointed by the District Court, appealed to the Court of Appeals, sub-

[27]40 Stat. 411 (Oct. 6, 1917), as amended by First War Powers Act of 1941, 55 Stat. 839 (Dec. 18, 1941), 50 U.S.C. App. §§1 *et seq.*

ject to further review in this Court by certiorari, would scarcely have been permitted to start all over again in the Court of Claims. Since the Trading with the Enemy Act does not specifically repeal 28 U.S.C. §1491 as to claims of unconstitutional takings by the Alien Property Custodian, it follows that the Court of Claims would have jurisdiction over such a case but would be obliged to dismiss any complaint for want of merit. From this it can be reasonably inferred that a substantively valid cause of action "upon any claim against the United States founded either upon the Constitution or any Act of Congress. . . " (28 U.S.C. §1491) must be one which is not only valid *ab initio* under the Constitution but is not precluded by a law which purports to create an entirely different remedy cognizable in a different court. When the procedural sections, §§209(a) and 303(c) and (d) of the RRRA, are read with the substantive sections, §§206 and 210-215, the conclusion is inescapable that Congress has affirmatively legislated that railroads whose rail properties are required to be conveyed pursuant to the RRRA are to be compensated by securities of Conrail and not in excess of $500 million of obligations of USRA, as determined by the Special Court, and not by a money judgment against the United States.

(vi) Even if there is a Tucker Act remedy under the theory of inverse eminent domain, the remedy at law would still be inadequate if it were limited, as Appellants contend, to a "short fall" remedy. No authority exists for the analogous proposition, for example, that the farmer whose lands were flooded in *Hurley v. Kincaid, supra*, could constitutionally be paid partly in stock of TVA, partly in bonds of the Federal Land Bank, and the balance in money upon a judgment of the Court of Claims. The *Almota* case,[28] and a long line

[28] *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973).

of eminent domain cases cited in the New Haven Trustee's brief as Cross-Appellant (at 56-59), stand for the proposition that "just compensation" within the meaning of the Fifth Amendment means money or its perfect equivalent.

(vii) *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962), does not stand for the proposition that a litigant's remedy at law under the Tucker Act can be assumed to be *adequate* in spite of substantial doubts as to its collectibility. Rather, it was early held in *Reeside* v. *Walker*, 52 U.S. (11 How.) 271 (1850), that no execution may be issued by any court to the Treasurer of the United States unless Congress has previously appropriated the funds to pay such judgment; and *Reeside* v. *Walker* was cited with approval in *Glidden Co.* v. *Zdanok*, *supra*. In terms of appropriations, Congress has appropriated only the following: up to $100,000 for any one judgment rendered in the Court of Claims (31 U.S.C. §724a); and $74,800,000 in appropriations pursuant to §213 of the RRRA (of which some $28,000,000 has thus far been committed).[29] The possibility that Congress would in fact appropriate funds, very likely to be required in the *hundreds of millions* or *billions*, for the purpose of paying Penn Central creditors is simply beyond the realm of reality. The *Amicus Curiae* brief filed by Congressman Brock Adams on behalf of members of Congress is eloquent for the shadow it casts.

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[29]See Foreign Assistance and Related Programs Appropriations Act, 1974, 87 Stat. 1048 (Jan. 2, 1974) ($35 million); Second Supplemental Appropriations Act, 1974, 88 Stat. 195 (June 8, 1974) ($39.8 million).

A. Congress Has Not Provided for Just Compensation for the Taking of Private Property Mandated by the RRRA

In §§206(d)(1) and 303(c) of the RRRA, Congress has legislated the *form* of the consideration, which USRA is legally authorized to provide in the final system plan, to be exchanged for the property to be taken from the estates of railroads pursuant to §303(b). Thus, §206(d)(1) provides:

> "All rail properties to be transferred to the Corporation [i.e., Conrail]. . .by trustees of a railroad in reorganization, or by any railroad leased, operated or controlled by a railroad in reorganization in the region, *shall be transferred in exchange for stock and other securities of the Corporation* (including obligations of the Association) and other benefits accruing to such railroad by reason of such transfer." (Emphasis added).

Under §303(a)(1), Conrail is to deposit with the Special Court "all of the stock and other securities of [Conrail] and obligations of the Association designated in the final system plan to be exchanged for such rail properties;" under §303(c)(1), the Special Court *shall* test the consideration in "accordance with the standard of fairness and equity applicable to the approval of a plan of reorganization or a step in such a plan under Section 77 of the Bankruptcy Act;" under §303(c)(2)(B), if the Special Court finds that the standard of fairness and equity is not met, it *shall* order additional amounts of securities of Conrail or obligations of USRA specified in the final system plan to be issued; and, finally, under §303(c)(2)(C), if there is still failure to meet the standard of fairness and equity, the Special Court *shall* cure the lack of fairness and equity by entering a deficiency judgment against Conrail—and not against the sovereign which created Conrail. Further very

clear evidence of Congressional intent not to subject the United States and its agencies to liability is found in §206(i), where it is provided that any securities of Conrail "which purport to directly obligate the Association [i.e., USRA] shall not become effective without affirmative approval, with or without modification, by a joint resolution of the Congress."

In any event, money is not even mentioned in the RRRA as a possible medium of payment for the properties required to be conveyed by a railroad in reorganization. The reason for excluding payment in money is set out at length in the letter from Secretary of Transportation Brinegar to Senators Magnuson and Cotton.[30] The executive branch did not desire to pay in money the price for a condemnation, as Secretary Brinegar acknowledges would be necessary in the case of a taking by eminent domain. Whether or not influenced by this advice, Congress in fact legislated what is, in economic and legal effect a taking, while it omitted any provision for a payment in money. The omission of a provision for a money payment was intentional and apparently was based upon the assumption by the legislative draftsmen that the substance of the transaction could be determined by the details of the form provided in the legislation. Thus, it may be inferred that Congress accepted Secretary Brinegar's advice that if the *language* of the legislation were language of reorganization, and not language of a taking by eminent domain, there could be a "traditional" re-

[30]This letter is printed at JA 214-20; an accompanying memorandum of the Department of Transportation, together with the Department's recommendations to Congress as to the text of the draft legislation, are reproduced in full in the Appendix hereto. Secretary Brinegar advised Congress in part: "The only alternative would be to have the Government put up the cash or bonds [necessary to effect a taking by condemnation], without recourse to the Corporation. *That is clearly unacceptable.*" JA 215 (emphasis added).

organization patterned after the New Haven's inclusion in Penn Central. Conrail would thus be created by Congress to be the inclusion "partner" of Penn Central; and, as the "first step" of its "reorganization," Penn Central would be required to convey to Conrail those of its rail assets which were designated by USRA.

The constitutional validity of this result is being challenged here by the New Haven Trustee's cross-appeal. For the purposes of the instant appeals, however, it suffices to note that the legislative history establishes the firm intent of Congress that the Treasury of the United States should not be exposed to any financial liability as guarantor of the securities to be issued by Conrail in exchange for the rail properties of Penn Central and other railroads required to be conveyed to Conrail; and that USRA itself could not undertake voluntarily the role of a guarantor of Conrail's securities unless authorized to do so by a joint resolution of the Congress.

B. There Is No Original Jurisdiction in the §2284 Court to Enter a Declaratory Judgment that, if Implementation of the RRRA Results in an Inadequately Compensated Taking, the United States Will Be Liable in the Court of Claims

No court, other than the United States Court of Claims, has original jurisdiction to decide that the United States is liable in money damages for a taking of private property under the Fifth Amendment in the case at bar.[31] *United States v. Sherwood, supra.* And even the Court of Claims itself has no subject-matter jurisdiction to issue declaratory judgments decreeing that, if certain steps were followed, the United States would be liable *in futuro. United States v. King, supra.* The jurisdictional defense of the United States affirmed in the *King* case is part and parcel of the doctrine of sovereign immunity, and is not affected by procedural statutes, such as 28 U.S.C. §2201 concerning the remedy of declaratory judgments. The rule of law is clear: the United States may not be sued save as it consents to be sued; the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit; the consent to suit must be unequivocal and directly expressed; and a waiver of sovereign immunity cannot be implied. *United States v. King, supra; United States v. Sherwood, supra,* at 586, 589-91; *Mine Safety Appliances Co. v. Forrestal,* 326 U.S. 371 (1945); *Lynch v. United States,* 292 U.S. 571, 581-82 (1934).[32] The jurisdiction of the Court of Claims is clearly limited to

[31]There is one unimportant qualification: 28 U.S.C. §1346(2) grants the District Courts concurrent jurisdiction over claims of less than $10,000 arising under the Constitution. If, contrary to what is being done in the case of the RRRA, the United States were authorized by statute specifically to exercise the sovereign's power of eminent domain, the District Courts would have jurisdiction under 28 U.S.C. §1358, and the Court of Claims would have no such jurisdiction.

[32]In the *Lynch* case, Mr. Justice Brandeis' opinion for a unanimous Court held that Congress retains the power at any time to withdraw the

(footnote continued on next page)

claims for the present recovery of money presently due and owing from the United States. *United States v. King, supra; Glidden Co. v. Zdanok, supra.*

Furthermore, even the question whether the RRRA intended to exclude the possibility of railroad trustees bringing suit in the Court of Claims against the United States is a matter which only the Court of Claims can initially resolve, since it has exclusive jurisdiction both to determine its own jurisdiction and to adjudicate the substantive merit, or lack thereof, of all claims for money damages asserted against the United States of the magnitude involved in this case. Thus, if the Court of Claims were to determine that the RRRA violated the Penn Central's Fifth Amendment rights, that it had jurisdiction to hear the case, and that as a result of implementing the RRRA a substantively valid cause of action arose entitling Penn Central to recover judgment against the United States in a specified amount, the United States could seek review of that decision in this Court.[33] If the Court of Claims, on the other hand, were to hold that it lacked jurisdiction to consider the action because the RRRA itself constituted a withdrawal by Congress of the limited waiver of sovereign immunity otherwise available, or that, while it had jurisdiction, the RRRA itself precluded a substantive cause of action for money damages against the United States, the Penn Central Trustees could likewise seek review in this Court. These are the ways con-

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(footnote continued from preceding page)

sovereign's consent to be sued even though it would deprive individuals of any remedy for a claim which (the Court held, at pp. 579-580) was based upon an abrogation of a contract in contravention of the taking clause of the Fifth Amendment.

[33]28 U.S.C. §1255. Two methods of review are provided: (1) writ of *certiorari*, and (2) certification by the Court of Claims of any question of law.

templated by law for exploration of the Tucker Act remedy in the present context.[34]

The Penn Central Trustees, as Appellants in these cases, do not assert their "Tucker Act remedy" argument merely by way of asserting an "adequate remedy at law" defense against the Appellees. The Trustees' brief here makes it clear that the relief the Trustees sought by their motion for summary judgment below is no less than a declaratory judgment that:

> "(a) If the *market value* of the consideration provided under the Act, determined as of the date of payment of that consideration, falls below the just compensation to which the Penn Central estate is constitutionally entitled, the Court of Claims *will* have jurisdiction over an action for a taking, *and must enter a judgment against the United States for any remaining amount owing;* the only defense open to the United States in that court will be that the value of the consideration paid under the Act is sufficient in amount to constitute the full just compensation necessary to satisfy the Fifth Amendment; and
>
> "(b) *If* it is determined that, by reason of the Act, Penn Central loss operations for the account of the estate *were prolonged past the point of unconstitutionality,* the Court of Claims *will have jurisdiction to award just compensation* to the estate for the taking of property occasioned thereby; the only defense open to the United States in that Court will be that the erosion caused by Penn Central loss operations did not become unconstitutional in amount before the date of conveyance, or that the Special Court has taken account of such erosion and awarded consideration to the estate of sufficient value to satisfy the Fifth Amendment.

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[34]The Penn Central Trustees have thus far refrained from commencing any action under 28 U.S.C. §1491 for the interim taking of their properties produced by implementation of the RRRA.

"In other words, *a bare holding that the jurisdiction of the Court of Claims was not repealed by the Act would be insufficient* if the United States were to retain defenses which, if successful, could frustrate a Tucker Act remedy as ensuring just compensation to the estate. Merely as one example, we think it clear that the Government must be precluded from arguing in a Court of Claims action that erosion is not compensable on the ground that the Trustees or the Reorganization Court somehow consented to the continuation of rail operations for the account of the estate, and that no taking occured for that reason.

* * *

"Since it would be hazardous, if not impossible, to try to imagine every conceivable defense to a Court of Claims action which ingenious Government counsel might formulate, the only way to ensure that the estate will receive just compensation is to preclude all defenses other than those outlined above." Brief of Penn Central Trustees as Appellants, at 63-64 (emphasis added).

By that position, the Penn Central Trustees urge this Court to limit sharply the doctrine of the *King* and *Sherwood* cases so as to enable them to support the constitutionality of the RRRA. It is clear that, if this Court refuses to formulate such an exception to the *King* and *Sherwood* doctrine, the Penn Central Trustees join the Appellees in these cases in asserting that the RRRA is unconstitutional and that the bare holding that Tucker Act jurisdiction was not withdrawn by the RRRA is insufficient to save the RRRA.[35]

[35]Aside from the Tucker Act remedy argument, the Penn Central Trustees' brief as Appellants in these cases is largely in agreement with the positions of the Appellees and with the position of the New Haven Trustee as Cross-Appellant. See particularly the Trustees' brief at 41-47 (as to interim erosion) and 54-62 (as to the inadequately compensated permanent taking); and, with respect to concurrence with the New Haven Trustee's cross-appeal, see the Trustees' brief at 48-52, arguing that the issues of whether the RRRA effects a permanent taking and the existence or non-existence of a Tucker Act remedy to provide just compensation therefor are not premature and are ripe for decision.

The Penn Central Trustees' argument that a Tucker Act remedy exists produces an anomalous judicial review pattern. The Trustees must assume, necessarily, that the Special Court's §303(c) decision, when reviewed by this Court under §303(d), would be binding on the Court of Claims under a doctrine of *res judicata* or collateral estoppel. There would thus be, under the Trustees' approach, not one but two declaratory judgments binding upon the Court of Claims in anticipation of any Court of Claims action being commenced: one by this Court on the present appeals, and a second by the Special Court in the §303(c) decision (which would be reviewed here under §303(d)). Apparently, therefore, the role thereafter of the Court of Claims, under the Trustees' approach, would be limited to adjudicating whatever remaining defenses could be deemed still open to the United States.

In this Court, it is recognized that the doctrine of *stare decisis* does not bar a revision or reversal of the *King* and *Sherwood* decisions. It should be significant to the Court, however, that the Appellees, the parties with the greatest financial stake in the outcome of this litigation, and presumably having the most to gain from this Court's entering a Tucker Act declaratory judgment as urged by the Penn Central Trustees, do *not* support that position. On the contrary, Appellees recognize that under the Constitution, Congress has the last word on appropriations. A declaratory judgment as sought by the Penn Central Trustees will, it is submitted, be at once a pyrrhic victory for the creditors and an advisory opinion by the judicial branch which is in no way binding upon Congress.

C. In the RRRA, Congress Intended to Preclude Any Substantive Cause of Action for Money Damages Against the United States in the Event that the Consideration Specified in the RRRA Was Adjudged to Be Constitutionally Inadequate

The Tucker Act is a jurisdictional statute, not a statute which creates substantive rights or remedies. The principal function of the limited grant of jurisdiction to the Court of Claims is to waive the defense of sovereign immunity in cases within the jurisdiction conferred. However, the jurisdictional grant (and waiver of sovereign immunity) is broader in scope than the nature of the valid actions which can be sustained under it. That is to say, not all cases which may be properly brought before the Court of Claims have substantive merit. The United States, USRA and the Penn Central Trustees fall into error in assuming that, so long as jurisdiction under the Tucker Act was not impliedly withdrawn, a valid substantive cause of action automatically exists merely because there is a claim properly founded on the Constitution. While the text of 28 U.S.C. §1491 may literally support that construction, it is not one which is judicially sanctioned. As the Court of Claims stated in *Eastport S.S. Corp. v. United States*, 372 F. 2d 1002 (Ct. Cl. 1967):

> "Section 1491 of Title 28 of the United States Code allows the Court of Claims to entertain claims against the United States 'founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.' But it is not every claim involving or invoking the Constitution, a federal statute, or a regulation which is cognizable here. The claim must, of course, be for money. Within that sphere, the non-contractual claims we consider un-

der Section 1491 can be divided into two somewhat overlapping classes—those in which the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum; and those demands in which money has not been paid but the plaintiff asserts that he is nevertheless entitled to a payment from the treasury. In the first group (where money or property has been paid or taken), the claim must assert that the value sued for was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation. In the second group, where no such payment has been made, the allegation must be that the particular provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum [citation and footnote omitted].

* * *

"The second category includes the varied litigations in which we are urged to hold that some specific provision of law embodies a command to the United States to pay the plaintiff some money upon proof of conditions which he is said to meet. Familiar examples are inverse eminent domain by a taking without formal proceedings (United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed 1206 (1946)) [other examples and citations omitted].

* * *

"In this type of case, we have held, 'a claimant who says that he is entitled to money from the United States because a statute or a regulation [or the Constitution] grants him that right, in terms or by implication, can properly come to the Court of Claims, at least if his claim is not frivolous but arguable' [citation omitted].

"Monetary claims which cannot be brought within these limits are beyond this court's jurisdiction, even though they may intimately involve the Constitution, an Act of Congress, or an executive reg-

> ulation. This is the reverse of saying that this court is not concerned with any and all pecuniary claims against the Federal Government, simply because they rely upon (and in that sense are 'founded upon') an aspect of federal constitutional, statutory or regulatory law. Where the claimant is not suing for money improperly exacted or retained (the first class defined above), the historical boundaries of our competence have excluded those instances in which the basis of the federal claim—be it the Constitution, a statute, or a regulation—cannot be held to command, in itself and as correctly interpreted, the payment of money to the claimant, but in which some other principle of damages has to be invoked for recovery. A federal criminal defendant, for instance, who has been invalidly convicted or deprived of his liberty because of a violation of the Constitution or an Act of Congress cannot obtain compensation under 28 U.S.C. §1491 for his loss (although remedies may occasionally be available under the unjust conviction sections (28 U.S.C. §§1495, 2513) or some parts of the civil rights legislation) [footnote omitted].
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> * * *
>
> "Under Section 1491 what one must always ask is whether the constitutional clause or the legislation which the claimant cites can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained. If not, this court can not give relief under Section 1491, although some separate general principle—arising for example from tort law—might lead to a remedy in another forum or under some special relief provision." 372 F. 2d at 1007-09.

The principles set forth in the *Eastport Steamship* decision define the question for decision here: is there a substantively valid cause of action in the Court of Claims if (a) the RRRA was not intended as an eminent domain statute, but (b) in fact is bound to result

in inadequately compensated takings of private property for public use if not enjoined. The issue is *not*, as suggested by some Appellants, whether there is an implied repeal of the Tucker Act; the issue is the proper statutory construction of the RRRA in light of the jurisdiction conferred by the Tucker Act, and the limitation that valid causes of action against the United States must be constructed upon statutory as well as constitutional underpinnings.

The New Haven Trustee has not asserted at any time that the jurisdiction of the Court of Claims under 28 U.S.C. §1491 was impliedly repealed by the RRRA. Rather, his position is that Congress has acted in the RRRA in a preclusionary fashion with respect to the substantive cause of action. The Penn Central Trustees have *no* substantive cause of action, under the Tucker Act, for a taking for which they can invoke the jurisdiction of the Court of Claims, because Congress specifically and advisedly legislated the exclusive means of paying compensation for the properties made subject to mandatory conveyances under the RRRA. Since no monies can be paid out of the Treasury of the United States "but in Consequence of Appropriations made by Law" (Constitution, Art. I, Sec. 9, Cl. 7), the Congress has the last and only effective word on whether there shall be any payment for a taking.

This position is sustained by the text of the RRRA, its legislative history, and applicable rules of construction:

(a) The RRRA contains substantive provisions with respect to compensation which appear undoubtedly to have been intended by Congress to be exclusive, namely, those contained in §§206(d)(1), 303(a)(l), 303(c)(1), 303(c)(2)(B), and 303(c)(2)(C). It likewise ex-

pressly made the §303(c) determinations of the Special Court exclusive in §209(a), and withdrew the jurisdiction of all courts (including, presumably, courts convened pursuant to 28 U.S.C. §2284) to restrain conveyances pursuant to the final system plan after it has been certified to the Special Court. (§303(b)(2), last sentence). These compensation and jurisdiction provisions seem wholly inconsistent with the construction that Congress in enacting the RRRA intended that private claimants to the estate of a railroad would be given the opportunity to litigate once in the Special Court, appeal that judgment to this Court, and, if not satisfied with its judgment, commence a second round of litigation in the Court of Claims.

(b) The doctrine of *inclusio unius est exclusio alterius*, combined with the legislative history of the RRRA,[36] virtually requires the conclusion that Congress did not intend to subject the Treasury of the United States to an obligation to pay in legal tender for properties required to be conveyed to Conrail under the authority of the RRRA.

(c) While an obligation on the part of the United States to pay for properties taken can be implied from legislation, the cases so holding have involved statutes in which Congress clearly did not attempt to prescribe that the consideration to be issued for the taking assume a form other than a money judgment against the United States.[37]

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[36]For example, see the colloquy between Reps. Adams and Kuykendall, quoted *supra* at 18.

[37]See, *e.g.*, *Hurley v. Kincaid*, *Yearsley v. W. A. Ross Construction Co.* and *United States v. Causby*, *supra*, and other cases cited in Appellants' briefs. For a discussion of *Hurley v. Kincaid* and related cases, see *infra* at 44-46. These cases are all examples of "inverse eminent domain," a doctrine which comes into play when a statute can fairly be interpreted as authorizing the executive branch to effect a taking without formal eminent domain proceedings.

(d) Where by proper statutory construction it is determined that Congress has legislated that a taking shall not be paid for in money by the United States, the doctrine of separation of powers, and the respect due to Congress' decisions as to legislative matters, prevent the judicial branch from permitting a taking to proceed on the assurances of the executive branch that the United States will be liable to the owners of the property in the Court of Claims. See *Youngstown Sheet & Tube Co. v. Sawyer, supra* (a taking by the executive department was not authorized by Congress); *Hooe v. United States*, 218 U.S. 322 (1910) (a taking by the executive department was not authorized if the amount exceeded limits set forth in Congressional budget appropriations).

Hooe v. United States, supra, is precisely in point. *Youngstown, supra*, is significant in this context because the Court, in response to the contentions by the Government that the steel mill owners had an adequate remedy at law for President Truman's unauthorized seizure,[38] cited *Hooe* as indicating substantial doubt whether a remedy in fact existed in the Court of Claims.

The facts in *Hooe* were as follows: Congress had appropriated a fixed sum of money for a government agency to lease part of a privately owned building.

[38]In this Court, the Secretary of Commerce argued that 28 U.S.C. §1491, giving the Court of Claims jurisdiction "upon any claim against the United States . . . founded . . . upon . . . any regulation of an executive department" was applicable "regardless of the constitutional validity of the President's taking," and supplied an adequate remedy at law. Brief of Acting Attorney General and Solicitor General Perlman, May, 1952, in *Sawyer v. Youngstown Sheet & Tube Co.* (No. 51-745) at 70, 2 The Steel Seizure Case 778. *Youngstown* is thus not distinguishable on the ground argued by USRA's Brief at 46 n. 56. It is further significant that the Government in *Youngstown* relied upon *Hurley v. Kincaid*, and argued that it was a panacea for all cases of uncompensated takings. *Id.* at 769-71.

The agency negotiated a one-year lease covering all floors except the basement, but the agency also occupied the basement. After the lease expired, the landlord demanded more rent for the building, including additional rent for the basement. The agency agreed the request was reasonable, and promised to seek a supplemental appropriation from Congress for the additional rent. Based on this promise, the landlord permitted the agency to remain in the premises even though it paid on a current basis only the rent provided in the initial lease. This continued for three more years, and Congress declined to approve any supplemental appropriation. Suit was brought in the Court of Claims. The Supreme Court held that the United States was not liable to the plaintiff on the ground that there was no cause of action based on implied promise, or the Fifth Amendment taking clause, because Congress had not authorized a taking at any price, but only the use of private property at the rental provided for in the Congressional appropriation. That the Congress had not authorized the payment of *any* rent for the basement area of the building was held to bar any cause of action under a *quantum meruit* theory, or a taking theory, because if private property was "taken," it was by action of the executive branch not concurred in by the Congress.

Cases such as *Hurley v. Kincaid, supra,* involve a Congressionally authorized taking where it is clear that Congress expected to subject the United States to suit for damages, a situation quite unlike the case at bar. *Hurley v. Kincaid* involved a statute which authorized the Government to acquire either fee title or an easement for the purpose of flooding privately-owned lands in the event the Government determined that it would be more feasible to allow flood waters to overflow such lands rather than to construct levees to con-

trol flood waters. The statute provided that "No liability of any kind shall attach to or vest upon the United States for any damage from or by floods or flood waters at any place. . . ." However, a proviso to that provision made it clear that the liability of the United States precluded by the statute was liability in an action in tort for consequential damages, not liability for an actual taking of an easement for flooding. In the *Kincaid* case, the Government resisted using its eminent domain powers to take a flooding easement on the ground that it was unnecessary because the government program would not subject Kincaid's property to additional destructive flood waters. In the District Court, the factual finding was made against the Government that the plan would, in fact, cause additional destructive flood waters to pass over Kincaid's land. An injunction was accordingly issued, and was affirmed by the Court of Appeals. This judgment was reversed by this Court on the ground that:

> "Kincaid concedes that the Act is valid and that it authorizes those entrusted with its execution to take his lands or an easement therein. . . . If that which has been done, or is contemplated, does constitute such a taking, the complainant can recover just compensation under the Tucker Act in an action at law as upon an implied contract, since the validity of the Act and the authority of the defendants are conceded." 285 U.S. at 103-04.

The differences between the RRRA and the statute involved in *Hurley v. Kincaid* are numerous and significant. First, unlike the statute at issue in *Kincaid*, the RRRA contains no provision whatsoever expressly authorizing the United States to take property or an easement therein by eminent domain. Second, unlike *Kincaid*, the RRRA includes express provisions mandating that payment for the properties required to be conveyed take the form of stock and other securities

of, and a deficiency judgment against, a corporation created pursuant to the Act. Had the statute in *Hurley v. Kincaid* provided that farmers whose land was flooded would receive shares of stock in TVA, as determined by a specially constituted court, and had this Court held that, in addition, Kincaid had a remedy for money damages against the United States in the Court of Claims, then the case might be of some relevance to the instant case. Third, Kincaid conceded, as the Court noted, that the statute involved was a constitutionally valid enactment;[39] the New Haven Trustee and the other Appellees here make no such concession.

These differences, it is submitted, are controlling. In the RRRA, furthermore, unlike the statute involved in *Hurley v. Kincaid*, no intention of Congress to effect a compensable taking is expressed, even though the RRRA defines with particularity the actions which government agencies are to cause to be done. While these actions will have the legal effect of an uncompensated or inadequately compensated taking, they do not express a Congressional intention to exercise the eminent domain power. The legislative history is clear—Congress was acting under a misapprehension as to the extent of its Bankruptcy Clause powers. Congress believed that invocation of the word "reorganization" would have the legal effect of avoiding what is, in substance, a taking from being adjudged to be an exercise of the eminent domain power. In the words of Senator Hartke, floor manager for the bill in the Senate:

> "We are providing that the creditors of this corporation would be required to take common stock

[39]Had 28 U.S.C. §§2282 and 2284 been in effect at the time, it may be questioned whether Kincaid would have persuaded a three-judge court to issue an injunction in the light of that concession.

in the *new quasi-government operation.* In other words, they are exchanging their present security interest in the rail properties for common stock in the new corporation.

"The railroad properties then become the properties of the new corporation free and clear of liens and encumbrances. In other words, the assets are being transferred and the rights are being changed. The nonrailroad property will remain in the bankruptcy court to be dealt with by them. One can talk about what is available if the railroad is liquidated and put through the wringer, but even then the chances of these creditors getting their money is relatively slim, and *this country cannot afford cessation of rail service* while the railroads are put through the wringer. So what, in effect, is called the 'cram down' theory forces them to accept this kind of settlement and judges have ruled that this is fair." (Remarks of Senator Hartke; 119 Cong. Rec. S 23783-4 (daily ed. December 21, 1973); emphasis added).

This passage fairly summarizes Congressional intent as regards authorizing any taking under the RRRA. It constitutes (i) a recognition that Conrail is indeed a "new quasi-government operation;" (ii) a specification of an intent to free the rail properties of railroads in reorganization from existing liens of creditors; (iii) a statement of the policy underlying the RRRA that "this country cannot afford cessation of rail service while the railroads are put through the wringer;" and (iv) an expression of the legal concept accepted by Congress, to wit: that the "cram-down theory" (presumably a reference to §77(e)) will force creditors "to accept this kind of settlement" and that "judges have ruled that this is fair."

It is submitted that the legislative history is wholly antithetical to any theory that the RRRA was intended to be a Congressionally authorized taking statute. In a

decision which predated his opinion in *Hurley v. Kincaid* by seven years (and which is not cited in any of the Appellants' briefs), Mr. Justice Brandeis observed:

> "There can be no recovery under the Tucker Act if the intention to take is lacking. *Tempel v. United States*, 248 U.S. 121. Moreover, the Act did not confer authority to take a business. In the absence of authority, even an intentional taking cannot support an action for compensation under the Tucker Act. *United States v. North American Transp. & Trading Co.*, 253 U.S. 330." *Mitchell v. United States*, 267 U.S. 341, 345 (1925).

As in *Hooe v. United States, supra*, Congress did not intend in the RRRA to exercise the sovereign's eminent domain powers to effect a compensable taking. Rather, it intended to accomplish a non-compensable taking in the belief that this could be achieved through exercise of Bankruptcy Clause powers. The court below has correctly found that Congress has violated the Fifth Amendment rights of creditors and stockholders of Penn Central in the process. But that finding does not convert Congress' intent into one of effecting a compensable taking by exercise of the eminent domain power. The court below was, therefore, on sound ground in refusing, as a matter of separation of powers, to impute to Congress an intent to effect a compensable taking. Under the doctrine of the *Hooe* and *Mitchell* cases, unless this Court is able to impute this intent to Congress as a matter of fair construction of the legislation, it cannot find that a substantively valid Tucker Act action would come into existence at the conclusion of the Special Court's §303(c) proceedings.

Likewise inapposite to the present decision is *Silesian American Corp. v. Clark*, 332 U.S. 469 (1947), cited by the Penn Central Trustees as a case "where the 'taking' statute at issue (the Trading with the En-

emy Act) contained no provision for compensation . . ." (Penn Central Trustees' Brief at 27). This characterization is inaccurate. Section 9(a) of that Act, 50 U.S.C. App. §9(a), provides in pertinent part:

> "Any person not an enemy or ally of an enemy claiming any interest, right, or title in money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder . . . may file with the said custodian a notice of his claim . . . and the President . . . may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian. . . . If the President shall not so order within sixty days . . . said claimant may institute a suit in equity in the United States District Court . . . to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian. . . ."

Further provisions of §9(a) authorize the President to order the sale of seized property of a person claiming to be not an enemy or an ally of an enemy, such sale to take place while the suit by a claimant is pending, and limit the recovery in the suit to the proceeds of the sale unless the claimant

> "files with the court an election to waive all claims to the net proceeds, or any part thereof, and to claim just compensation instead."[40]

Section 7(c) of the Trading with the Enemy Act, 50 U.S.C. App. §7(c), provides, in pertinent part:

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[40]For a definitive interpretation of the continued applicability of §9(a) in light of the 1941 amendment of §5(b), see *Clark v. Uebersee Finanz-Korporation*, 332 U.S. 480 (1947), decided the same day as the *Silesian American* case.

> "The sole relief and remedy of any person having any claim to any money or other property . . . paid over to the Alien Property Custodian . . . or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property . . . shall be limited to and enforced against the net proceeds received therefrom . . . ."[41]

The Trading with the Enemy Act does indeed present some striking analogies to the RRRA, although the facts in the *Silesian American* case are hardly "similar to the present situation." Penn Central Trustees' Brief at 27. One analogy is that Congress, although it clearly authorized takings of private property, did not want to create a situation in which the Alien Property Custodian could by error subject the United States Treasury to liability of millions or hundreds of millions of dollars.[42] Hence Congress provided a different remedy: a person who claimed that the Alien Property Custodian had misclassified him as an enemy alien could (after exhausting his administrative remedies with the Custodian and the President) bring suit in equity to recover his property.[43] Recognizing, however, that the Government might find it prudent to sell the property during the course of litigation seeking its recovery, Congress provided that

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[41]It is noteworthy that in §7(c) of the Trading with the Enemy Act, Congress expressly limited the substantive cause of action available to claimants, and did not repeal the Tucker Act jurisdiction over such claims. Congress obviously believed that it was unnecessary to repeal the Tucker Act jurisdiction.

[42]For example, the *Interhandel* litigation was a claim by a Swiss Corporation which asserted that it was not controlled by nationals of Nazi Germany and was entitled to recover from the Alien Property Custodian 100% of the stock of General Aniline & Film Corporation; the value of this claim was measured in hundreds of millions of dollars. The case was ultimately settled in the 1960's.

[43]The Tucker Act provides the Court of Claims with jurisdiction only to render money judgments, and in this respect is an inferior remedy to that provided in §9(a) of the Trading with the Enemy Act.

the property could be sold. Not wishing to give the claimant in effect a right to demand that the Government then pay him whichever was the greater, the net proceeds of sale or just compensation (presumably as of the date of taking), Congress provided for a limit on the possible recovery to the net proceeds unless the claimant filed a waiver agreeing to seek only just compensation. The basic analogy to the RRRA in this scheme is that Congress has created in each instance an elaborate judicial machinery for determining issues of value of property and the compensation to be paid therefor. If there is a section of the RRRA which corresponds to §9(a) of the Trading with the Enemy Act, it is §303(c), which vests jurisdiction (within limits) in the Special Court to decide whether transfers made under §303(b) are fair and equitable and, if not, prescribing various substantive remedies, including the power of the Special Court to order Conrail to provide additional securities or to enter a deficiency judgment against Conrail. If, and to the extent that, §303(c) is perceived to parallel §§9(a) and 7(c) of the Trading with the Enemy Act, the intention of Congress in the case of the RRRA to create or permit a substantive cause of action against the United States in the Court of Claims is made even more doubtful.

A lack of a substantive cause of action for takings resulting from implementation of the RRRA would mean that the United States would have a complete defense in a Court of Claims action under the Tucker Act: the defense would rely on Congress' power to declare when and under what circumstances, if at all, the United States Treasury is subject to liability. That power, of course, derives from the express words of Article I, Section 9, Clause 7:

> "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law . . . ."

The same power was exercised by Congress in the Trading with the Enemy Act to deny a person entitled to Fifth Amendment protection a substantively valid cause of action, or to limit his recovery if his action could not, consistent with the Constitution, be denied. Furthermore, Congress did not expressly repeal the Tucker Act jurisdiction as to claims arising under §9(a) of the Trading with the Enemy Act. Presumably, if any claimant had filed a complaint in the Court of Claims, it would have been dismissed not on jurisdictional grounds but for want of a valid cause of action. Such a claimant's cause of action would not have been valid because (a) he had not exhausted administrative remedies, and upon discovering the claimant to be a non-enemy alien the President would order his property restored, or (b) if he had exhausted administrative remedies, he had not exhausted his judicial remedies in equity, or (c) if his property had been sold, he was not entitled to just compensation but only to the proceeds of the sale unless he signed the waiver. Although §9(a) is not wholly clear on this point, if the claimant signed the waiver, his claim for just compensation would presumably be adjudicated by the District Court under §9(a), from which he could appeal to the Court of Appeals and, if not satisfied, petition this Court for a writ of *certiorari*. It seems wholly untenable that, after judgment in this Court affirming the District Court's decision, such a claimant could start all over again in the Court of Claims under 28 U.S.C. §1491.

If that correctly states the law as applied under the Trading with the Enemy Act, it must be concluded that the *jurisdiction* of the Court of Claims is broader in scope than the area of substantively valid causes of action. Like all courts, the Court of Claims has cases presented to it that, for one reason or another, are without substantive merit. Congress need not concern

itself with repealing jurisdictional legislation pertaining to the Court of Claims when it perceives that no substantively valid cause of action could ever be established, or when it deliberately sets out to preclude the same. The nub of the New Haven Trustee's position on this point is that Congress intended to preclude a Tucker Act cause of action by any person aggrieved by the §303(c) decision of the Special Court, as reviewed on appeal by this Court pursuant to §303(d).

The differences, as well as the analogies, between the RRRA and the Trading with the Enemy Act are revealing. Railroad creditors as a class are apparently viewed as having a lesser degree of Fifth Amendment rights than non-enemy aliens, since they can have stock and other securities forced upon them, and "the 'cram-down' theory forces them to accept this kind of settlement."[44] Unlike non-enemy aliens, railroad creditors would not be allowed even to elect to receive the proceeds of the sale of rail properties: for example, if Conrail takes the Northeast Corridor rail properties and sells them to Amtrak for $500 million as contemplated by the RRRA,[45] Conrail keeps the proceeds. Under the Trading with the Enemy Act, the non-enemy alien has a choice of accepting net proceeds of the sale of his property or just compensation.[46]

Fort Berthold Reservation v. United States, 390 F. 2d

[44]See Senator Hartke's remarks, quoted in full *supra* at 46-47.

[45]See §206(c)(1)(C) and §601(d) of the RRRA. USRA has advised the Special Court (at the oral argument on August 27, 1974) that the "missing" $500 million in §210 not accounted for by the $1 billion of USRA obligations which may be issued to Conrail is intended to be allotted to Amtrak for this purpose.

[46]Judge Fullam observed in his Secondary Debtor 180-day decision:

"Certainly if Congress were to give Amtrak the powers of eminent domain, Amtrak could properly acquire the corridor properties. But I find it difficult to accept the theory that it is constitutionally permissible for the government to achieve that result by the RRRA, without providing the present owners of the property with cash or its equivalent." (JA 155).

686 (Ct. Cl. 1968) is cited in the Penn Central Trustees' Brief (at 16) as being "virtually on all fours with the present situation." *Fort Berthold* arose in the jurisdictional context of the Act of August 13, 1946, §24, 60 Stat. 1049, 1055, which created the Indian Claims Commission with authority to determine certain types of Indian claims against the United States which had occurred prior to the date of the Act, subject to a right to appeal to the Court of Claims; and another provision[47] gave the Court of Claims original jurisdiction to determine similar claims thereafter arising. In *Fort Berthold*, an earlier act of Congress[48] had authorized the taking of the claimants' land and arbitrarily decreed the price ($2.50 per acre) to be paid therefor. Except for the fact that Congress relented in 1946 and extended to Indian claimants rights similar to those enjoyed by other Americans since 1887, and specifically refrained from imposing the six-year statute of limitations applicable to Tucker Act suits (28 U.S.C. §2501), these Indian claimants would have been without any substantive remedy in the Court of Claims or any other court for any failure of earlier takings to have accorded them just compensation. Because Congress did relent in the case of Indian claims, these Indian claimants were afforded both an administrative hearing and a right to appellate judicial review in the Court of Claims, and the Court of Claims upheld certain of their claims some 58 years after the takings occurred. If all inadequately compensated takings were subject to suit in the Court of Claims based on 28 U.S.C. §1491, these claims could have been adjudicated long ago. It is submitted that reliance on *Fort Berthold* by the Penn Central Trustees for construction of the RRRA is wholly misplaced.

[47]Codified as 28 U.S.C. §1505 by Act of May 24, 1949, c. 139, §89(a), 63 Stat. 102.

[48]Act of June 1, 1910, 36 Stat. 455.

ley v. W. A. Ross Construction Co., supra, is not in *Years* the same reason as *Hurley v. Kincaid, supra.* In point fo private riparian owners brought an action for *Yearsley,* to their land against a government contractor damage on a river improvement project. Chief Justice working said, "it is clear that if this authority to carry Hughes project was validly conferred, that is, if what out the e was within the constitutional power of Con- was don ere is no liability on the part of the contractor gress, t cising its will." (309 U.S. at 20-21). Chief Jus- for exe hes then discussed the case on the theory that tice Hu contractor had done "constituted a taking of what th laintiffs'] property for which compensation their [made." On this theory, he held the statute must b ce the Fifth Amendment does not require pay- valid sir advance of the taking,[49] and the plaintiffs had ment in ly in the Court of Claims, citing *Hurley v.* a reme *supra.* *Kincaid,*

Case s such as *Hurley v. Kincaid* and *Yearsley* must be contras ed with cases such as *Land v. Dollar,* 330 U.S. 731 (1 47), in which plaintiffs were the stockholders of Dol ar Steamship Lines, Ltd. Facing difficult fi- nancial straits, in 1938 plaintiffs entered into a con- tract wi th the Maritime Commission under which they deliver d their stock to the Commission in exchange for fin ancial assistance and operating subsidies. In 1943, the plaintiffs demanded the return of the shares, and the Maritime Commission refused on the groun that it had acquired title to the shares. The plaintiffs sued in equity to recover their shares. The

[49]The New Haven Trustee recognizes, of course, that Congress can exercise the sovereign's eminent domain power and take private property subject to later payment of just compensation, plus interest from the date of taking, as judicially determined. However, the issue before the Court in these cases is, quite simply, whether Congress authorized such a taking and agreed to pay just compensation therefor, not whether Congress has constitutional power so to do.

suit was dismissed by the district court as an unconsented suit against the government. This Court reversed, holding that if the plaintiff's contentions were proven, they would be entitled to equitable relief to secure possession of their shares, citing *United States v. Lee*, 106 U.S. 196 (1882) and a series of cases which followed *Lee*. If *Hurley v. Kincaid* stood for the proposition for which it is cited by Appellants, *Land v. Dollar* should have been decided on the ground that the plaintiffs were in the wrong court seeking the wrong remedy, and they should have been remitted to an action for damages under the Tucker Act for the value of their shares taken by the Maritime Commission.

Land v. Dollar, supra, was then followed by two cases which, if Appellants were correct, should also have been decided by reference to *Hurley v. Kincaid, supra*, but were instead decided on the basis of sovereign immunity. In its 1949 decision in *Larson v. Domestic & Foreign Commerce Corp., supra*, the Court reconciled two divergent lines of sovereign immunity cases, one represented by *United States v. Lee, Land v. Dollar*, and *Goltra v. Weeks*, 271 U.S. 536 (1926), all holding on their facts that sovereign immunity does not bar equitable relief, and the other represented by *Goldberg v. Daniels*, 231 U.S. 218 (1913), holding that sovereign immunity is a bar. Chief Justice Vinson, for a majority of the Court, held that sovereign immunity was a bar in a case where plaintiff did not claim that the statute under which the government officer acted was itself unconstitutional, thus confining the *Lee* doctrine to cases of asserted unconstitutionality. *Lee* itself, however, should have been overruled expressly in *Larson*, if *Hurley v. Kincaid* stands for the Appellants' proposition that all governmental takings which violate the Fifth Amendment are compensable in actions under the Tucker Act, particularly since *Lee* predated the en-

actment of the Tucker Act. Mr. Justice Douglas concurred in the result in *Larson*, but would have limited its holding to government procurement cases, thus leaving the *Lee* line of cases otherwise in force. Mr. Justice Frankfurter dissented on the ground that *Larson* should have been governed by *Lee*, *Land v. Dollar* and *Goltra v. Weeks*. Both the concurring opinion and the dissent in *Larson* are inconsistent with the rule of law which Appellants claim is to be derived from *Hurley v. Kincaid*.

The second of the post-1949 sovereign immunity cases was *Malone v. Bowdoin*, 369 U.S. 643 (1962), in which plaintiffs filed an action of ejectment against a forest service officer of the United States claiming title to land occupied by the officer. The District Court dismissed the case on grounds of sovereign immunity; the Court of Appeals reversed, citing the *Lee* case. This Court (by a 4 to 3 vote) reversed, and held that the action was barred by sovereign immunity because the case was governed by *Larson*. The opinion of the majority, by Mr. Justice Stewart, has an important bearing on the scope to be given to *Hurley v. Kincaid*, *supra*:

> "While it is possible to differentiate many of these cases [e.g., *Lee*, *Land v. Dollar*] upon their individualized facts, it is fair to say that to reconcile completely all decisions of the Court in this field prior to 1949 would be a Procrustean task.
>
> "The Court's 1949 Larson decision makes it unnecessary, however, to undertake that task here . . . .
>
> "While not expressly overruling United States v. Lee, *supra*, the Court in Larson limited that decision in such a way as to make it inapplicable to the case before us. Pointing out that at the time of the Lee decision there was no remedy by which the

> plaintiff could have recovered compensation for the taking of his land, the Court interpreted Lee as simply 'a specific application of the constitutional exception to the doctrine of sovereign immunity.' 337 U.S., at 696. So construed, the Lee case has validity only 'where there is a claim that the holding [of property of the plaintiff] *constitutes an unconstitutional taking of property without just compensation.*
>
> "No such claim has been advanced in the present case." 369 U.S. at 646-48 (footnote omitted; emphasis added).

Since in the present case plaintiffs asserted that their property (i.e., their mortgage liens which would be divested pursuant to §303(b)(2)of the RRRA, and their right to earn a return on their investment in such mortgages) is threatened with an unconstitutional taking, it follows (on the basis of *Malone v. Bowdoin*) that the plaintiffs in the instant cases meet the test established by *Malone v. Bowdoin* and *Larson* for the applicability of the *Lee* decision. And if the reasoning of the dissent in *Malone v. Bowdoin* is followed, it is clear *a fortiori* that the Appellees have established their right to injunctive relief. Speaking for the dissent in *Malone v. Bowdoin*, Mr. Justice Douglas would have limited the *Larson* holding to government procurement cases. He observed:

> "If it [the United States] is aggrieved by the state or federal court ruling on title, it can bring its arsenal of power into play. Eminent domain—with the power immediately to take possession—is available.
>
> "If, however, the citizen must bow to the doctrine of sovereign immunity, he is precluded from any relief except a suit for damages under 28 U.S.C. §1346(b) or 28 U.S.C. §1346(a)(2), or 28 U.S.C. §1491. *This places the advantage with an all-powerful*

Government, not with the citizen." 369 U.S. at 650 (emphasis added).[50]

It should be observed in the case of the RRRA, that the alternative of the Government bringing "its arsenal of power into play. Eminent domain—with the power immediately to take possession—" is likewise available. See New Haven Trustee's Brief as Cross-Appellant at 88-92.

Larson and *Malone v. Bowdoin* were also followed in *Dugan v. Rank*, 372 U.S. 609 (1963), which is another in the series of flooding and riparian ownership cases exemplified by *Hurley v. Kincaid, supra.*[51] An action was brought in *Dugan* to enjoin the United States from impounding waters as part of a dam project thereby making plaintiff's agricultural land less valuable. The District Court granted an injunction, holding that the United States had consented to suit under the McCarran amendment, 43 U.S.C. §666. The Court reversed, not on the ground of any adequate remedy at law, but because the action was barred by sovereign immunity, citing *Larson* and *Malone v. Bowdoin*, and the McCarran amendment did not apply. Mr. Justice Clark observed:

[50]The Court has on other occasions refused to construe an eminent domain statute so narrowly that a citizen would be left only with a remedy in the Court of Claims. See e.g., *Catlin v. United States*, 324 U.S. 229, 241 (1945):

"While the language and the wording of the act [Declaration of Taking Act of February 26, 1931, 46 Stat. 1421] are not wholly free from doubt, we see no necessary inconsistency between the provisions for transfer of title upon filing of the declaration and making of the deposit and at the same time preserving the owner's pre-existing right to question the validity of the taking. . . . The alternative construction, that title passes irrevocably, leaving the owner no opportunity to question the taking's validity *or one for which the only remedy would be to accept the compensation which would be just if the taking were valid, would cause serious question concerning the statute's validity.*" (emphasis added).

[51]Other "flooding" cases include *Jacobs v. United States*, 290 U.S. 13 (1933); *United States v. Dickinson*, 331 U.S. 745 (1947). Cf. *United States v. Causby*, 328 U.S. 256 (1946) (low flights of military aircraft over a chicken farm).

"Since the Government, through its officers here, had the power, *under authorization of Congress*, to seize the property of the respondents . . . . *and this power of seizure was constitutionally permissible*, as we held in [*Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958)], there can be no question that this case comes under the rule of Larson and Malone, *supra*. The power to seize which was granted here had no limitation placed upon it by the Congress. . . ." 372 U.S. at 622-23 (emphasis added).

If the RRRA were worded differently, no doubt it could have been sustained as a grant by Congress to the executive branch to seize plaintiff's property (i.e., their mortgage liens and their right to earn a return on their investment) as well as Penn Central's rail properties. However, it is not so worded. Not a single provision of the RRRA can fairly be interpreted as saying that Congress expressly authorized USRA, if necessary, to take by eminent domain the property of Penn Central and of its mortgage lien creditors. On the contrary, the *Amicus Curiae* brief filed in these cases by Rep. Brock Adams (on behalf of 36 Congressmen) states:

"The Tucker Act, 28 U.S.C. 1491 (1970), waiver of the sovereign's jurisdictional immunity was enacted to provide adequate opportunity for expeditious and orderly determination of claims against the government. The Tucker Act deals with the five limited areas of liability to which the government consents. The five areas do not purport to deal with the upholding of other Acts of Congress. This Court has never relied upon the presence of the Tucker Act to uphold the constitutionality of another Act of Congress.

"The logic employed in attempting to argue that the Rail Act is constitutional because of a potential Tucker Act remedy is indeed strained. Each and every act of Congress of a similar nature, irre-

spective of the amount of authorization or the process provided for in any such act, could be constitutionally upheld on the grounds that a future Tucker Act remedy might be invoked. The intent of Congress in passing the Tucker Act was not to insure the constitutionality of potential unconstitutional laws and such a precedent would be very dangerous.

"The Tucker Act remedy in such cases as *United States v. Causby*, 328 U.S. 256 (1945), and *Hurley v. Kincaid*, 285 U.S. 95 (1932), is based upon a lawful government action inadvertently causing injury to a private party which gives rise to a cause of action in the Court of Claims. Such a lawful action by the Government may result in an 'implied taking,' i.e., low-flying airplanes or flooding of property. In any of these cases, however, the original statutory action was proper, i.e., flying military airplanes or carrying out a flood control project." *Id.* at 17-18.

* * *

"The court should *not* at this time consider the availability of a future Tucker Act remedy in considering the constitutionality of the Rail Act. Any Tucker Act remedy must be based upon the facts which show an implied taking or improper erosion of creditor rights if and when the matter is presented to the Court of Claims. Any potential Tucker Act remedy is, therefore, not before this Court. *If this Court should decide at this time that a mechanism of a deficiency judgment against the United States under the Tucker Act is necessary to make this Act constitutional, then the Act must fall* since the legislative history and the language of the Act are clear that no deficiency judgment against the U.S. is authorized by the Act." *Id.* at 21-22 (emphasis added).

Under the doctrine of *United States v. Lee*, *Goltra v. Weeks* and *Land v. Dollar*, *supra*, as limited by *Larson* and *Malone v. Bowdoin*, *supra*, the Court is required to

assess whether the RRRA is constitutionally valid legislation or whether it results in an inadequately compensated taking (either permanent or interim or both) of plaintiffs' property rights. It is submitted that the answer to this question is that Congress did not purport to exercise the sovereign's eminent domain powers and, in any event, specifically intended not to permit a deficiency judgment against the United States Treasury. If, but only if, the Court can first read into the RRRA an intent to exercise the power of eminent domain, can the RRRA be sustained; and only in that event would it follow that the United States has consented to suit in the Court of Claims. If the RRRA is a constitutional exercise of the eminent domain power, the doctrine of adequate remedy at law would be applicable, and the limited exception to sovereign immunity which permits equity actions seeking to restrain the enforcement of an unconstitutional enactment would be inapplicable. The Appellants, however, would put the cart before the horse. They argue that the RRRA *is* constitutional *because* of the availability of a Tucker Act remedy. The law is otherwise: *only if* the RRRA is constitutional because the Congress in fact intended to authorize the exercise of the sovereign's eminent domain power, would there be a Tucker Act remedy. The Court below correctly held that the RRRA is unconstitutional because Congress did not authorize the exercise of the eminent domain power, and accordingly held that there is no Tucker Act remedy for any takings of private property caused by the RRRA.

In *Youngstown, supra,* counsel for the Government similarly put the cart before the horse in arguing:

> "Plaintiffs' argument is that this [Tucker Act] remedy is not available to them unless Secretary Sawyer's acts are supported by statutory or con-

stitutional authority; hence, that the preliminary question whether plaintiffs have an adequate remedy at law hinges on the very merits of the case. We submit, on the contrary, that plaintiffs have a remedy in the Court of Claims, and that therefore the Court need not reach any of the constitutional questions in order to decide that an injunction may not issue." Brief of Acting Attorney General and Solicitor General Perlman, May, 1952, in *Sawyer v. Youngstown Sheet & Tube Co.* (No. 51-745), at 55-56, 2 The Steel Seizure Case 763-64.

In these cases, the United States and USRA make precisely the same argument in support of their Tucker Act remedy defense. See United States brief at 39-48; USRA brief at 43-60.[52] The rejection of this argument by the Court in *Youngstown* is controlling precedent here. If *Hurley v. Kincaid* has the meaning ascribed to it by Appellants, then all six concurring opinions and the dissenting opinion in *Youngstown* were in error because the Justices never should have reached the merits of the asserted lack of constitutional authority to effect the seizure. If the Tucker Act remedy cures all instances of temporary takings, then the steel companies in *Youngstown* clearly had, as government counsel claimed, a complete and adequate remedy at law, similar to that upheld by this Court in *Pewee Coal Co. v. United States*, 341 U.S. 114 (1951), *affirming* 115 Ct. Cl. 626, 88 F. Supp. 426 (1950). See also *United States v. United Mineworkers*, 330 U.S. 258, 284-85 (1947) (seizure of coal mines by executive order, directing owners to continue to operate for account of the Government, is a taking "in as complete a

[52]Much of the arguments of the United States and USRA are devoted to a non-issue in this case: whether the RRRA impliedly effected a repeal of the Court of Claims Tucker Act jurisdiction. The Court below did not so hold, although such a contention was advanced by certain of the plaintiffs. The New Haven Trustee argued below, and asserts here, that there has been no implied repeal of the Tucker Act jurisdiction of the Court of Claims.

sense as if the Government held full title and ownership"). The only way in which the decision in *Youngstown* can be reconciled with the *Hurley v. Kincaid* line of cases is that the issue of adequate remedy at law itself turns on constitutional and statutory authority to exercise the eminent domain power. If the constitutional and statutory authority be lacking, either because Congress has rejected the idea of subjecting the United States Treasury to the cost of a taking (the instant case), or because Congress prescribed a different statutory route which the executive branch has declined to follow (*Youngstown*), then there is no remedy under the Tucker Act. This distinction is also the basis upon which *Youngstown* can be reconciled with *Larson v. Domestic and Foreign Commerce Corp., supra*:

> "There is no claim that [the administrator's] action constituted an unconstitutional taking . . . Only if the Administrator's action was within his authority could such a suit [in the Court of Claims under the Tucker Act] be maintained." 337 U.S. at 703 and n. 27.[53]

This Court cannot avoid deciding whether the RRRA represents a constitutional exercise of the eminent domain power, or an invalid exercise of the Bankruptcy Clause power. If, but only if, the RRRA is constitutional is it necessary to consider the nature of any Tucker Act remedy for an inadequately compensated taking.

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[53]This distinction also helps to explain why the vendor in *Armstrong v. United States, supra*, who was barred by sovereign immunity from enforcing his lien by repossession and sale, had a remedy in the Court of Claims. There was no suggestion that the Department of the Navy, in ordering the vessel to be transferred to the United States, was acting in excess of constitutional or statutory authority.

D. The Doctrine of Adequate Remedy at Law Requires that the New Haven Trustee Have an Independent Cause of Action Against the United States Under the Theory of the Armstrong Decision

In *Armstrong v. United States, supra,* this Court in 1960 upheld a judgment of the Court of Claims that the United States was liable for a taking of the interest of a vendor who supplied materials to a contractor for a naval vessel. The vendor was entitled to a lien on the property in the possession of the contractor, but when title passed to the United States the lien created by state law could not be enforced by reason of sovereign immunity. *United States v. Ansonia Brass & Copper Co.,* 218 U.S. 452 (1910). The Court held that *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555 (1935) was applicable, 364 U.S. at 44, entitling the vendor to assert that divestment of his lien is a taking of his property, 364 U.S. at 48-49, saying:

> "This [the destruction of the liens] was not because their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the liens. . . . Since this acquisition [of property subject to the liens] was for a public use . . . in the circumstances of this case [the Government] did thereby take the property value of those liens within the meaning of the Fifth Amendment. . . . The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar [the] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

If any of the "inverse eminent domain" cases are of relevance in the case at hand, the case most clearly in point is the *Armstrong* decision. However, the logic of the *Armstrong* decision requires a completely different type of Tucker Act remedy than that advocated by

Appellants: the New Haven Trustee, with a lien upon property securing a claim for $124 million plus accrued interest, should be entitled to judgment against the United States for $124 million plus interest (upon proof that the property subject to his liens is worth that amount), in exchange for which the United States should be subrogated to the New Haven Trustee's claim against Penn Central. The logic of *Armstrong* requires this result because the effect of §302(b)(2) of the RRRA is to divest the lien created by state law and to substitute nothing of comparable legal effect. If the Court were to hold the *Armstrong* rationale applicable, the New Haven Trustee would not have to await the §303(c) judgment of the Special Court; rather, forthwith upon divestment of his lien by the §303(b) order of the Special Court, he would file his complaint in the Court of Claims. The New Haven Trustee's remedy at law can scarcely be "adequate" unless *Armstrong* is held by the Court to be applicable to the divestment of lien legislated by §303(b) of the RRRA.

It may well be that Senator Hartke had the *Armstrong* decision in mind when he stated:

> "If we did nothing while continuing to mandate rail service, there is the distinct possibility in view of the prior action of Congress [a reference to Senate Joint Resolution No. 59] that a number of these people [Penn Central creditors] could make a claim against the Government which could be sustained in the Court of Claims." 119 Cong. Rec. S23,783-84 (daily ed. Dec. 21, 1973) (quoted in part at JA 49).

E. A Deficiency Judgment Against the United States for a Short Fall in Consideration Would Not Guarantee Receipt of Just Compensation or Constitute an Adequate Remedy at Law, Particularly Where There Is No Assurance that Congress Would Appropriate the Funds Necessary to Pay a Judgment of the Court of Claims

The New Haven Trustee has argued in his Brief as Cross-Appellant that any exercise of the sovereign's power of eminent domain must be accompanied by statutory provision for payment in money or its perfect equivalent of the just compensation value of the properties taken (both permanently and for interim use). See New Haven Trustee's Cross-Appellant Brief at 52-83.

The Penn Central Trustees, as Appellants in these cases, seem to agree with the New Haven Trustee as to this legal conclusion, but attempt to avoid its force by an invitation to the Court to declare now the operative rules governing later judicial proceedings in both the Special Court and the Court of Claims, arguing as follows:

> "If a fully adequate Court of Claims remedy is thus established, the question remains whether the Act nonetheless infringes the Fifth Amendment because the partial consideration there provided for is to be paid in forms (*e.g.*, Conrail securities) other than cash. Even if a Court of Claims remedy is available for the deficiency, which of course will be owed in cash, arguably the form of compensation specified in the Act is constitutionally inadequate because of the rule that when property is taken for a public purpose the Constitution requires payment in cash or cash equivalent. *E.g., Almota Farmers Elev. & Whse. Co. v. United States*, 409 U.S. 470 (1973); *United States v. Reynolds*, 397 U.S. 14 (1970); *Olsen v. United States*, 292 U.S. 246 (1934); *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 (1795). This prob-

lem concerned the Reorganization Court (JA 146-47).

"We think that concern would be fully justified if the Conrail securities and other consideration tendered under the Act were valued on the basis of some alleged "intrinsic" value unrelated to their market value on the date of their receipt by the estates in reorganization. The estates would then be receiving, as partial compensation for a taking of property, nothing resembling cash or cash equivalent, but merely speculative securities the alleged value of which could be realized only after many years and only if the Special Court's prognosis of the viability of Conrail proved accurate. It was a similar problem in the New Haven reorganization which led Judge Anderson to devise an 'underwriting plan' to ensure that the New Haven estate in fact received the cash equivalent of the 'intrinsic' value attributed to the Penn Central stock it was acquiring. *In re New York, N.H. & H. R.R.*, 304 F. Supp. 793, 808-10, 304 F. Supp. 1136 (D. Conn. 1969). That device was specifically approved by this Court, but for the unforeseen Penn Central bankruptcy, in *New Haven Inclusion Cases*, 399 U.S. 392, 483-89 (1970): and the Court rejected the lower court's findings as to 'intrinsic value,' since 'the fairness and equity that are the essence of a §77 proceeding forbid our approval of a payment for the transferred New Haven properties that may be worth only a fraction of its purported value.' 399 U.S. at 488.

"No effective underwriting plan is permissible under the 1973 Act as presently written. We believe it follows that, pursuant to the constitutional rule with respect to cash or cash equivalent, the Special Court will be obliged to ignore any alleged 'intrinsic' value and, instead, to value the securities tendered to the estates in reorganization at no more than their cash market value on the date they are received by those estates.

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and being guaranteed as to principal and in-
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y pass to the estates of the owners of the rail
es conveyed under §303(b) of the RRRA.

No findings have been made as to what these rail properties are worth,[54] and no court has judicially determined the amount of post-January 2, 1974 erosion of the estates which would also be compensable in the Court of Claims. It suffices for present purposes, however, to note that a "deficiency judgment" as visualized by the Penn Central Trustees necessarily will involve hundreds of millions, if not *billions*, of dollars.

It is to be doubted that the United States and USRA, despite their reliance on the Tucker Act remedy, agree with the Penn Central Trustees on either the valuation of the rail properties or the valuation of Conrail's securities. Thus, unless the Court accepts the Trustees' invitation to limit the *Sherwood* and *King* doctrine by issuing a declaratory judgment as to the theory of valuation which will govern subsequent judicial proceedings, it would appear that a Tucker Act remedy, even if one exists, cannot be relied upon as an adequate remedy at law.

The United States has heretofore argued in the Special Court proceedings under §207(b), and therefore can be expected to argue in the later §303(c) proceedings, as follows: first, that the RRRA is *not* an exercise of the sovereign's power of eminent domain (see Brief of the United States at 16-36), despite the conflict between that view and their argument that a Tucker Act remedy exists for any taking found to have occurred; second, that the rail properties of the railroads have little or no liquidation value, because of the difficulties which the railroads experience in ob-

[54]Even the *method* of valuation is a matter of dispute; see New Haven Trustee's Brief as Cross-Appellant at 82. See also *In re Port Authority Trans-Hudson Corp.*, 20 N.Y. 2d 457, 231 N.E. 2d 734, *cert. denied sub nom. Port Authority Hudson Corp. v. Hudson Rapid Tubes Corp.*, 390 U.S. 1002 (1968); *In re City of New York (Fifth Avenue Coach Lines)*, 18 N.Y. 2d 212, 219 N.E. 2d 410, *appeal dismissed sub nom. Fifth Ave. Coach Lines v. City of New York*, 386 U.S. 778 (1966).

taining permission to abandon; third, that USRA's or Conrail's bonds, together with Conrail's common stock, have a value equal to or in excess of the rail properties conveyed; fourth, that a deficiency judgment against Conrail will represent value, dollar for dollar, and does not duplicate alleged value of the common stock of Conrail; fifth, that the undefined "other benefits" referred to in §206(d)(1) and §303(c)(1)(A)(i) have value sufficient to make up any remaining deficiency in consideration. If these arguments fail to carry the day, the United States can be expected to argue that only the "short fall" caused by rejection of its valuation arguments is recoverable in the Court of Claims.

When, as and if the case finally moves to the Court of Claims stage, the United States could be expected to argue on grounds of sovereign immunity that it is not bound by any unfavorable decision in the Special Court, even if sustained by this Court. See *United States v. Sherwood, supra; United States v. King, supra.* Compare *United States v. Dollar,* 196 F. 2d 551 (9th Cir. 1952), where the Court of Appeals declined to give collateral estoppel effect to *Land v. Dollar,* 184 F. 2d 245 (D.C. Cir. 1950), in which, following a trial on the merits, the *Dollar* plaintiffs received a judgment entitling them to recover their shares of stock.[55] The United States could be expected to argue in the Court of Claims that sovereign immunity makes non-binding all prior judgments as to liability of the United States for a taking. In the Court of Claims, the United States can be expected to raise at least the five lines of defense outlined above, and, presumably, other defenses as well.

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[55]But cf. *United States v. Candelaria,* 16 F. 2d 559, 562-63 (8th Cir. 1926), which gave collateral estoppel effect to *United States v. Candelaria,* 271 U.S. 432 (1926). The *Dollar* litigation was settled finally. See 344 U.S. 806, 807 (1952).

As Mr. Justice Black observed in *Youngstown Sheet & Tube Co. v. Sawyer, supra*:

> "Moreover, seizure and governmental operation of these going businesses were bound to result in many present and future damages of such nature as to be difficult, if not incapable, of measurement." 343 U.S. at 585.

The situation presented by the RRRA calls for valuation of properties and securities far more complex than any valuations which would have been entailed had this Court decided to remit the steel companies to their remedy, conceded to exist by the Secretary of Commerce, in the Coun of Claims. Moreover, the United States and USRA do not in these cases concede that the remedy exists, or what its measure would be; they concede only that, in the contingency of a future adverse court ruling on valuation, such a remedy might exist. These cases are thus governed *a fortiori* by the holding of the Court in *Youngstown*.

Appellant USRA (USRA's brief at 60, n. 81) summarily dismisses what is perhaps the most significant defect of the Tucker Act remedy argument: that Congress under Article I, Section 9, Clause 7, of the Constitution has the final word on whether any judgment of the Court of Claims shall be paid. Congress, in 31 U.S.C. §724a, has made a blanket appropriation of moneys to be paid to satisfy final judgments in the Court of Claims of $100,000 or less, an amount presumably sufficient for cases such as *Causby v. United States, supra* ($2,000 judgment). This amount is obviously inadequate in the instant case, even if the action were limited to recovery of the constitutional "short fall," and *a fortiori* if it is not so limited.

USRA's reliance upon *Glidden Co. v. Zdanok*, 370

U.S. 530 (1962)[56] is misplaced. *Glidden* does not hold that judgments of the Court of Claims are capable of being executed without Congressional appropriation. On the contrary, in *Glidden* the Court held that the inability of the Court of Claims to enforce its judgments by execution directed to the Secretary of the Treasury of the United States did not operate to deprive judgments of the Court of Claims of the finality inherent in a "judicial" decree of an Article III Court.[57] This is made plain by the following extracts from the opinion:

> "For claims in excess of $100,000 28 U.S.C. §2518 directs the Secretary of the Treasury to certify them to Congress once review in this Court has been foregone or sought and found unavailing. This, then is the domain of our problem, *for Art. I, §9, cl. 7, vests exclusive responsibility for appropriations in Congress* and the Court early held that *no execution may issue directed to the Secretary of the Treasury until such an appropriation has been made.* Reeside v. Walker (U.S.) 11 How. 272, 291.
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> "A study concluded in 1933 found only 15 instances in 70 years when Congress had refused to pay a judgment. Note, 46 Harv. L. Rev. 677, 685-686 n. 63.[58] This historical record, surely more fa-

[56]The case involved the constitutional validity of an act of Congress declaring that the Court of Claims is an Article III Court in the context, not of a suit in the Court of Claims, but rather of a suit in a District Court which was reviewed by a panel of the Court of Appeals for the Second Circuit, which included a Court of Claims judge sitting by designation under 28 U.S.C. §293(a).

[57]The actual holding of *Glidden* was as follows:

"We conclude that the presence of the United States as a party defendant to suits maintained in the Court of Claims and the Court of Customs and Patent Appeals does not debar those Courts from exercising the judicial power provided for in Article III." 370 U.S. at 571.

[58]The Note at 46 Harv. L. Rev. 677 (1935) is entitled: "The Court of Claims: Judicial Power and Congressional Review." Its first sentence reads as follows: "The action of Congress in 'remanding' the 'case' of *Pocono Pines Assembly Hotels Co. v. United States*, to the Court of Claims

(footnote continued on next page)

vorable to prevailing parties than that obtaining in private litigation, *may well make us doubt whether the capacity to enforce a judgment is always indispensable for the exercise of judicial power.*

"If this Court may rely on the good faith of state governments or other public bodies to respond to its judgments, there seems to be no sound reason why the Court of Claims *may not rely on the good faith of the United States.*" 370 U.S. at 569-71; emphasis and footnote added.

Glidden thus leaves the matter exactly where it has stood since *Reeside v. Walker, supra,* namely, that no execution (in excess of the $100,000 provided for in 31 U.S.C. §724a) may be directed to the Secretary of the Treasury until an appropriation has been made by Congress under Art. I, §9, Cl. 7.

The Court of Claims has never had occasion to issue a judgment against the United States for hundreds of millions or billions of dollars. As a practical matter, it is almost unthinkable that prudent persons would rely upon Congress' willingness, which is particularly doubtful in view of the legislative history of the RRRA, to appropriate hundreds of millions or billions of dollars to satisfy a judgment. It is at least as likely that, if the Special Court entered the declaratory judgment which the Penn Central Trustees seek, Congress would interpose the sovereign immunity of the United States. This it could do simply by expressly with-

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(footnote continued from preceding page)

raises important questions as to the nature of the decisions of that tribunal." *Pocono Pines,* 69 Ct. Cl. 91 (1930), held the United States liable to plaintiff in the sum of $227,239.54. Congress reacted by passing a law, 46 Stat. 1622 (1931) remanding the case to the Court of Claims for a new trial, with instructions to report its conclusions to Congress. Plaintiff petitioned the Supreme Court for a writ of mandamus or prohibition to prevent a further action in the Court of Claims, which petition was denied without opinion, 285 U.S. 526 (1932). The Court of Claims construed Congress' action as a fact finding reference and not as an attempt to review an already final judgment, 73 Ct. Cl. 447 (1932).

drawing jurisdiction under §1491 to hear cases arising under the RRRA.[59] If this Court were to sustain the constitutionality of the RRRA upon a Tucker Act remedy theory, its judgment will not, in any event, have the effect of final adjudication by the Court of Claims that the United States is liable to the Penn Central estate, or as to the amount of any such liability. If Congress waited until after conveyance of the Penn Central's properties to Conrail pursuant to §303(b), and then withdrew the jurisdiction of the Court of Claims to hear any claim arising from implementation of the RRRA, the *only* remedy of the Penn Central estate would be a deficiency judgment against Conrail.

That this is the most likely result is indicated by the *Amicus Curiae* brief of Rep. Adams:

> "It would seem that some creditor appellees hope and expect that if they can destroy the Act, they will force the government to nationalize the Penn Central which they hope would require the rail properties to be taken under eminent domain principles which might result in a greater cash return for them. One of the purposes of this brief *amicus curiae* is to indicate the strong resistance which exists in Congress to paying any additional amounts of government money to these estates beyond that provided in the Act." *Id.* at 16.

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[59]See the opinion of Mr. Justice Brandeis in *Lynch v. United States*, *supra*.

F. This Court Should Not Render an Advisory Opinion that a Tucker Act Remedy Saves the Constitutionality of the RRRA if Congress Does Not Repeal or Amend the Act

The Penn Central Trustees would have this Court issue an advisory opinion as to the availability of the Tucker Act remedy, even if it is not fully convinced that Congress intended to exercise eminent domain powers in enacting the RRRA:

> "We would in addition point out, however, that if the Court entertains any doubt as to Congress' intention on this score, it will not, by holding in favor of the existence of the Tucker Act remedy, compel the expenditure of any public funds contrary to the desire of Congress. If, after such a holding, Congress believes that its intent has been frustrated or that the price for continuation of rail service in the Northeast is too high if it must meet constitutional standards, Congress will have more than adequate time, prior to any compulsory conveyance under the Act, to repeal the Act or to amend it so as to avoid a taking of property. The earliest time at which compulsory conveyances under the Act could be made is September 1975. This gives Congress ample time to consider whether it still wishes such conveyances to proceed after it is fully on notice of the legal consequences thereof. Moreover, under Section 208 of the Act, Congress must review the final system plan in any event, and will have the opportunity to disapprove or to amend the final system plan, or to amend the Act, if it is unwilling to pay the cost of the taking. There is no risk whatever that unintended or undesired obligations will be incurred." Penn Central Trustees' Brief at 25.

This is, in effect, an invitation to the Court to prolong the agony of the Penn Central claimants for an additional period of time in spite of the frank recognition by the Penn Central Trustees that the result for

creditors might be that their estate would be further diminished by hundreds of millions of dollars. Aside from the propriety of such a proposal, adoption of this proposal would involve the Court in the rendering of an advisory opinion. The Court recently reviewed the origins of the rule against federal courts issuing advisory opinions and made clear the reasons for the Article III prohibitions against them. *Flast v. Cohen*, 392 U.S. 83, 96-97 (1968).

In the instant cases, the plaintiffs did not seek a declaratory judgment that, upon their mortgage liens being divested pursuant to §303(b)(2) of the RRRA, they would be entitled to judgment against the United States for a specific sum of money. Plaintiffs rather sought to enjoin the implementation of the RRRA as an invalid statute. Those who advocate a Tucker Act remedy approach are the defendants in these cases. The Governmental Appellants do not take the position that on the present record there could be a judgment in any particular amount against the United States; on the contrary, they can fairly be expected in future court proceedings vigorously to resist both liability and, if liability be established, the amount thereof. The present posture of the cases means that the Tucker Act remedy issue, despite all that has been written about it, has not been presented with "that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests." *Flast v. Cohen, supra*, 392 U.S. at 96-97, quoting *United States v. Fruehauf*, 365 U.S. 146, 157 (1961). See also *United States v. Nixon*, 42 U.S.L.W. 5237, 5241 (U.S., July 24, 1974), quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962).

II

THE COURT BELOW WAS CORRECT IN HOLDING THAT THE RRRA COMPELS PENN CENTRAL TO CONTINUE RAIL OPERATIONS PAST THE POINT OF UNCONSTITUTIONAL EROSION, AND IN ISSUING AN INJUNCTION AGAINST §304(f) AS APPLIED TO DISCONTINUANCE OF RAIL SERVICE AND THE CERTIFICATION OF A FINAL SYSTEM PLAN UNDER §209(c)

The New Haven Trustee is wholly in accord with the views of the Penn Central Trustees, set forth in Section II of their brief (pp 30-47), that, absent a Tucker Act remedy, the RRRA requires Penn Central to devote its private property to a public use without assurance of the receipt of just compensation therefor; that on the undisputed facts the point of unconstitutional erosion of the Penn Central estate has already, or soon will be, passed; and that it was not necessary for the court below, in ruling that the implementation of the RRRA must be enjoined, to determine that the point of unconstitutional erosion had in fact already been passed, or to define erosion, or to assess its impact on Penn Central with mathematical precision.

A. This Court's Decisions, as Interpreted and Applied by the Third Circuit in the Columbus Option Case, Govern the Interim Erosion Issue

The United States' brief (at 16-37), and USRA's brief (at 75-95), argue a theory of Fifth Amendment interpretation of which the essence is that, because of the peculiar public interest in railroads, it is constitutionally permissible for Congress to defer the exercise of creditors' normal remedies endlessly. The

only limit to the doctrine which these Appellants would acknowledge is that there must be a showing that the government is doing something which *might* (without establishing whether it *will*) ultimately lead to the creditors being relieved from any continuing obligation to subsidize the public interest. The United States advanced this theory without success in *In re Penn Central Transportation Co. (Columbus Option Appeals)*, 494 F. 2d 270 (3d Cir. 1974), *petition for cert. filed*, 42 U.S.L.W. 3633 (U.S., May 8, 1974), No. 73-1672. There is no precedent which supports the Governmental Appellants' theory.[60]

The issues decided in *Columbus Option Appeals*, can best be seen by starting with the contentions of the parties as summarized by Circuit Judge Gibbons:

> "They [the mortgage indenture trustees] object to the sale of unmortgaged capital assets securing prior liens [$100 million of United States guaranteed Trustees' Certificates] unless (1) the proceeds of sale are applied in reduction of those liens, or (2) under the equitable rule of marshaling the prior liens are reduced *pro tanto*, or (3) the court, before it permits expenditure of the proceeds, makes the findings required for a section 77(o) sale by *Central Railroad Co. of New Jersey v. Manufacturers Hanover Trust Co.*, 421 F. 2d 604 (3d Cir.), *cert. denied*, 398 U.S. 949 (1970) (*Jersey Central*) and *In re Third Avenue Transit Corp.*, 198 F. 2d

[60]USRA's brief claims (at 93 n. 116) that its interpretation of the "decisions from *Rock Island* through *New Haven Inclusion Cases* was adopted in *In re Boston & Maine Corp.*, 484 F. 2d 369, 374-75 (1st Cir. 1973). . . ." The holding in that case does not furnish support for the Appellants' theory: ". . . while . . . the secured creditors cannot be made to devote their property, uncompensated, to the public welfare . . . the present record falls short of presenting facts sufficient to raise the issues of . . . unconstitutional taking." 484 F. 2d at 374. The Boston & Maine Railroad has been found to be reorganizable on an income basis within a reasonable time under §77. *In re Boston & Maine Corp.* (D. Mass. No. 70-250M, May 2, 1974).

703 (2d Cir. 1952) (*Third Avenue*)." 494 F. 2d at 273.

* * *

"The United States acknowledges that by resorting to first lien trustees certificates the trustees operating a railroad in reorganization can accomplish a substantial diminution of the security of the railroad's secured creditors, but urges

(1) that such result violates neither section 77 nor the fifth amendment,

(2) that its first lien is not, under the Emergency Rail Services Act of 1970, subject to the marshaling rule, and that the marshaling rule is not constitutionally required, and

(3) that the principles of the *Jersey Central* and *Third Avenue* cases are applicable only to property mortgaged by the debtor to the protesting creditor.

"Chief reliance for these positions is placed upon the *Penn Central Merger Cases*, 389 U.S. 486 (1968) and the *New Haven Inclusion Cases*, 399 U.S. 392 (1970)." 494 F. 2d at 275.

The United States thus made a three-pronged argument to the Court of Appeals which necessitated the court's deciding whether "the substantial diminution of the security of the railroad's secured creditors," that is to say, interim erosion, was or was not authorized by §77 and the Fifth Amendment. By the time the case was decided (February 6, 1974), the RRRA had been enacted, and if the result of the decision would have been in any way affected by the "light at the end of the tunnel" claimed by the Government to be afforded by the RRRA, the Court of Appeals was bound to give effect to the RRRA.

The United States relied in *Columbus Option Appeals* on the Emergency Rail Services Act of 1970, 45 U.S.C.

§662 ("1970 Act"), as authority for the propositions that:

> "it [the United States], as a superior lienholder, is required to permit the sale of all the debtor's unmortgaged capital assets and the application of the proceeds thereof for deficit operation of the railroad even if this means that junior encumbrancers must ultimately bear the entire cost of the trustees certificates." 494 F. 2d at 277.

The secured creditor parties in *Columbus Option Appeals* urged that the 1970 Act had to be interpreted in a wholly different manner in order that it not run afoul of the Fifth Amendment clause. Therefore the "interim taking" issue was squarely presented by the 1970 Act, which was then interpreted by the Court of Appeals contrary to the Government's contentions, on the ground that such an interpretation was *necessary* to avoid Fifth Amendment taking issues.

Just as it does in this case, the United States urged in *Columbus Option Appeals* that in *Penn Central Merger Cases* and *New Haven Inclusion Cases*,

> "the Court laid down a new principle of constitutional law. That new principle, they [the United States and the Penn Central Trustees] urge, is that secured investors in a railroad enterprise take on obligations in relation to the public which makes it appropriate that they run such risk of erosion of their investment as is necessary in the public interest in order to preserve railroad service." *Id.* at 279.

This line of argument perforce required the court to analyze the entire New Haven reorganization as it pertained to *Penn Central Merger Cases* and *New Haven Inclusion Cases*. *Id.* at 279-82.

Judge Gibbons concluded as follows:

"The constitutionality of the erosion [of the New

Haven estate] which had taken place prior to the valuation date [December 31, 1966] was never presented to the Court in any proceeding in which it could have passed upon that issue. The *New Haven Inclusion Cases* decide no more than that Penn Central does not have to pay for erosion which took place prior to its purchase of the assets. . . . The Supreme Court merely approved the reorganization court's application of settled fifth amendment law. Nothing more was presented to it in either of the cases relied on by the government and the trustees." 494 F. 2d at 282.

The Government next urged upon the Third Circuit the "light at the end of the tunnel" theory:

"The appellees suggest that we can take judicial notice of proposed legislative solutions for the northeast rail transportation crisis which at the time of argument were under active consideration in Congress and have since been enacted. They suggest, further, that such judicial notice can serve as a substitute for the findings required by the *Third Avenue* and *Jersey Central* rules." *Id.*

This line of argument required the panel to address the possible effect of the RRRA:

"The Regional Rail Reorganization Act of 1973 . . . enacted January 2, 1974, establishes the United States Railway Association whose duty is to prepare a final plan for acquiring and distributing some of the assets of each bankrupt northeast railroad permitted by its reorganization court to participate. If a reorganization court finds the Act does not provide a process which would be fair and equitable to the estate of the railroad, it may either attempt a separate reorganization under §77 if it finds the railroad is reorganizable on an income basis, or dismiss the reorganization proceeding. Assuming that the Act withstands constitutional scrutiny, *see, e. g.*, N.Y. Times, Jan. 25, 1974, p. 43, cols. 5-7 (New Haven trustees' suit challenging the Act),

and that the procedure contemplated is not interrupted, the transfer of assets would take place approximately 510 days after enactment. Loans and emergency grants are available, but there is no indemnification against interim losses. Section 303(c) of the Act contemplates that no more shall be paid in compensation than is 'fair and equitable', which is defined as the minimum constitutionally required. In determining whether to participate in the proceedings under the Act, the reorganization court will have to be cognizant of the limitations imposed by the fifth amendment. Unless adequate protection against interim losses can be obtained either in the form of emergency grants, loans under which the Association bears the risk and burden of loss at least ahead of secured creditors, or constitutionally compelled compensation under the final plan, it may be necessary to dismiss the reorganization." 494 F. 2d at 282 n. 9.

Columbus Option Appeals thus required the Court of Appeals to meet the issue of whether secured creditors of a railroad can constitutionally be required by Congressional enactments to bear the brunt of protecting the public's undoubted interest in a viable rail transportation system. The Court of Appeals held as follows:

"We also take notice that it is highly likely that some form of rail transportation system, publicly or privately owned, will almost certainly survive even if the present proceedings under §77 are dismissed. But such judicial notice cannot serve to enlarge the power of the reorganization court and the ICC to subject the property of secured creditors to a taking. . . . Congress, in devising a legislative solution, will be bound by the fifth amendment to pay the fair value of the Penn Central properties at the time any new rail transportation entity takes them." *Id.* at 282-83.

In holding that *Third Avenue* and *Jersey Central, supra*, applied not only to pre-January 2, 1974 §77 pro-

ceedings, but also to the post-RRRA situation, the Court of Appeals made it clear that the "*Brooks-Scanlon-Louisville Joint Stock Land Bank-Third Avenue-Jersey Central*" learning is not "obsolete." On the contrary:

> "They [the *Jersey Central, Third Avenue, Rock Island, Radford, Brooks-Scanlon* line of cases] spell out the findings which must be made to insure that the reorganization court is not engaged in an intentional uncompensated taking." 494 F. 2d at 279.[61]

The New Haven Trustee submits that the evidence in the record establishes beyond any doubt that the erosion of the Penn Central estate which will necessarily occur during the planning processes of the RRRA will vastly exceed the $85 million of grants authorized by §213 of the RRRA. The court below noted that:

> "It becomes quickly apparent that the limited amount of these funds—available to railroads in reorganization in the region—have not been specially designated to meet challenges of unconstitutional erosion." (JA 31).

Accordingly, based on the Stipulation as to Factual Matters (JA 317-23), an inadequately compensated interim taking for use of Penn Central's rail properties

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[61]The United States and USRA downgrade the significance of three decisions of the Court—*Brooks-Scanlon Co. v. R.R. Commission*, 251 U.S. 396 (1920), *Bullock v. R.R. Commission of Florida*, 254 U.S. 513 (1921), and *Railroad Commission v. Eastern Texas R.R.*, 264 U.S. 79 (1924)—on the dubious ground that the *size* of the enterprise determined the applicable interpretation of the Fourteenth Amendment's due process clause. See United States' brief at 19, n. 11; USRA's brief at 78 n. 96. The *Brooks-Scanlon* line of cases stands for the proposition that the owners of a public utility have a constitutional right to a fair return on their investment and, if such a return is not obtainable in rendering public service, to withdraw their invested capital and devote it to other more productive uses. This principle has not been changed by the numerous decisions since the 1930's upholding the constitutionality of acts of Congress regulating public utilities. See, *e.g., Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944), quoted in New Haven Trustee's Cross-Appellant Brief at 91 n. 84.

was established. Plaintiffs were entitled to an injunction to prevent its continuance.

Whether uncompensated erosion of the Penn Central estate is currently taking stockholders' property, unsecured creditors' property, or secured creditors' property is a factual issue which the Court does not have to reach in deciding whether the decision below was correct, for the simple reason that uncompensated erosion through deficit operations must affect someone. Whoever is currently affected by erosion, be he secured creditor, unsecured creditor or stockholder, is a person entitled to the protection of the Fifth Amendment. *Columbus Option Appeals* declares that, if the erosion is incurred intentionally to benefit the public, the public's representatives (the United States) must assume the burden. Parties representing secured creditors with liens on property of Penn Central and its Secondary Debtors and non-bankrupt leased lines (New Haven Trustee and the *Connecticut General* plaintiffs), as well as unsecured creditors and stockholders (Penn Central Company, plaintiff), are now squarely before this Court asserting that *their* interests are being eroded by deficit rail operations. Since one or more parties with standing are before the Court, and one or more of them must be suffering from the erosion of the Penn Central estate, no matter how large the value of the estate may be, it follows that one or more plaintiffs is suffering that degree of irreparable economic injury which satisfies the Article III concept of standing and justifies a court exercising its equitable powers so as to prevent an unconstitutional taking of plaintiffs' properties. *Cf. Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970); *Flast v. Cohen, supra.*

B. The New Haven Reorganization Does Not Furnish Precedent for the Government's Contention that Creditors of Penn Central Must Continue to Endure Further Uncompensated Erosion Without Limit in Time or Amount

The United States' brief (at 21-27) and USRA's brief (at 87-93) argue that continued erosion of the Penn Central estate is justified by the historical precedent of the New Haven reorganization. Significantly, the Government's argument that the RRRA does not effect an interim taking of Appellees' property relies upon a theory that derives from a purported analogy between the facts of the New Haven reorganization and those of the Penn Central reorganization. The factual analysis of the New Haven precedent contained in the United States' and USRA's briefs is, however, materially incorrect.

In early 1962, only six months after the New Haven filed for reorganization under §77, the New Haven Trustees filed a report with the New Haven Reorganization Court to the effect that the New Haven could not be reorganized other than through inclusion in a major trunk line system. The merger of the Pennsylvania and New York Central Railroads, proposed shortly thereafter, afforded such an opportunity, by reason of the authority of the ICC to condition its approval of any such merger by requiring inclusion of the New Haven in the merged system.[62] The New Haven Trustees, without any opposition from New Ha-

[62]Inclusion in the merged Penn Central was warranted, independent of New Haven's status as a carrier in reorganization under §77, on the ground that the merger would otherwise have made the New Haven's situation wholly untenable due to diversion to New York Central's rail lines in New England of substantial freight traffic historically interchanged between the New Haven and the Pennsylvania Railroad.

ven creditor interests, recommended that application be made for inclusion of New Haven in the merged Penn Central System as being in the best interest of the New Haven estate, as well as the public interest, and sought the court's authority to pursue inclusion.[63]

Throughout the course of the New Haven reorganization proceedings, it was the publicly stated position of the New Haven Trustees that it was in the best interest of the New Haven's *creditors* for railroad operations to be continued until inclusion in Penn Central was achieved and that, compared to the inclusion terms potentially available, liquidation was a less favorable route for the *creditors*. Contrary to the situation now prevailing in the Penn Central reorganization, which finds creditors opposing "inclusion" in Conrail to the point of constitutional litigation, the New Haven's creditor interests, without exception, considered that inclusion in the new trunk line system to be created by the merger of the Pennsylvania and New York Central Railroads was in the creditors' best interest. The creditors' favorable view of inclusion was based upon the fact that Penn Central was the combination of two profitable companies with combined assets in excess of 20 times the assets of the New Haven, and also upon the expectation that the merger itself would add substantially to the profit-

[63]There is no similarity between the decision of the New Haven's Trustees and creditors to pursue inclusion as being in the best interest of the estate, as well as the public interest, and the compulsion of the RRRA requiring mandatory conveyances to Conrail against the united opposition of Penn Central creditors. Congress, in §207(b), has sought to simulate the factual circumstances of the New Haven experience by delegating to the Penn Central Reorganization Court the decision to permit, or not permit, conveyance of assets to Conrail. The analogy breaks down when one considers that the New Haven Reorganization Court was not acting *sua sponte*, but merely approving a business decision of the New Haven Trustees with the concurrence of the New Haven creditors.

ability of the constituent railroads.[64] Thus, the fact that the New Haven continued to operate in the reasonable expectation that the securities of Penn Central to be received upon the inclusion would provide New Ha-

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[64]It must be kept in mind that the ICC, in approving the merger of the Pennsylvania and New York Central Railroads, accepted the evidence of those railroads that:

> ". . . their annual savings from the merger will exceed $80 million [per year] after about 8 years. . . . These large operating savings will go far toward compensating for the persistently low rates of return, and the increased earnings flowing from the merger should motivate the unified company to accelerate investments in transportation property and continually modernize plant and equipment. This in turn should enable the unified company to more fully develop and utilize the inherent advantages of railroad transportation in the territory served and provide more and better service, all to the ultimate benefit of the public." 327 I.C.C. 475, 501-02.

The Securities and Exchange Commission, in its Staff Report to the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce, *The Financial Collapse of the Penn Central Company* (August, 1972), stated the point as follows:

> "The merger of the Pennsylvania and New York Central railroads was repeatedly held out, both before and after the merger, as a strongly positive factor for the future, despite internal misgivings. . . . Statements made by [Penn Central] management in the early months of 1968 were highly optimistic. . . . It is clear with hindsight that the optimistic picture painted [in Penn Central's first post-merger letter to shareholders dated March 15, 1968] was not justified. . . . These generally optimistic statements on the part of [Penn Central] management . . . continued throughout the summer [of 1968]. For example, in a speech given to the New York Security Analysts' group in September 1968, [Stuart] Saunders made very optimistic statements as to merger benefits. They would be a great deal larger than projected and would be realized sooner than anticipated, he indicated." SEC Staff Report at 173-175.

The earnings reports released by Penn Central in the immediate post-merger period gave support to the false optimism then prevalent:

> "On January 30, 1969, Penn Central reported consolidated earnings of $90 million for the full year 1968, a 27-percent increase over 1967, and fourth quarter earnings of $38 million, up 32 percent. . . . Analyzing . . . the fourth quarter figures, if the effect of [various paper profits on extraordinary transactions] were eliminated, the profit would be virtually wiped out, and, for reasons stated earlier, the staff [of the SEC] believes that these were improperly booked as income. . . . From the foregoing discussion, it is clear that Penn Central on a consolidated basis earned virtually nothing in the second half of 1968 and on an unconsolidated basis had a large loss." *Id.* at 183.

ven's creditors with value at least equal to the available alternative of liquidation has no bearing on the question of how long and under what circumstances Penn Central can be *compelled* by Congressional enactment to continue to operate and to incur further massive erosion by reason of deficit rail operations. By contrast, the Penn Central Trustees have advised the Court unequivocally that the continued deficit operation of the railroad for the account of their estate can no longer be constitutionally justified. See Penn Central Trustees' brief at 30-47. The Penn Central Trustees have also advised this Court that "there is nothing within the four corners of the Act which assures the Penn Central estate of the just compensation required by the Constitution for the taking of its properties." *Id.* at 61.

The United States' Brief (at pp. 22-27) discusses several opinions entered by the various courts which reviewed the terms of the New Haven's proposed inclusion in the merged Penn Central system as though they were entered in the context of the New Haven bondholders' having opposed inclusion in Penn Central. That discussion incorrectly pictures the procedural setting of those judicial decisions, and attempts to derive a rule of law that is without foundation in the opinions upon which the United States relies.

In 1967, the Court refused to approve consummation of the Penn Central merger until the ICC afforded adequate traffic protection to certain eastern railroads not to be included in the merger. *Baltimore & Ohio R.R. v. United States*, 389 U.S. 372 (1967). Because of that decision, it was generally recognized that, at the least, the Penn Central merger would be considerably delayed and there was concern whether the

merger might abort.[65]

In this context of doubt whether the Penn Central merger would ever come to pass, carrying with it the possible frustration of the New Haven Trustees' and creditors' hopes, the New Haven Trustees petitioned the New Haven's Reorganization Court for instructions, and some of the bondholders then cross-petitioned to dismiss the New Haven reorganization proceedings and liquidate the railroad.[66] Shortly after the motions were argued, the ICC on June 9, 1967 issued supplemental reports in both the Pennsylvania-Central and Norfolk & Western merger cases, curing the defects found by the Court in the *Baltimore & Ohio* case, *supra*. Expedited review by a three-judge District Court and the Court followed. Significantly, during that review period, the New Haven bondholders whose §77(g) motion was *sub judice* took a position diametrically opposed to the one which might be inferred from the United States' brief. Instead of pressing for termination of the reorganization and for liquidation, as are the creditors in Penn Central, the New Haven's bondholders in 1967 were urging the promptest possible inclusion of New Haven in the proposed Penn-Central system.

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[65]For example, in a decision of the Court of Appeals for the Second Circuit, entered two months after the Supreme Court decision, Judge Friendly observed:

> "As a result of the decision in *Baltimore & Ohio R.R. v. United States, supra*, and its probable sequelae, it is by no means certain that there ever will be a Penn Central in which the New Haven can be included. At the very best the time-table envisioned by the Trustees in September, 1966 . . . has been thrown badly out of kilter." *In re New York, N.H. & H. R.R.*, 378 F. 2d 635, (2d Cir. 1967).

[66]As Judge Anderson later noted: "The cross-petitioners . . . asked *either for an immediate take-over of the New Haven by the Penn Central*, once the merger was approved, *or* for the termination of the reorganization proceedings and liquidation of the Railroad." *In re New York, N.H. & H. R.R. (Order No. 441)*, 281 F. Supp. 65, 66 (D. Conn. 1968) (emphasis added).

Thus, the pertinent issue when the New Haven inclusion was first before the Court in December, 1967, was created by the New Haven bondholders' dissatisfaction with the terms of inclusion fixed by the ICC (which objections, going both to valuation of properties and valuation of securities, were later sustained in substantial part by the courts). The procedural context in which the case arose involved an attempt by the Penn Central management to deny the New Haven bondholders effective judicial review of the ICC's decision by offering to go forward with inclusion only on the basis of the ICC approved terms. This took the form of a refusal of Penn and Central managements to agree to carry out the inclusion before the exact terms were finally adjudicated. The issue was thus not whether the New Haven should be liquidated rather than kept alive until it could be included in Penn Central, as the Governmental Appellants assert.

The oft-cited reference in Mr. Justice Fortas' opinion to "Procrustean measures"[67] was not, as would appear from the United States Brief (at 23-24), in response to an attempt to shut down the New Haven's operations in disregard of the public interest in order to benefit creditors. Instead, the Court's "Procrustean measures" passage referred to an attempt by certain New Haven bondholders to gain a bargaining advantage in order to deal with the intransigence of the Penn and Central managements. This attempt by a small segment of New Haven bondholders was opposed by the New Haven Trustees on the ground that it could well backfire and frustrate the ultimate inclusion of the New Haven in Penn Central that had long been sought by the creditors. The New Haven

[67] *Penn Central Merger Cases, supra,* 389 U.S. at 510-11.

Trustees therefore opposed the attempt by these bondholders to postpone the Penn Central merger until the Penn and Central managements agreed to inclusion terms more favorable than those fixed by the ICC.

The New Haven Trustees argued to the Court that the risk of frustration of the merger was not warranted from a New Haven standpoint so long as Penn Central would be committed by the act of merging to pay such inclusion terms as were finally set by the judicial process.[68] This issue was raised directly in the argument before the Court, and counsel for the Pennsylvania and New York Central Railroads thereupon orally agreed that the merged company would be so bound.[69] It was in light of Penn Central's agreement that the price would be "open-ended" on the "up side," and in the total absence of any indication that the post-merger judicial review of the ICC's terms of inclusion would not be sufficient to guarantee fairness and equity, that Mr. Justice Fortas referred to the attempt by some bondholders to delay the merger as calling for "Procrustean measures." Thus, the quotation from the Court's opinion (United States' brief, at 23-24) does not provide support for the conclusions which the Government would have the Court now draw from it.

The same is true with regard to Judge Anderson's decisions, quoted in the United States' brief (at 24-25); and in USRA's brief (at 88-93).

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[68]The New Haven's operations became subject to a serious cash drain that began in 1967. The only source of cash potentially available was Penn Central, which, by the act of merging, would be committed to lend the necessary funds to the New Haven Trustees, as well as to assume about one-half of the New Haven's post-merger but pre-inclusion operating losses. Funds were projected to be needed in early 1968, so postponement of the merger could have defeated inclusion. This was a result perceived by all concerned to be detrimental to the New Haven estate.

[69]See colloquy between Mr. Justice Brennan and counsel for Penn Central, quoted in *In re New York, N.H. & H. R.R. (Decision on Reorganization Plan)*, 289 F. Supp. 451, 460 (D. Conn. 1968).

In the first place, the United States is in factual error when it says:

> "The New Haven creditors thereupon petitioned the reorganization court to dismiss the proceedings . . ." (United States' brief at 24).

As noted above, the cross-petition for dismissal of the reorganization had been filed *prior* to the decision of this Court in *Penn Central Merger Cases*, at a time when the Penn Central merger seemed doomed to lengthy postponement, if not frustration. While the cross-petition was *sub judice*, the Court had decided the *Penn Central Merger Cases* less than nine months after its initial decision in the *Baltimore & Ohio* case rejecting the merger. Circumstances having so changed since the filing of the cross-petition, and a majority of the New Haven bondholders having continued to recognize that inclusion in Penn Central was preferable to liquidation, the New Haven Reorganization Court properly concluded that, with the merger having already taken place and inclusion hopefully close at hand, and with Penn-Central obliged to pay judically approved terms, dismissal of the reorganization and liquidation of the New Haven's rail operations would have been not only an unsound exercise of judicial discretion but a counter-productive move from the standpoint of the New Haven bondholders. *In re New York, N.H. & H. R.R. (Order No. 441)*, *supra*, 281 F. Supp. at 68-69.[70]

However, circumstances later changed again, and the New Haven Reorganization Court responded

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[70] "The cross-petitioners are apparently the only ones who seek liquidation. Neither the trustees for any of the series of bonds nor any other creditors have joined in the cross-petitions.

"It would be an abuse of discretion and error on the part of this court to entertain and approve of action by the cross-petitioners designed to scuttle the entire reorganization proceeding when such a course . . . would . . .be of no benefit to the creditors. . . ." *Id.*

promptly and properly to that change. Judge Anderson first concluded that the inclusion terms fixed by the ICC in its *Second Supplemental Report*, 331 I.C.C. 643 (Nov. 16, 1967) were inadequate and necessitated a remand to the ICC for further proceedings, with the probability that further lengthy judicial review proceedings would follow the ICC's order on remand. This problem was aggravated by cash attrition due to worsening deficit rail operations (both passenger and freight). The cash then on hand was virtually exhausted even after giving effect to financial assistance which Penn Central was required to furnish the New Haven. Judge Anderson then concluded on August 10, 1968, on constitutional grounds, that he could not condone additional priority borrowing necessary to continue New Haven's rail operations into 1969. Significantly, the decision that railroad operations would cease was reached notwithstanding existing assurances both that the New Haven would ultimately be included in the merged Penn Central system and that the inclusion would necessarily be on terms found to be fair and equitable after judicial review. By contrast, the RRRA provides no assurance that there will ever be an "inclusion," i.e., a Congressionally approved final system plan and, even if there is one, that its terms will ever be judicially approved as fair and equitable.

Of the several decisions involving the New Haven reorganization that are cited by the United States, the one which fairly may be cited for its bearing on the instant situation is Judge Anderson's August 10, 1968 opinion at 289 F. Supp. 451, 459:

> "In view of the history of this deficit operation from the time of the filing of the petition under §77 and even before, the size of the losses, the long period of time necessarily involved in seeking to work out a solution, short of liquidation, through inclusion in the Penn-Central, the present con-

dition of the Railroad and the rate of loss and outflow of cash in the recent past and in the foreseeable future, this court finds that the continued erosion of the Debtor's estate from operational losses after the end of 1968 will clearly constitute a taking of the Debtor's property and consequently the interests of the bondholders, without just compensation. It is therefore constitutionally impermissible, and obviously no reorganization plan which calls for such a taking can be approved."

The foregoing passage was cited favorably by the Court in the *New Haven Inclusion Cases*, *supra*, 399 U.S. at 491.

The New Haven Trustee recognizes that §77 is constitutional insofar as it permits a reasonable time during which the public interest is afforded its "one bite at the apple" in the form of a reasonable attempt to reorganize the enterprise. That chapter of the Penn Central reorganization is covered by the period from June 21, 1970 to January 1, 1973, the date when the Penn Central Trustees advised Judge Fullam that Penn Central could not be reorganized absent extraordinary amounts of governmental grants.[71] A second bite at the apple has taken place since January 1, 1973 and is continuing while this case is *sub judice*. The principle advocated by the United States here results in the so-called balancing process between public and private interests becoming a never-ending nibbling at the apple, so long as it can be said that Congress and the agencies of the executive branch are conscientiously continuing to attempt the formulation of a solution. Further, the United States adds a corollary: if a reorganization proceeding reaches the point where reorganization under existing law must finally be rec-

[71]The Trustees' January 1, 1973 and February 1, 1973 Reports (J.D.S. 8, 9) estimated that governmental grants (not loans) in the amount of $600 million to $800 million were necessary.

ognized as impossible, Congress is permitted to amend the reorganization law and, if it does, the balancing process starts all over again. Presumably, if its second attempt to solve the rail crisis proved inadequate to meet constitutional safeguards, Congress could enact still another statute designed to provide a public interest "solution" to the continuing and unsolved problem of Penn Central rail operating deficits, while requiring creditors to absorb further operating losses. Under the Government theory, this procedure could be repeated, *ad infinitum*, or until the problem was finally recognized by the Congress to be hopeless absent nationalization of the railroad.

With this theory, the United States brushes aside (and indeed denies) the erosion already incurred by the Penn Central estate during more than four years of §77 proceedings; and it treats as irrelevant the specific findings made by the Penn Central Reorganization Court in its May 2, 1974 Opinion and Order No. 1543 in connection with the findings required by the first sentence of §207(b) of the RRRA (JA 84-103). According to the United States, the four years during which private claimants' legal rights have been subordinated to the public interest count for nothing, because a new statute may offer, it is argued, as little as two more years (and several hundreds of millions of dollars) of additional erosion before private creditors are finally accorded some measure of relief from the duty to continue to finance the public interest.

It is significant that the United States and USRA fail to address the implications from the fact that, as early as February 10, 1971, the Penn Central Trustees publicly stated that governmental assistance was urgently needed by Penn Central in order for it to meet

four "conditions to viability" as a private enterprise.[72] Virtually nothing was done by the Congress, the ICC or any other agency of the government to assist the achievement of these four conditions.[73] When the Trustees said in their January 1, 1973 Report that reorganization of Penn Central on an income basis was impossible, it took fully one year for the enactment of the RRRA—a solution which, as the New Haven Trustee has argued in his brief as Cross-Appellant, has proved to be both unconstitutional as a matter of law, and wholly inadequate as a matter of economics.

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[72]Trustees' Report dated February 10, 1971. (J.D.S. 1). USRA's Brief at 30 describes the four conditions to viability.

[73]Significantly, no mention is made of any steps taken by the government to assist the Trustees during the nearly two years between that Report and the January 1, 1973 Trustees' Report (J.D.S. 8). It is also noteworthy that when it did take action, Congress aggravated the Penn Central's problems by preventing a solution of the crew-consist issue. By contrast, in the New Haven reorganization the States of Massachusetts, Rhode Island, Connecticut and New York in 1965 agreed on contributions totaling approximately $5,500,000 per year, which was one-third to one-fourth the New Haven's net operating loss. See *In re New York, N.H. & H. R.R. (Order No. 441), supra*, 281 F. Supp. at 66. The United States, however, provided only $12,500,000 of loan guarantees to New Haven, and nothing by way of grant.

C. The Rock Island and Denver & Rio Grande Cases Do Not Furnish Support for the Government's Theory

The attempt of the United States and USRA to draw support for their argument from the *Rock Island*[74] and *Denver & Rio Grande*[75] cases (United States' brief at 20-22; USRA's brief at 84-86) is similarly unpersuasive. In the *Rock Island* case, the §77 petition had been filed on June 7, 1933, shortly after enactment of §77, on March 3, 1933.[76] The case was promptly heard by the Rock Island's reorganization court, which issued an order on November 22, 1933 denying a petition by secured creditors for permission to foreclose on a pledge. The District Court's decision was affirmed by the Court of Appeals on July 23, 1934, 72 F. 2d 443 (7th Cir. 1934). Certiorari was granted, 293 U.S. 550, 551 (1934), and the case was argued February 12, 1935 and decided April 1, 1935, at which point the debtor's §77 proceedings had consumed but 22 months. But the Court in 1935 thought that 22 months was perilously close to being an *excessive* period in which to restrain creditors from the exercise of their normal remedies, justifying the *long delay* on the basis of its having been caused by the constitutional test litigation launched by the creditors:

> "If this *long delay* were without adequate excuse, the retention of the injunction for the *long period* which has intervened since it was granted *could not be justified.*" 294 U.S. at 685 (emphasis added).

The United States' brief (at 21) quotes a portion of the text in which the foregoing quotation appears. The portion omitted from the quotation in the United

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[74] *Continental Ill. Nat. Bank v. Chicago, R.I. & Pac. Ry., supra.*

[75] *Reconstruction Finance Corp. v. Denver & R.G.W. R.R., supra.*

[76] 47 Stat. 1474.

States' brief, indicated by asterisks, includes these words:

> "Until they [doubts concerning the constitutional validity of §77] are finally resolved, the consummation, or even the preparation, of any definite plan is plainly impracticable."

The omission is significant. In Penn Central's case, more than four years have elapsed since the §77 filing on June 21, 1970. The ICC had three plans for reorganization submitted to it commencing as early as June 28, 1973; it rejected all of them on September 28, 1973. The ICC at the same time formulated no plan of its own, as was its statutory duty under §77. Instead, although the ICC indicated it would hold further hearings on a plan for Penn Central, in the year since its first Report it has not done so. The New Haven Trustee's §77(g) motion to dismiss Penn Central's §77 proceedings has been pending before the Penn Central Reorganization Court since October 9, 1973.[77]

Even more significant, however, is the absence of any assurance that resolution of the instant cases, concerning the constitutional validity of the RRRA, will lead to the consummation, or even the preparation of any definitive plan for reorganization of Penn Central. This conclusion is equally true on the assumption that the RRRA is found here to be defective under the Fifth Amendment, on the one hand, or if the RRRA is upheld on the basis of a finding of a Tucker Act remedy, on the other. In the latter event, there would be a drawn out valuation proceeding under §303(c) which, it is understood, the Government recognizes as requiring a time-table of 5 to 10 years, including appellate review here; and that period would be followed by

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[77]Not until May 6, 1974 was a hearing held on the motion; a further hearing was held September 19, 1974.

a Court of Claims action, perhaps consuming another two years. A period would then follow in which Congress' decision would be taken as to whether or not it would appropriate the funds needed to meet any judgment certified to it pursuant to 28 U.S.C. §2518. Then, and only then, would a plan for the reorganization of Penn Central dealing with its creditors' rights be filed with the ICC. Additional time would be required for the ICC's administrative hearings on such a plan, its report and order thereon, and judicial review of its report and order by the Penn Central Reorganization Court (which would have also the duty of adjudicating a large number of proofs-of-claim, and such matters as the remand issues from *New Haven Inclusion Cases, supra*). Assuming that the distributive phase could be completed in three years, a plan for reorganization of Penn Central must reasonably be estimated to require a minimum of 10 to 15 years if the RRRA is to be implemented. It must further be emphasized that this estimate is premised on the assumption that Congress will not veto the first final system plan filed with it by USRA. A Congressional veto of one or more final system plans, together with the time required for Congress to respond to a Tucker Act judgment, might well stretch the process into the twenty-first century.

The injunction against mortgage creditors exercising their normal foreclosure remedies contained in Order No. 1 has been in effect for over four years. Moreover, some of the creditors' liens which are thus restrained may not even be primarily on railroad properties. The *Rock Island* decision is limited to the sound proposition that a *reasonable* delay during which exercise of creditors' rights is deferred is constitutionally permissible. Conceptually and practically, *Rock Island* cannot be deemed to support the United States' con-

tentions with regard to the effect of the RRRA upon Penn Central's secured creditors.[78]

The reliance of the United States and USRA on the *Denver & Rio Grande* case, (United States' brief at 21; USRA's brief at 86) is likewise unwarranted:

1. The Denver & Rio Grande filed under §77 on November 1, 1935. As of December 31, 1935 its current assets were $5,966,667 (of which $1,257,943 was cash). By December 31, 1944, current assets had increased to $32,665,501 (of which $19,142,627 was cash). The total deferred liabilities (including unpaid accrued interest) from November 1, 1935 was $55,310,152. See 328 U.S. 500, at 513-14. In addition to the increase in current assets of $26,698,834, the Court's opinion (328 U.S. at 514-15) states that a net capital addition of approximately $30,000,000 was made out of internally generated funds, principally in the purchase of $43,000,000 of new locomotive and freight cars to handle increased war-time business, net of $13,000,000 of book value of equipment retired

[78]USRA's brief at 85 n. 106 sets out an oblique attack on the Third Circuit's *Columbus Option Appeals* decision, *supra*, on the ground that it involves a factual misreading of the *Rock Island* decision. The New Haven Trustee agrees that the *Rock Island* decision did not turn on the value of the collateral underlying the notes; this was a suggestion of the author of the Note in 82 Yale L.J. 1004, 1112 (1973), which appears to be without support. The Third Circuit's decision in *Columbus Option Appeals* is in no way dependent upon the commentator's misreading of the *Rock Island* decision. The correct reading of the *Rock Island* decision is that of Judge Anderson, *In re New York, N. H. & H. R. R., supra*, 289 F. Supp. at 459: "In [*Rock Island*] the Supreme Court sustained an order of the bankruptcy court enjoining creditors who held collateral notes from selling the collateral despite the possibility of a decline in its value during the period of restraint. Noting that the value of the collateral greatly exceeded the secured indebtedness and that the order contemplated only reasonable delay, the Court nevertheless suggested that the order would have to be reconsidered if injury to creditors became irreparable through an unreasonably long delay in the proceedings before the bankruptcy court." This reading may be viewed as having been impliedly approved by this Court in *New Haven Inclusion Cases, supra*, 399 U.S. at 491.

from use. Since the book value of the railroad's assets increased by $56.7 million, in the *Denver & Rio Grande* case there was no erosion during its nine years of §77 reorganization.[79]

2. The Denver & Rio Grande had income available for fixed charges in every year of its operation under §77. The amount of such income varied from a low of $2,893,255 during the 3 years 1936-38 to $5,019,436 in 1941. 328 U.S. at 514. In the following war-time years, income available for fixed charges was $17,044,420 (1942), $11,573,668 (1943) and $8,157,880 (1944). 328 U.S. at 514, n. 18. The total net income available for fixed charges during the reorganization (through December 31, 1944) amounted to $49,420,972. 328 U.S. at 542 (dissenting opinion of Frankfurter, J.). This income exceeded accrued interest on senior secured claims by approximately $9,500,000. *Id.*

3. The fact that the holders of the General Mortgage Bonds of the Denver & Rio Grande (the so-called "Junior Generals") received only common stock of a par value equal to 10% of their claims hardly provides a precedent for the RRRA. All other secured creditors of Denver & Rio Grande received mortgage bonds and common stock of a par value equal to their claims, including interest accrued thereon. The Junior General's contract rights made them subordinate to all other secured claimants of the Denver & Rio Grande estate.

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[79]In Penn Central's case, by contrast, book value of railroad physical assets declined from $2,889,799,000 at Dec. 31, 1970 to $2,618,390,000 at Dec. 31, 1973, a reduction of $271,409,000. 1973 Form R-1 Report, Schedule 200A; 1970 Form A Report, Schedule 200A. At Dec. 31, 1973, accrued administration expenses amounted to a sum in excess of $546,000,000. Stip. Fact, ¶¶12-15. Thus the indicated erosion, computed in the same manner as in the *Denver & Rio Grande* case, is $817 million as of Dec. 31, 1973. See Part II-H, *infra*, for a discussion of the erosion evidence.

Under the "rule of absolute priority" of *Boyd*,[80] *Los Angeles Lumber*,[81] and *Consolidated Rock Products*,[82] the holders of Junior Generals could not reasonably have expected to receive treatment *pari passu* with the other secured claimants unless there was found to be an equity for the common stock. The ICC valued the Denver & Rio Grande's assets in accordance with the capitalization of earnings method prescribed by §77(e); such valuation showed that the common stock was without value, and the Junior Generals had only a partial equity. While this factual conclusion itself was controversial (see opinion of the Court of Appeals for the Tenth Circuit, 150 F. 2d 28; dissenting opinion of Frankfurter, J., 328 U.S. at 536-49), the dispute in *Denver & Rio Grande* concerned the application of acknowledged rules of statutory construction and constitutional interpretation to a disputed factual situation.

In the case of Penn Central, the hopeless rail deficits are factually acknowledged, and the dispute concerns the proper application of constitutional principles to a novel statute. The RRRA was designed to create a "reorganization" when the facts indicate that no reorganization in the accepted legal definition of that word is possible. The *Denver & Rio Grande* decision provides no assistance in meeting the issue whether the RRRA exceeds Congress' Bankruptcy Clause powers, and offends the Fifth Amendment, by subjecting Penn Central's claimants to the reduction of their equity by continued erosion and to an ultimate deprivation of the property securing their claims without just compensation.

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[80] *Northern Pacific Ry. v. Boyd*, 228 U.S. 482 (1913).

[81] *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939).

[82] *Consolidated Rock Products Co. v. DuBois*, 312 U.S. 510 (1941).

D. The Court Below Correctly Construed §304(f) of the RRRA to Require the Affirmative Assent of USRA to any Termination of Rail Operations

The USRA Brief asserts (at 61-66) that the court below failed to construe §304(f) correctly, arguing that a narrow construction of that section would have enabled the court to defer reaching the constitutional issues presented by the RRRA.[83]

On the issue of the proper construction of §304(f), it is necessary that this subsection be read in the light of §304 as a totality (see JA 416-17), for it has no meaning separate and apart from the balance of §304. It is apparent on the face of §304 that, if the provisions limiting the right to abandon even rail segments which are not included in the final system plan, particularly the provisions found in §304(c)(2), are to be made effective, then such lines must not be discontinued or abandoned before the date the final system plan becomes effective. And, obviously, it was not the intent of Congress to permit interim discontinuance or abandonment of the rail segments which are included in the Conrail system by designation in the final system plan.[84]

Thus, the area of possible interim discontinuances and abandonments permitted under §304(f) is confined to a particular rail line whose current traffic is so

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[83]In his cross-appeal, the New Haven Trustee has dealt with the reasons why the constitutional issues are not premature, and why this case is governed by *Epperson v. Arkansas*, 393 U.S. 97 (1968) and *Roe v. Wade*, 410 U.S. 113 (1973), rather than by *Poe v. Ullman*, 367 U.S. 497 (1961). See New Haven Trustee's Cross-Appellant Brief at 24-36. USRA's contentions as to prematurity, accordingly, are not further addressed here.

[84]See letter dated April 26, 1974 from Rep. Brock Adams to John W. Barnum, Under Secretary of Transportation, reprinted in full in Penn Central Trustees' Brief, Appendix B, at 7a-9a.

insignificant that a State would be unwilling to indicate to USRA an intent to commit local tax monies to its support. This is the true meaning of the phrase in §304(f): "unless no affected State or local or regional transportation authority reasonably opposes such action."

Significantly, the USRA brief does not advance any contrary interpretation of §304(f). Rather, USRA, without citing any authority in point, seems to suggest that the RRRA ought to read with a judicial gloss that it is not to be taken seriously in the event a literal interpretation would require "erosion beyond constitutional limits" (USRA brief at 64). Cases such as *United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963), cited in USRA's brief (at 64-65) stand for a different proposition entirely: when a statute is attacked as being "void for vagueness," but its meaning is plain as to the plaintiff's factual situation, an attack on the statute as being facially defective as applied to other possible situations will not be considered. This is but an application of the rule that:

> "One to whom application of the statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States v. Raines*, 362 U.S. 17 (1960), relying upon *Yazoo & Mississippi Valley R.R. v. Jackson Vinegar Co.*, 226 U.S. 217 (1912).

More to the point than the cases cited in the USRA brief (at 65-66) is *Aptheker v. Secretary of State*, 378 U.S. 500 (1964), in which §6 of the Subversive Activities Control Act of 1950 was held unconstitutional "on its face." Mr. Justice Goldberg observed for the majority:

> "It must be remembered that '[a]lthough this Court will often strain to construe legislation so as to save

it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . .' or judicially rewriting it. . . . To put the matter another way, this Court will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutional defects.

"The clarity and preciseness of the provision in question make it impossible to narrow its indiscriminately cast and overly broad scope without substantial rewriting. . . . [A]n attempt to 'construe' the statute and to probe its recesses for some core of constitutionality would inject an element of vagueness into the statute's scope and application; the plain words would thus become uncertain in meaning only if courts proceeded on a case-by-case basis to separate out constitutional from unconstitutional areas of coverage." 378 U.S. at 515-16.

Similarly in the instant cases, the Court should not consider the abstract question of whether Congress might have enacted a valid statute purporting to achieve the public-interest goals of §304 in cases where a debtor railroad's rail operations are sufficiently profitable to produce income before fixed charges, but might not require the same application to a railroad with a massive deficit in income available for fixed charges. Appellees in these cases should not be required to assume the burden of demonstrating that Congress could not have written a statute constitutionally restricting the right of other railroads to withdraw their property from public service. It is submitted that *Aptheker v. Secretary of State, supra,* is in point, and that the cases cited in USRA's brief (at 66) are not.

E. The Court Below Was Correct in Enjoining USRA from Attempting to Implement §304(f)

The USRA brief (at 66-68) contains an argument which seems to say that an injunction should not have been issued against USRA implementing §304(f) even in the absence of an adequate remedy at law.

Section 304(f) *in haec verba* withdraws the Penn Central Reorganization Court's power, as a court of equity, to protect constitutional rights by ordering a cessation, either full or partial, of rail operations. §601(b) of the RRRA when read in conjunction with §304(f), must be viewed as making inapplicable to debtor railroads subject to the RRRA the power of the reorganization court under §77(o) to authorize abandonments and discontinuances of service pending abandonments being approved by the ICC under §1(18) of the Interstate Commerce Act. Given the purposes of 28 U.S.C. §§2282 and 2284, only a three-judge court constituted as there provided has authority to issue an injunction protecting the plaintiffs from an unconstitutional application of §304(f), and therefore to restore the power of the reorganization court under §77(o). The injunction granted below restores the Penn Central Reorganization Court's equity power to the *status quo ante* the RRRA, and properly leaves to that court, which has the greatest familiarity with the facts, the responsibility to determine whether the point of unconstitutional erosion has happened.

A further ground for not disturbing the injunction against USRA's enforcement of §304(f) is that USRA has not demonstrated that the existence of such injunction will materially impede its planning functions relative to preparation of a final system plan. See *infra* at 109-11.

F. The Court Below Was Correct in Adjudging §303 of the RRRA Void for Failure to Provide Just Compensation for the Interim Takings Mandated by §304

The USRA brief asserts (at 68-72) that the court below misread §303 to preclude the Special Court's providing a constitutional remedy in the event that there is no Tucker Act remedy for the interim takings of Penn Central's and plaintiff's property mandated by §304. The argument is based principally on USRA's prematurity contentions and its argument that §304(f) can be construed narrowly to avoid constitutional issues.[85] The principal element of USRA's argument is its contention that the injunction against implementation of §304(f) will be so successful as to render moot any claim for an interim taking based on the RRRA. The argument proves too much. If the injunction against implementing §304(f) leads to a decision by the Reorganization Court permitting a complete cessation of Penn Central's rail operations and eventual liquidation of those rail properties, there will never be any occasion for a §303(b) conveyance. If, on the other hand, USRA is successful in preventing a decision that would permit discontinuance of all rail operations (the only hypothesis under which §303(c) would be brought into play), then it is still the fact that the RRRA will have caused Penn Central to incur additional erosion for which §303(c) does not provide payment of just compensation in money or its perfect equivalent. The court was required by the posture of the case on motion for summary judgment to decide whether §303(c) provided just compensation for the interim taking, an issue which it found to be ripe for adjudication. Its judgment was correct.

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[85]For rebuttal, see New Haven Trustee's Brief as Cross-Appellant at 24-36; Part II-D, *supra*.

G. The Court Below Was Correct in Enjoining Certification of a Final System Plan Pursuant to §209(c) of the RRRA

Once the court determined that §304(f) of the RRRA mandated an uncompensated interim taking of Penn Central's and plaintiff's property, that the Tucker Act did not provide an adequate remedy at law, and that §303(c) did not permit the Special Court to cure this deficiency, the court was virtually compelled to enjoin certification of a final system plan by USRA to the Special Court pursuant to §209(c) of the RRRA. Section 209(c) is the operative provision which will set into motion the mandatory conveyances and divestment of creditor liens provided in §302(b) of the RRRA. Since the last sentence of §303(b)(2) provides that

> "[s]uch conveyances shall not be restrained or enjoined by any court."

it was necessary for the §2284 court to protect its jurisdiction by an order that will prevent §303(b) from becoming operative.

If §303(c) is adjudged repugnant to the Constitution, it follows as a matter of law that certification pursuant to §209(c) should not be permitted. USRA's argument to the contrary (USRA brief at 73-74) is largely a repetition of arguments previously discussed. The only new element is the contention that USRA *could* devise a final system plan which did in fact compensate the Penn Central estate for the interim taking of its property.

The concise answer to this contention is that the court below, as a court of equity, has inherent jurisdiction to consider the continued necessity for its presently outstanding injunction, and to consider

whether changed circumstances warrant relief therefrom. Thus, if USRA should formulate a final system plan which it claims provides just compensation for the interim takings mandated by the RRRA, it can apply to the §2284 court for an appropriate modification of the injunction based on such a final system plan. The injunction does not prevent a final system plan from being *formulated and submitted to Congress pursuant to §208(a).*[86] If USRA is aggrieved by any future judgment of the §2284 court on the issue of whether the injunction should be modified, it would have a right to appeal to this Court from an order denying modification of the injunction. In short, at this stage of the case, USRA has not made the requisite factual showing that it can surmount the constitutional problem of an uncompensated interim taking. It will be timely to consider that issue after USRA has submitted its final system plan and its evidence in support thereof to the §2284 court.

When, as and if USRA does present to the §2284 court a final system plan under the RRRA, the issue of whether implementation of such a plan will produce an inadequately compensated permanent taking of Penn Central's and plaintiffs' property must then be faced, if they have not been resolved by the Court's judgment on the New Haven Trustee's cross-appeal. At that point, none of the alleged grounds of prematurity cited by the Court below will be present. Thus the injunction against certification of a final sys-

[86]USRA has advised the Special Court that in fact it is seeking a 120-day extension of the time deadlines, plus an increase from $26 million to $40 million in its appropriations. A bill to this effect has been filed by Senator Hartke (S. 4003; see Congressional Record, September 16, 1974, S16619). Thus it would appear that USRA intends to prepare a final system plan for submission to Congress notwithstanding the injunction against such a plan being certified to the Special Court.

tem plan pursuant to §209(c) is a necessary protection to assure compliance with applicable Fifth Amendment principles, both as respects the interim taking issue and the permanent taking issue. USRA's argument to the contrary erroneously assumes that the court would have found, had it reached the issue, that the compulsory conveyance provisions of the RRRA are valid constitutionally. No such assumption is justified, particularly in light of Judge Fullam's concurring opinion below (JA 55-81), and his opinion in support of Order No. 1596 (JA 124-51). As Judge Fullam observed in the latter opinion:

> "I am satisfied, therefore, that the use of common stock to pay for the rail assets conveyed pursuant to the Final System Plan cannot be justified on the basis of any constitutional doctrine yet announced by the Supreme Court. In my view, the RRRA in its present form does violence to the Constitution, whether considered as a reorganization statute, or as an eminent domain statute, or as a combination of the two." (JA 146).

H. The Court Below Was Correct in Concluding That Erosion of the Penn Central Estate Has Been Substantial and Is Continuing During the Planning Processes of the RRRA

USRA's brief (at 75-82) and the United States' brief (Appendix, at 59-73) argue that the court below should not have found, on the record in this case, that erosion of the Penn Central estate has occurred or is continuing during the planning process of the RRRA. The Court should summarily dispose of this contention, and the Governmental Appellants' related arguments concerning what "erosion" is, how it is calculated, and when it becomes unconstitutional to require a debtor railroad's estate to continue to bear it, by reference to the findings of fact of the Penn Central Reorganization Court in its May 2, 1974 Opinion in Support of Order No. 1543 (JA 84-102).[87]

Judge Fullam's findings of fact in support of the "120-day" decision under the first sentence of §207(b) of the RRRA included the following:

> "1. During the period from the filing of the Debtor's reorganization petition on June 21, 1970, to December 31, 1973, the Debtor's operations have produced losses in ordinary income, calculated in accordance with ICC regulations (49 C.F.R. Part 1201, 501-51) totalling $851.1 million.
>
> "2. The Debtor has been able to continue operations during this period only by deferring payments of virtually all real estate taxes, rentals of

[87]The United States participated in the proceedings upon which Opinion and Order No. 1543 were based, and urged the ultimate conclusion reached by Judge Fullam, that Penn Central was not reorganizable on an income basis. The United States did not appeal from Order 1543, and in their appeals from Order No. 1596 ("180-day" findings under §207(b) of the RRRA), neither the United States nor USRA complained of any of the factual findings set forth in Opinion and Order No. 1543.

leased lines, and interest (including mortgage and collateral trust bonds) other than equipment obligations.

"3. Non-recurring income [sic] aggregating $155.3 million from trustees certificates, sales of real property and equipment, sales of securities, and drawdowns from escrowed funds, have been utilized to sustain operations." (JA 89).[88]

* * *

"18. Below is the forecasted income statement for the Debtor premised on the traffic and revenue forecast with certain assumptions for cost increases.

	1974	1975	1976	1977	1978
	(dollars in millions)				
Operating Revenues					
Freight	$1,879.2	$2,069.3	$2,258.2	$2,435.5	$2,637.3
All other	289.3	303.9	322.0	340.0	360.0
Total	2,168.5	2,373.2	2,580.2	2,775.5	2,997.3
Operating Costs	2,309.7	2,491.6	2,651.6	2,815.7	3,001.7
Net Rwy. Oper. Inc.	(141.2)	(118.4)	(71.4)	(40.2)	(4.4)
Other Income	62.2	74.2	82.0	88.5	90.4
Misc. Deductions	21.2	20.2	20.2	20.2	20.2
Inc. Avail for Fx. Chgs	(100.2)	(64.4)	(9.6)	28.1	65.8
Fixed Charges	137.5	131.9	126.4	124.1	122.0
Ordinary Income	$ (237.7)	$ (196.3)	$ (136.0)	$ (96.0)	$ (56.2)
Average Number of Employees	79,325	79,325	79,325	79,325	79,325
Tons handled (Mil.)	282.1	293.8	305.3	316.0	327.9
Operating Ratio (%)	82.99	81.16	79.49	78.51	77.45"

(JA 94-95).

* * *

"24. In order to depict the financial results of the Debtor's rail operations only, the income statement shown in Finding 18 was adjusted as follows:

"a. Non-rail income, including accruals of tax allocation payments due from related companies, is extracted from the statement.

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[88]The reference to non-recurring *income* is presumably meant to refer to non-recurring sources of cash, since borrowings on Trustees' Certificates do not represent income at all, and the remaining items represent only in part non-recurring income.

"b. Due to the lack of definitive information, an arbitrary allocation of 50% of the leased line rents and interest obligations (components of fixed charges) have been extracted from the statement.

"c. Tax accruals have been adjusted according to a preliminary analysis developed by the Trustees' staff of the tax consequences of severance of rail and non-rail operations.

"d. The rail operation is presumed to carry the full cost of overhead." (JA 98).

"25. Set out below is the forecasted income statement based on the procedure set out in Finding 24 for the Debtor's rail operations only.

	1974	1975	1976	1977	1978
	(dollars in millions)				
Operating Revenues					
Freight	$1,879.2	$2,069.3	$2,258.2	$2,435.5	$2,637.3
All Other	289.3	303.9	322.0	340.0	360.0
Total	2,168.5	2,373.2	2,580.2	2,775.5	2,997.3
Operating Costs	2,314.3	2,496.1	2,656.1	2,820.1	3,006.0
Net Rwy. Oper. Inc.	(145.8)	(122.9)	(75.9)	(44.6)	(8.7)
Other Income	5.6	5.6	5.6	5.6	5.6
Misc. Deductions	13.0	10.9	10.9	10.9	10.9
Inc. Avail for Fx. Chgs.	(153.2)	(128.2)	(81.2)	(49.9)	(14.0)
Fixed Charges	83.5	78.2	72.7	70.4	68.3
Ordinary Income	$ (236.7)	$ (206.4)	$ (153.9)	$ (120.3)	$ (82.3)
Average Number of Employees	79,325	79,325	79,325	79,325	79,325
Tons Handled (Millions)	282.1	293.8	305.3	316.0	327.9
Operating Ratio (Percent)	82.99	81.16	79.49	78.51	77.45"

(JA 98-99).

Based on unchallenged facts, operation by Penn Central of its railroad during 1974 and 1975 can be expected to result in *negative* income available for fixed charges of $153.2 million and $128.2 million, respectively, or a total in excess of $280 million for these two years *before* even consideration of continuing accrued interest on debt in default and unpaid lease line rentals, each of which may be a priority administration expense. Interest is a priority administration expense if the underlying debt is fully secured. Unpaid leased

line rentals are administration expenses pending a decision to affirm or reject the underlying leases; if any lease is rejected by the Trustees, the lessor will have an administration claim for the reasonable rental value of its properties for the period preceding rejection.[89] If all fixed charges were to constitute administration expenses, the total erosion of the estate during the years 1974 and 1975, measured by the income statement, would exceed $440 million.

The New Haven Trustee does not assert that income statement losses, as such, necessarily establish that erosion is occurring, or the precise amount of that erosion. On the other hand, *negative* income available for fixed charges of the magnitude here existing is strongly indicative of massive erosion from deficit rail operations unless it can be shown that some of the amounts deducted in the computation of income available for fixed charges have in fact been the source of incremental capitalized value to the estate.

The United States and USRA have presented an analysis which is flawed by numerous fallacies in their attempt to downgrade the substantial evidence of erosion of the Penn Central estate.[90] For example, they at-

[89]The Government seems to assume that, following rejection of a lease, the effect of §77(c)(6) would entitle Penn Central to claim that operations were for the account of the lessor relating back to June 21, 1970; §77(c)(6) operates prospectively only.

[90]No attempt will be made to itemize all of the Government's fallacies; however, as an example, the assertion that net book value of freight equipment and road properties has *increased* $89 million (United States' brief at 68) is wholly inaccurate. At Dec. 31, 1970, Penn Central's balance sheet showed road and equipment property of $2,889,799,000, after depreciation and amortization; at Dec. 31, 1973, the figure was $2,618,390,000, a *reduction* of $271,409,000. Form R-1 Report, Schedule 200A (comparative 1970 figures, Form A Report). This error, which is of the magnitude of $360 million, is indicative of the unreliability of the figures set forth in the Appendix to the United States' brief. Other fallacious numbers are noted in succeeding footnotes. The reduction in the book value, net of depreciation, of Penn Central's physical assets can be broken down as follows: road properties, from $1,409,192,000 at Dec. 31, 1970, to $1,354,319,000 at Dec. 31, 1973, a reduction of

(footnote continued on next page)

tack the accounting concept of depreciation at a time when, by reason of inflation, there is substantial doubt as to whether book depreciation based on historical cost is enough to reflect replacement cost when the capital asset must be junked and replaced at a highly inflated price in order to keep the railroad operational.[91] They also attack the ICC's accounting prac-

(footnote continued from preceding page)

$54,873,000; rail equipment, from $1,208,465,000 at Dec. 31, 1970 to $973,133,000 at Dec. 31, 1973, a reduction of $235,332,000. Form R-1 Report, Schedules 200A, 211D. The decline in rail equipment can be further broken down in terms of gross book value; locomotives declined from $404,618,000 to $327,356,000; freight cars from $1,098,289,960 to $994,833,000; passenger cars from $118,131,860 to $56,543,000. Penn Central received no cash proceeds from its initial sale of locomotives and passenger cars to Amtrak; the purchase price for such equipment was offset by Penn Central's obligation to invest in the common stock of Amtrak. At Dec. 31, 1973 Penn Central's balance sheet showed $52,382,000 invested in Amtrak common stock, an investment which is non-marketable and of questionable value. Form R-1 Report, Schedule 206.

[91]During 1973, Penn Central's total depreciation and amortization charge was $88,989,000, of which $54,348,000 was equipment depreciation and $29,877,000 was road depreciation (Form R-1 Report, Schedules 322, 330, and 397). The book value of equipment retired during 1973 was $97,806,000, of which $74,307,000 was charged to the depreciation account. (Form R-1 Report, Schedule 397). Thus retirements of rail equipment exceeded the total charge to income in respect of depreciation and amortization. New investment in transportation property totaled only $21,091,000. *Id.* Equipment obligations of $47,285,000 were paid, which is substantially less than the book value of equipment retired. *Id.* Only $1,487,000 of new equipment obligations were issued, because Penn Central is unable to sell equipment trust certificates and must resort to leasing its replacement rail cars and locomotives. A total of 21 new freight cars was purchased; 1,329 freight cars were leased; 9,973 freight cars were retired from service. Form R-1 Report, Schedule 417. The assertion of the United States that $206.5 million paid on maturing instalments of equipment debt had the effect of "increasing the estate's equity in readily saleable railroad equipment" (United States brief, at 66) is wholly fallacious because it ignores the fact of *retirement* of old and obsolete equipment. In addition to retirements of $97.8 million in 1973, there were retirements of $133.4 million in 1972. (1972 Form A, Schedule 397). (Schedule 397 does not appear in the Form A Report for 1971). Retirement of rail equipment in 1972 and 1973 thus more than offset the entire amount paid on maturing equipment obligations in four years since Penn Central filed its §77 petition. Since book value of rail equipment owned by Penn Central has declined by $235 million in the 3 years ended December 31, 1973, it would appear that payments on related debt of $206.5 million (assuming that is a correct figure) did not increase the estate's equity in railroad equipment at all.

tice of requiring that the costs of maintenance of way and maintenance of equipment be accounted as a current cost rather than treated as a capital asset, at a time when inadequate expenditures on maintenance of way (aggravated by inflation which reduces the number of units of work performed for a given expenditure) have rendered a substantial portion of the Penn Central system unsafe even for freight train operations at 10 miles per hour.[92]

The short answer to the Governmental Appellants' contentions about erosion is that it is not necessary for a court to define erosion with mathematical precision in order to ascertain whether or not the estate is steadily becoming less valuable after deduction of priority administration claims. Even if, *arguendo*, appreciation of balance sheet assets were legally an offset to erosion caused by rail operations producing negative income available for fixed charges (a point which is strongly contested by Appellees), there is no evidence which establishes that Penn Central's balance sheet assets (either rail or non-rail) have appreciated since 1970, or are likely to appreciate in 1974 and 1975, in any material amount, much less an amount sufficient to offset the negative income available for fixed charges. Moreover, the Fifth Amendment guarantees that a reg-

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[92]During 1973, Penn Central expended $13,539,000 in replacement ties, and $13,238,000 in replacement rail; but expended only $134,000 in ties and $303,000 in rail on new lines and extensions. Form R-1 Report, Schedules 513-16. 95,581 tons of replacement rail were laid, but 113,135 tons of rail were taken up and scrapped. *Id.* The United States' figure of $358 million allegedly spent for track replacement (United States' brief, at 68) apparently covers more than the cost of ties and rail; this figure cannot be reconciled even with expenditures, including labor, in all forms of maintenance of way. In 1973, Penn Central's total expense for maintenance of way and structures was $226,082,000, exclusive of depreciation. Form R–1 Report, Schedule 320. The Penn Central Trustees have stated that this amount is insufficient to keep pace with the rapid deterioration of the roadbed. See Trustees' Reports, J.D.S. 8,9 and 10.

ulated public utility should not only not operate at a *loss*, but should earn a return on its investment, or at the very least an amount sufficient to offset accruing interest and leased line rentals, that is to say, the cost of capital devoted to the enterprise.[93]

The court below was entitled to give weight to Judge Fullam's findings of fact, from which a finding of substantial erosion of the Penn Central estate is plainly warranted. Since the Government offered no evidence establishing that there has been any appreciation of Penn Central's balance sheet assets, the court below was not even required to reach the legal issue of whether such hypothetical appreciation, particularly as to non-rail assets, is an offset to erosion.[94]

The court properly found that the erosion of the Penn Central estate during four years of §77 operations has been substantial, and that such erosion is continuing. This is the only finding necessary to sustain its judgment that the RRRA is unconstitutional insofar as it requires private property to be devoted to a public use without just compensation.

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[93]See *Federal Power Commission v. Hope Natural Gas Co., supra.*

[94]The assertion in the United States' brief (at 69) that Pennsylvania Co. has increased in value by $53 to $100 million has no factual foundation and is based on an argumentative view of evidence adduced during proceedings relative to a proposed settlement agreement under which the Pennsylvania Co. stock would have been exchanged for the debt which it presently secures. As Judge Fullam observed in *In re Penn Central Transportation Co. (Order No. 1189)*, 358 F. Supp. 154, 183 (E.D. Pa. 1973), declining to approve such settlement agreement, "... the inescapable truth is that no one really knows how much the Common Stock of Pennco is worth; the best that can be hoped for is an educated guess within a fairly wide range."

CONCLUSION

For the reasons stated, those portions of the Order below dated June 25, 1974:

which enjoin defendant USRA from certifying a final system plan to the Special Court pursuant to §209(c) of the RRRA;

which enjoin defendants from taking any action to enforce §304(f) of the RRRA; and

which adjudicated that §303, §304(f) and a portion of §207(b) are unconstitutional;

should be affirmed in all respects.

The New Haven Trustee has set forth the grounds upon which the Order below should be reversed and remanded in his brief, as Cross-Appellant, dated August 28, 1974.

September 26, 1974

Respectfully submitted,

Of Counsel:

MORRIS RAKER
CHARLES W. MORSE, JR.

SULLIVAN & WORCESTER
225 Franklin Street
Boston, Massachusetts
02110

JOSEPH AUERBACH
225 Franklin Street
Boston, Massachusetts
02110

JAMES WM. MOORE
54 Meadow Street
New Haven, Connecticut
06506

Attorneys for Appellee
Richard Joyce Smith, Trustee
of the Property of the New York,
New Haven and Hartford Railroad
Company, Debtor

APPENDIX

LETTER DATED NOVEMBER 14, 1973 FROM SECRETARY OF TRANSPORTATION BRINEGAR TO SENATORS MAGNUSON AND COTTON, REPRINTED IN SENATE REPORT NO. 93-601, 93rd CONG., 1st Sess. (1973)

THE SECRETARY OF TRANSPORTATION,
Washington, D.C., November 14, 1973.

HON. WARREN G. MAGNUSON,
Chairman, Senate Committee on Commerce,
Washington, D.C.

HON. NORRIS COTTON,
Ranking Minority Member, Senate Committee on Commerce,
Washington, D.C.

[Text of letter reproduced at JA 214-220]

[The following memorandum was attached to the letter]

DEPARTMENT OF TRANSPORTATION

MEMORANDUM

If the rail assets of the bankrupt railroads were to be acquired by FRC[95] by means of condemnation, the following unfavorable consequences would result:

1. The price would be higher.

If they were transferring their rail assets to another railroad as part of a reorganization, the bankrupt estates would be entitled to "the estimated market value that would be realized in a total liquidation, less the

[95] "FRC" refers to "Federal Rail Corporation," the original name of Consolidated Rail Corporation in Senate Working Paper No. 1.

cost of dismantling properties and other liquidation costs and after discounting proceeds to present worth." *New Haven Inclusion Cases*, 399 U.S. 392, 436 (1970). These deductions from market value could not be made in a condemnation. In condemnation, "the owner is entitled to the fair market value of the property at the time of the taking." *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 474 (1973); accord, *United States v. Reynolds*, 397 U.S. 14, 16 (1970); *United States v. Miller*, 317 U.S. 369, 374 (1943); *United States v. Klamath and Moadoc Tribes of Indians*, 304 U.S. 119, 123 (1938); *Olsen v. United States*, 292 U.S. 246, 255 (1934).

2. The payment would have to be in cash.

In a plan of reorganization, creditors normally have their claims satisfied with securities. In a condemnation, however, the Supreme Court has repeatedly stated that compensation must be "paid in money". *Olsen v. United States*, 292 U.S. 246, 255 (1934); accord, *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473-74 (1970); *United States v. Reynolds*, 397 U.S. 14, 16 (1970); *United States v. Miller* , 317 U.S. 369, 373 (1943). As was stated by Justice Paterson in *Vanhorne's Lessee v. Dorrance*, 2 U.S. 303 (C.C. Pa. 1795), at 315:

> "No just compensation can be made except in money. Money is a common standard, by comparison with which the value of anything may be ascertained. It is not only a sign which represents the respective values of commodities, but is an universal medium, easily portable, liable to universal variation, and readily exchanged for any kind of property. Compensation is a recompense in value, a *quid pro quo*, and must be in money. True it is, that land or anything else may be a compensation, but then it must be at the election of the party; it

cannot be forced upon him. His consent will legislate the act, and make it valid; nothing short of it will have the effect."

3. Even if the stock of FRC could be used for payment, it would have to be valued at present market value.

As stated in point 1, *supra*, the rule in condemnation is that property must be valued as of the date of the taking. Thus, even if cash payment were not required, the FRC stock would have to be valued at its current market value. Before FRC begins to operate and has an opportunity to demonstrate its earning potential, its stock may have a depressed value in the marketplace. However, in a reorganization under section 77 of the Bankruptcy Act, it is well settled that the earning power of the railroad is the chief criterion of value. 5 COLLIER ON BANKRUPTCY ¶77.18 at 550 (14th ed. 1972); see the last paragraph of section 77(e). Thus, a capitalization of FRC's projected earnings over a reasonable period of time would be the method for valuing FRC's common stock in such a proceeding.

[The following text was enclosed with the letter and memorandum]

PROPOSED AMENDMENTS TO SENATE COMMERCE COMMITTEE WORKING PAPER NO. 1

P. 6, delete lines 5-12, and substitute:

"(6) 'Fair and equitable compensation' means a payment in money or property having a value which would have been required to be paid had the rail properties been conveyed to another railroad pursuant to a plan of reorganization under section 77 of the Bankruptcy Act (11 U.S.C. 205).

"(7) 'Fair liquidation value' means the best price that the market could have fairly been expected to provide as of December 31, 1973, for the sale of such rail properties over a reasonable period of time less the economic costs and expenses incident to holding and maintaining such properties over such time and to their disposition and less a reasonable discount for delay in receipt of proceeds over such time."

Renumber the succeeding paragraphs of section 103.

P. 6, line 21, insert after "service" the words: "or any interest in or rights to use such property".

P. 25, line 5, delete "of" and substitute "operated by".

P. 25, delete everything after "region" on line 6 down through "which" on line 8.

P. 25, line 9, replace the comma after "Corporation" with a semicolon and delete everything thereafter down through the end of line 11.

P. 25, line 18, insert "or leased" after "purchased".

P. 26, insert the following between lines 1 and 2:

"The final system plan may provide for purchase by the Corporation of rail properties of a profitable railroad, and may require any profitable railroad designated to purchase or sell rail properties to obligate itself to be bound by any order of the special court entered under section 303 of this Act which changes the compensation to be paid for the rail properties."

P. 26, delete lines 9 through 16, and insert:

"(d). Transfers.—All transfers pursuant to the final system plan shall be made in accordance with and subject to the following principles:"

P. 26, line 17, delete "conveyed" and substitute "transferred".

P. 26, delete everything after "for" on line 21 down through the end of line 23 and substitute:

"all of the common stock of the Corporation. The final system plan shall allocate the percentage of the Corporation's common stock to be given to each railroad in reorganization in proportion to the rail properties conveyed to the Corporation by each railroad in reorganization".

P. 27, delete everything after "conveyed" on line 1 down through the end of line 2 and substitute "for fair and equitable compensation."

P. 27, insert the following between lines 2 and 3:

"(3) All rail properties to be conveyed to the Corporation by a profitable railroad shall be conveyed pursuant to terms agreed upon between the Association and that profitable railroad."

P. 27, line 3, change "(3)" to "(4)".

P. 28, line 6, delete "JUST" and "VALUE".

P. 28, delete everything after "designate" on line 7 down through the end of line 15, and substitute:

"the fair liquidation value of all rail properties of a railroad in reorganization to be transferred to the Corporation under the final system plan, and the value of the consideration to be paid by the Corporation in exchange for the properties; the fair and equitable compensation to be paid by a profitable railroad for rail properties of a railroad in reorganization that are to be conveyed to the profitable railroad under the final system plan; and the consideration to be paid by the Corporation for any rail properties of a profitable railroad to be purchased under the final system plan."

P. 28, line 8, delete "conveyed" and substitute "transferred".

P. 32, line 4, delete "1 year" and substitute "180 days".

P. 32, line 13, delete "the one that is most".

P. 32, line 22, after "court", insert "shall have all the powers of a reorganization court in proceedings under section 77 of the Bankruptcy Act and".

P. 33, line 4, delete "90 days, but not earlier than 75" and substitute "15".

P. 33, line 6, delete everything after the word "plan" down through the end of line 18 on p. 35 and substitue "to the special court, together with a petition seeking the court's approval pursuant to section 303(a) of this Act."

P. 46, delete everything on line 12 down through the end of line 10 on p. 50 and substitute the following:

"PROCEEDINGS BEFORE SPECIAL COURT[96]

"SEC. 303.(a) APPROVAL OF TRANSFERS UNDER PLAN—As soon as is possible after submission of the final system plan to it, the special court, after hearings, shall decide whether or not to approve the transfers of rail properties and the compensation therefor provided for in the final system plan. In making that decision with respect to each railroad in reorganization, the court shall consider—

(1) whether the transfers are fair and equitable to the debtor's estate; and

---

[96]Compare this section of the Department of Transportation draft of Nov. 14, 1973 with §§207(b), 303(b), 303(c) and 303(d) of the RRRA.

(2) the interest of the public in the continuation of rail service over the rail properties proposed for transfer under the final system plan.

If the court finds that it cannot approve any of the transfers provided for in the final system plan because the common stock of the Corporation has not been fairly allocated among the railroads in reorganization transferring rail properties to the Corporation, it shall reallocate the stock in a manner which is fair and equitable. If the court finds that a transfer of rail properties of a railroad in reorganization for common stock of the Corporation would not be fair and equitable to the estate of a railroad in reorganization, even with the stock fairly allocated, it shall amend the final system plan to provide for the transfer to that railroad in reorganization in addition to its allocated amount of the common stock of the Corporation, obligations of the Association in an amount which, together with the stock, make the transaction fair and equitable to the estate of that railroad. If the court finds that a transfer of rail properties of a railroad in reorganization to a profitable railroad would not be for fair and equitable compensation, it shall determine what fair and equitable compensation would be and order that such compensation be paid.[97] If there is no way that the court can make a finding that the proposed transfers of rail properties from a railroad in reorganization to the Corporation are fair and equitable to the estate of a railroad in reorganization, then the court shall disapprove the final system plan with respect to that railroad and remand the case to its reorganization court for further proceedings under section 77 of the Bankruptcy Act.[98] If the court approves the fi-

[97]Compare this sentence to the limited discretion afforded to the Special Court by §303(c)(2) of the RRRA.

[98]Compare this sentence with the lack of any remedy in §303(c) of the RRRA in the event that, after the conveyances, the Special Court finds that the consideration specified does not provide fairness and equity.

nal system plan with respect to a railroad in reorganization, it shall order the parties to make the conveyances as provided for in the final system plan, as it may have been amended by the court. Proceedings under this section shall take precedence over all other matters assigned to the judges of the special court, shall be assigned for hearings at the earliest practicable date and shall be expedited in every way possible.

"(b) APPEALS—A finding or determination entered pursuant to subsection (a) of this section may be appealed directly to the Supreme Court of the United States in the same manner that an injunction order may be appealed under section 1253 of title 28, United States Code: *Provided*, that such appeal is exclusive and shall be filed in the Supreme Court not more than 5 days after such finding or determination is entered by the special court. The Supreme Court shall grant the highest priority to the determination of any such appeals. Notwithstanding the filing of an appeal under this subsection, the special court may refuse to stay the execution of its orders issued under subsection (a) of this section.

"(c) COURT REVIEW OF ACTIONS—Except as provided in section 209(a) of this Act and in this section, action or inaction under this Act of the Secretary, the Commission, the Association or any director, member, officer, committee, or subordinate unit of any of them, shall not be reviewable in any court."

P. 50, line 14, delete "in the region" and substitute "which transfers to the Corporation and/or profitable railroads all or substantially all of its rail properties designated for such transfer in the final system plan, as approved with or without amendment by the special court under section 303 of this Act, and rail service on

rail properties of a profitable railroad in the region which transfers most of its rail properties to the Corporation pursuant to the final system plan, as approved with or without amendment by the special court under Section 303 of this Act,"

QUORUM OF FNRA BOARD

Amendment To Section 201(f) Of Working Paper No. 1 Dated November 11, 1973.

P. 11, lines 9-10, delete "Four members of such Board, excluding Government members," and substitue "6 members of such Board, including 3 of the Government members,"

QUALIFICATIONS OF OFFICERS OF THE ASSOCIATION

Amendment to section 202(a)(5) of Working Paper No. 1 dated November 11, 1973.

P. 13, line 17, insert after "railroad" the words:

"other than a vested right to receive present or future payments on retirement or pension benefits on deferred compensation for prior service".

LOAN GUARANTEE AUTHORITY

Amendments to section 310 of Working Paper No. 1 Dated November 11, 1973

P. 36, delete lines 15 through 18 and substitute:

"(c) *Guarantee.*—The Secretary is authorized on such terms and conditions as he may prescribe, to guarantee any lender against loss of principal and interest on obligations issued by the Association under this section."

P. 37, delete everything on line 3 down through "prescribe". on line 9 and substitute:

"(e) *Authorization to Issue Obligations to the Secretary of the Treasury.*—If at any time the moneys available to the Secretary are insufficient to enable him to discharge his responsibilities under subsection (c) of this section, he shall issue to the Secretary of the Treasury notes or other obligations in such forms and denominations, bearing such maturities, and subject to such terms and conditions as may be prescribed by the Secretary of the Treasury."[99]

[99]Compare this section, with its open-ended authorization to the Secretary of Transportation to acquire necessary funds from the Secretary of the Treasury, with §§210, 213(b), 214 and 215 of the RRRA.

IN THE

Supreme Court of the United States

October Term, 1974

SEP 26 1974
JR., CLE

No. 74-165
No. 74-167
No. 74-168

UNITED STATES OF AMERICA, *et al.*,
Appellants,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF APPELLEES, CONNECTICUT GENERAL INSURANCE CORPORATION, ET AL.

LOUIS A. CRACO
1 Chase Manhattan Plaza
New York, New York 10005

FREDERIC L. BALLARD
1035 Land Title Building
Philadelphia, Pa. 19110
Attorneys for Appellees

Of Counsel:
WALTER H. BROWN, JR.
THOMAS L. BRYAN
MICHAEL B. TARGOFF
CORNELIUS T. FINNEGAN, III
REBECCA T. HALBROOK
WILLKIE FARR & GALLAGHER
1 Chase Manhattan Plaza
New York, New York 10005

ALAN S. FELLHEIMER
BALLARD, SPAHR, ANDREWS & INGERSOLL
1035 Land Title Building
Philadelphia, Pa. 19110

September 26, 1974



TABLE OF CONTENTS

	PAGE
Table of Authorities	v
Opinions Below	2
Jurisdiction	2
Constitutional and Statutory Provisions Involved	3
Questions Presented	4
Statement of the Case	
I. Nature of Case and Proceedings Below	4
II. The Penn Central Reorganization: Backdrop for the Rail Act	6
III. The Impact of Operations During Reorganization of the Penn Central Estate	16
IV. Proceedings under the Rail Act	20
Summary of Argument	23
Argument:	
I. The Rail Act is Unconstitutional in that It Requires Mandatory Interim Operations at Hopeless Losses Without Providing Assurance of a Legal Remedy to Furnish Fair and Just Compensation for Erosion Beyond Constitutional Limits	33
A. The Act Does Mandate Interim Operation of the Penn Central System	35
B. Penn Central Interim Operations Impose Enormous Losses, Accumulate Priority Claims and Cause Erosion of the Value of the Estate	41
1. Post-Bankruptcy Financial Results through December 31, 1973	41

PAGE

2. Reasonably Foreseeable Future Financial Results after December 31, 1973 42

3. Erosion in the Value of the Estate .. 44

C. Compulsory Interim Operations are Unconstitutional in the Absence of Reasonable Present Assurance of Reorganizability under the Act or an Assurance of Just Compensation 47

1. The Public Interest in Continued Service Does Not Justify Mandatory, Uncompensated Interim Operations 47

2. The Rail Act Does Not Afford Any Reasonable Prospect of Likely Reorganization for the Penn Central Estate 53

(a) Conrail will not be materially different from Penn Central ... 53

(b) Conrail will face the same problems as Penn Central 54

(c) Conrail has no reasonable prospect of viability 54

(d) Conrail is an untried concept in railroad operations 55

(e) The Penn Central Trustees' viability condition concerning abandonments will not be satisfied .. 56

(f) The Penn Central Trustees' viability condition concerning unnecessary employees will not be satisfied 57

(g) The Penn Central Trustees' viability condition concerning passenger service will not be satisfied 58

(h) The Penn Central Trustees' viability condition concerning traffic and revenues will not be satisfied 59

PAGE

3. The Act Provides No Assurance of Payment for the Taking by Interim Erosion 61

(a) Interim payments provided are inadequate 62

(b) The Act fails to provide compensation which is adequate in medium and amount to assure fair value for the assets to be conveyed and still less does it provide redress for interim erosion 64

(i) Kind and amount of compensation under the Act 66

(ii) Inadequacy of compensation on any theory of valuation 69

(c) The Act fails to provide any procedures which could assure the requisite fair value for the properties conveyed and compensation for interim erosion 74

D. *New Haven Inclusion Cases*, 399 U.S. 392, Does Not Support the Constitutionality of the Rail Act, but Exposes its Unconstitutionality 79

II. There is No Adequate Remedy at Law Available to Appellees under the Tucker Act .. 83

A. The Statutory Scheme of the Act on Its Face Purports to be Exclusive and Exhaustive 85

B. The Legislative History is Consistent Only With the Exclusion of a Remedy in the Court of Claims 89

C. In Light of the History and Language of the Rail Act, the Tucker Act "Remedy" Cannot Be Adequate 98

PAGE

III. Injunctive Relief Granted Below was Timely and Proper 102

IV. The Order Entered Below may be Sustained on Other Grounds not Reached by the District Court 108

A. The Act Takes Appellees' Property for Public Use Without Just Compensation 109

B. To the Extent the Act is a Bankruptcy Act, It is Void Because It is not Geographically Uniform 112

C. The Processes of the Act Deprive Appellees and the Penn Central Estate of Due Process of Law 114

Conclusion 118

Table of Authorities

PAGE

CASES:

Almota Farmers Elev. & Whse. Co. v. *United States*, 409 U.S. 470 112

Altvater v. *Freeman*, 319 U.S. 359 83

American Life Ins. Co. v. *Stewart*, 300 U.S. 203... 101

Armstrong v. *United States*, 364 U.S. 40...27, 48, 110, 112

Atchison, T. & S.F. Ry. v. *Public Util. Comm'n*, 346 U.S. 346 ..... 27, 49

Bohler v. *Callaway*, 267 U.S. 479 101

Brooks-Scanlon Co. v. *Railroad Comm'n*, 251 U.S. 396 ..... 27, 47, 50, 51, 52, 73

Bullock v. *Railroad Comm'n*, 254 U.S. 513 ..... 50, 51

Central R.R. of N.J. v. *Manufacturers Hanover Trust Co.*, 421 F.2d 604 (3d Cir. 1970), *cert. denied*, 398 U.S. 949 52

Confederated Bands of Ute Indians v. *United States*, 117 Ct. Cl. 433 (1950) 99

Consolidated Rock Products Co. v. *Du Bois*, 312 U.S. 510 ..... 52, 74

Continental Ill. Nat'l Bank & Trust Co. v. *Chicago, R.I. & P.Ry.*, 294 U.S. 648 ..... 51, 52

Davis v. *Wakelee*, 156 U.S. 680 101

Delaney v. *Carter Oil Co.*, 174 F.2d 314 (10th Cir. 1949), *cert. denied*, 338 U.S. 824 83

Ecker v. *Western Pac. R.R.*, 318 U.S. 448 ..... 52, 74

Glidden Co. v. *Zdanok*, 370 U.S. 530 99

Group of Institutional Investors v. *Chicago, Mil., St. P. & Pac. R.R.*, 318 U.S. 523 ..... 52, 74

Hanover Nat'l Bank v. *Moyses*, 186 U.S. 181 .... 32, 113

CASES (Continued):

	PAGE
Harlem Valley Transp. Ass'n v. *Stafford*, 360 F. Supp. 1057 (S.D.N.Y. 1973), *aff'd*, No. 73-2496 (2d Cir., June 18, 1974)	12
Head Money Cases, 112 U.S. 580	113, 114
Hurley v. *Kincaid*, 285 U.S. 95	100
In re Boston & Maine Corp., 484 F.2d 369 (1st Cir. 1973)	46
In re Central R.R. of N. J., 485 F.2d 208 (3d Cir. 1973), *cert. denied*, 414 U.S. 1131	6
In re City of New York (Fifth Avenue Coach Lines, Inc.), 18 N.Y.2d 212, 219 N.E.2d 410 (1966), *appeal dismissed*, 386 U.S. 778	72
In re New York, N.H. & H.R.R., 289 F. Supp. 451 (D. Conn. 1968)	73
In re New York, N.H. & H.R.R., 304 F. Supp. 793 (D. Conn. 1969), *aff'd in part sub nom. New Haven Inclusion Cases*, 399 U.S. 392	46, 51
In re Penn Central Transp. Co., 355 F. Supp. 1343 (E.D. Pa. 1973)	14
In re Penn Central Transp. Co., 484 F.2d 323 (3d Cir. 1973)	9
In re Penn Central Transp. Co., 494 F.2d 270 (3d Cir.), *petition for cert. filed*, 42 U.S.L.W. 3633 (U.S. May 8, 1974) (No. 73-1672) (*"Columbus Options"*)	51, 53
In re Port Authority Trans-Hudson Corp., 20 N.Y. 2d 457, 231 N.E.2d 734 (1967), *cert. denied*, 390 U.S. 1002	72
In re Riker Del. Corp., 385 F.2d 124 (3d Cir. 1967)	52, 53
In re Third Ave. Transit Corp., 198 F.2d 703 (2d Cir. 1952)	53
Interstate Consol. St. Ry. v. *Massachusetts*, 207 U.S. 79	50
Leary v. *United States*, 395 U.S. 6	117

CASES (Continued):

PAGE

Lockerty v. *Phillips*, 319 U.S. 182 108

Louisville Joint Stock Land Bank v. *Radford*, 295 U.S. 555 ..... 27, 48, 74, 110

Miller v. *Schoene*, 276 U.S. 272 49

Nashville, C., & St. L. Ry. v. *Walters*, 294 U.S. 405 27, 49

New Haven Inclusion Cases, 399 U.S. 392 ..... 26, 28, 39, 51 *et passim*

New York, N.H. & H. R.R. First Mtg. 4% Bondholders' Comm. v. *United States*, 305 F. Supp. 1049 (S.D.N.Y. 1969), *vacated on other grounds sub nom. New Haven Inclusion Cases*, 399 U.S. 392 ..... 39, 51

Olson v. *United States*, 292 U.S. 246 112

Pennsylvania Coal Co. v. *Mahon*, 260 U.S. 393.... 50

Railroad Comm'n v. *Eastern Texas R.R.*, 264 U.S. 79 ..... 50, 51

Reconstruction Finance Corp. v. *Denver & R. G. W. R.R.*, 328 U.S. 495 ..... 51, 61

Southern Pacific Co. v. *Jensen*, 244 U.S. 205 101

Tot v. *United States*, 319 U.S. 463 117

Union Pac. R.R. v. *Board of County Comm'rs*, 247 U.S. 282 101

United States v. *Cors*, 337 U.S. 325 49

United States v. Dickinson, 331 U.S. 745 49

United States v. *Gainey*, 380 U.S. 63 117

United States v. *Miller*, 317 U.S. 369 112

United States v. *Reynolds*, 397 U.S. 14 112

United States v. *Romano*, 382 U.S. 136 117

CASES (Continued):

PAGE

Vanhorne's Lessee v. *Dorrance*, 2 U.S. (2 Dall.) 304 112

Vlandis v. *Kline*, 412 U.S. 441 117

Wright v. *Union Central Life Ins. Co.*, 311 U.S. 273 74

Wright v. *Vinton Branch of the Mountain Trust Bank*, 300 U.S. 440 74

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 ..... 83, 84, 100, 101 *et passim*

CONSTITUTIONAL PROVISIONS AND STATUTES:

U.S. Constitution:

Art. I, Sec. 8, Clauses 3 and 4 3

Art. I, Sec. 9, Clause 7 ..... 3, 100

Amendment V ..... 3 *et passim*

Bankruptcy Act:

Section 77, 11 U.S.C. § 205 ..... 4 *et passim*

Emergency Rail Services Act of 1970:

45 U.S.C. §§ 661 *et seq.* 8

Judicial Code:

28 U.S.C. § 1252 2

28 U.S.C. § 1253 2

28 U.S.C. § 1331 2

28 U.S.C. § 1337 2

28 U.S.C. §§ 2201-02 2

28 U.S.C. § 2282 2

28 U.S.C. § 2284 2

28 U.S.C. § 2518 99

31 U.S.C. § 724a 99

PAGE

CONSTITUTIONAL PROVISIONS AND STATUTES (Continued):

Regional Rail Reorganization Act of 1973:
45 U.S.C. §§ 701-93 ..... 2 *et passim*

Tucker Act:
28 U.S.C. § 1491 ..... 3, 29, 83 *et passim*

Railway Labor Act:
45 U.S.C. §§ 151 *et seq.* 13

Act of June 28, 1938, 52 Stat. 1209, as amended .. 99

Supplemental Appropriation Act of September 27, 1950, 64 Stat. 1044 99

S. J. Res. 59-2, 93d Cong., 1st Sess. (1973) 13

LEGISLATIVE MATERIALS:

H. R. Rep. No. 93-744, 93d Cong., 1st Sess. (1973) 91, 107

H. R. Rep. No. 93-620, 93d Cong., 1st Sess. (1973) 106, 107

S. Rep. No. 93-601, 93d Cong., 1st Sess. (1973) 76, 91, 107

119 Cong. Rec. H11876 *et seq.* (daily ed. Dec. 20, 1973) 92, 93

119 Cong. Rec. H9730 *et seq.* (daily ed. Nov. 8, 1973) 93, 94

119 Cong. Rec. S23777 *et seq.* (daily ed. Dec. 21, 1973) 36, 94

Subcommittee Print-H.R. 9142, dated August 2, 1973, with Changes Proposed by Messrs. Shoup and Adams 90

Hearings on S 2188 before the Senate Committee on Commerce, 93rd Cong., 1st Sess. (Nov. 15, 1973) 63

Explanation of Legislation Pertaining to the Midwest and Northeast Rail Crisis, before the Senate Committee on Commerce, 93d Cong., 1st Sess. (1973) 91

Oversight Hearings before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 93d Cong., 2d Sess. (June 14, 1974) ... 95, 96, 97

MISCELLANEOUS: PAGE

Annual Report of Penn Central to the ICC for 1969 (Form A) 7

Annual Report of Penn Central to the ICC for 1970 (Form A) 45

Annual Report of Penn Central for 1973 (Form R-1) 45

49 C.F.R. §§ 213 *et seq.* 17

Fed. R. Civ. P. 56 ..... 23, 83

Fed. R. Civ. P. 57 83

5 Collier, *Bankruptcy* (14th ed. 1974) 78

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-165
No. 74-167
No. 74-168

UNITED STATES OF AMERICA, *et al.*,
Appellants,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF APPELLEES, CONNECTICUT GENERAL INSURANCE CORPORATION, ET AL.

This brief is filed on behalf of Appellees who are owners of mortgage bonds of Penn Central Transportation Company ("Penn Central") and of certain lessors of leased lines of Penn Central ("Lessors") secured by mortgages on rail properties of Penn Central and Lessors, and certain banks which are corporate trustees or successor corporate trustees under indentures, mortgages or deeds of trust under which bonds or other debt securities of Penn Central or a Lessor were issued or secured.[1]

---

[1] The identity of Appellees and their interests in Penn Central and Lessors is described at pages 204-05 and 210 of the Joint Appendix which the parties have lodged with the Court. Reference to the pages of that Appendix will be prefaced by "JA". The parties have also lodged with the Court a Joint Documentary Submission

(Footnote continued)

Opinions Below

The opinions in the District Court, and its order entered on June 25, 1974, are not yet reported. They are set out in full in the Joint Appendix at JA 9-83.

Jurisdiction

This case was brought pursuant to 28 U.S.C. §§ 1331(a), 1337, 2201 and 2202, seeking a declaratory judgment that the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985-1023, 45 U.S.C. §§ 701-93 (the "Rail Act" or "Act"), is void for repugnance to the Constitution of the United States and an injunction against the enforcement, operation and execution of the Act insofar as it was found to be unconstitutional. Two other actions, *Smith* v. *United States* and *Penn Central Co.* v. *Brinegar,* originally brought in the District of Columbia on substantially the same grounds, were transferred to the Eastern District of Pennsylvania. The three actions were consolidated for disposition before a three-judge Court convened pursuant to 28 U.S.C. §§ 2282 and 2284.

These appeals have been taken from the order of that Court granting partial summary judgment to the plaintiffs, declaring certain portions of the Act to be unconstitutional and granting certain injunctive relief. The jurisdiction of this Court has been invoked by Appellants pursuant to 28 U.S.C. §§ 1252 and 1253.

Pursuant to stipulation of all counsel, briefs on the merits are being filed in advance of the determination of this Court as to probable jurisdiction, in order to facilitate an expedited hearing schedule as sought by all parties in a joint motion previously filed with the Court.

(Continued footnote)
containing other materials which formed a portion of the record before the Court below, pursuant to stipulation. References to the items in the Joint Documentary Submission will be prefaced by "J. Doc. No." followed by the item number and, where appropriate, a further internal reference as to the subject matter of the citation.

Constitutional and Statutory Provisions Involved

Article I, Section 8, Clauses 3 and 4, of the United States Constitution, in pertinent part provide:

> "The Congress shall have power . . .
>
> • • • •
>
> To regulate Commerce with foreign Nations and among the several States . . .;
>
> To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States; . . ."

Article I, Section 9, Clause 7, provides:

> "No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law; . . ."

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person . . . shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Rail Act, Pub. L. No. 93-236, 87 Stat. 985, 45 U.S.C. §§ 701-93, is set forth in full at JA 391-431.

The Tucker Act, as amended, 28 U.S.C. § 1491, provides in pertinent part:

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . ."

Questions Presented

1. Was the Court below correct in concluding that the Rail Act required the Penn Central estate to continue rail operations at massive and irreversible losses, without assurance of adequate compensation, and that the Act in this respect was repugnant to the Fifth Amendment to the United States Constitution?

2. Did the Court below correctly hold that no recourse pursuant to the Tucker Act exists so as to afford Appellees an adequate remedy at law for the constitutional deficiencies resulting from the operation of the Rail Act?

3. Did the Court below abuse its discretion in issuing the injunctions contained in its order, or in shaping their respective terms?

4. Can the result reached by the Court below be sustained on alternative grounds in that:

(a) the Act effects an uncompensated taking of Appellees' property;

(b) the Act constitutes a law on the subject of bankruptcies which is void because, by its terms, it is not uniform throughout the United States; or

(c) the procedures mandated by the Act deprive Appellees of their property without due process of law?

Statement of the Case

I. Nature of Case and Proceedings Below

During 1974 the financial crisis long impending among the railroads of the Northeast and Midwest moved swiftly to a legal climax. In response to the apparent inability of the seven bankrupt Class I railroads in the region, most particularly Penn Central, to achieve reorganization under Section 77 of the Bankruptcy Act, 11 U.S.C. §205 ("Sec-

tion 77"), Congress passed and the President signed the Rail Act, effective on January 2, 1974.

The Act immediately encountered broad-based challenges, posed by the Penn Central Trustees (the "Trustees") and all classes of its security holders, in proceedings both under and outside the Act.

Proceeding under Section 207(b) of the Act, although reserving the rights of all parties to object to its terms, the Penn Central Reorganization Court held, on May 2, 1974, that Penn Central was not capable of being reorganized on an income basis within a reasonable time (hereinafter referred to as the "120-Day Decision").[2]

Also proceeding under the terms of the Act, with a similar reservation, the same Court, on July 2, 1974 found that the Act does not provide a process which would be fair and equitable to the Penn Central estate (hereinafter referred to as the "180-Day Decision").[3]

Meanwhile, the actions from which these appeals have been generated were commenced by secured creditors, indenture trustees, unsecured creditors and the sole stockholder of Penn Central. Consolidated for disposition, the matter came on before the three-judge Court upon motions and cross-motions for summary judgment. The three-judge Court had before it, in addition to the papers originally filed in the respective plenary actions, a stipulation of

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[2] Reorganization Court Memorandum and Order No. 1543, May 2, 1974 (JA 84 *et seq.*).

[3] Memorandum in Support of Findings and Order No. 1596 Pursuant to the Second Sentence of § 207(b) of the Regional Rail Reorganization Act of 1973, July 2, 1974 (JA 124 *et seq.*). An appeal from that determination has been taken to the Special Court established pursuant to the Act and is, as of the date of this brief, *sub judice*. The Act requires the Special Court to decide appeals within 80 days after they were noticed so that the Special Court must decide the appeal after this brief is submitted but before this Court reconvenes. Appellees will, if appropriate, file a supplemental memorandum relating to the decision of the Special Court.

facts (JA 203-09) and, by agreement of the parties (JA 197-99), specified portions of the record previously developed in the Penn Central reorganization proceedings.

The Court below granted plaintiffs' motions in part, denied the cross-motions of the defendants and the intervening defendants, filed [illegible]inions and entered its order on June 25, 1974. In specified respects, the order declared the Act unconstitutional and enjoined its effectuation.

II. The Penn Central Reorganization: Backdrop for the Rail Act

This litigation arises in the context of complex and deeply-rooted problems in the transportation system of the Northeast and Midwest regions of the United States. The Penn Central system, embracing approximately 19,850 route miles of the rail trackage in that region (JA 212-13), is at the center of the crisis. Reasons for the declining prospects of rail transportation in the region abound, but most certainly they include competition from millions of automobiles and multiple schedules of competitive jet air service which have blighted the prospects for railroad passenger transportation while the traditional railroad freight business has been lost progressively to inland waterway operations, pipelines and trucks. The crisis has been aggravated by an accumulation of Government policies tending "to favor non-rail transportation and perpetuate a regulatory climate that [was] hostile to experimentation".[4] While the railroads labor under ever increasing burdens of maintenance and equipment expense, competing transportation systems relying on water, air and highway have been the beneficiaries of heavy public investment

[4] *In re Central R.R. of N.J.*, 485 F. 2d 208, 217 (3d Cir. 1973) (Aldisert, J., dissenting), *cert. denied*, 414 U.S. 1131. For a discussion of these subjects in more detail, see Staff Report, "The Penn Central and Other Railroads," Senate Committee on Commerce, December 1972 at 220 *et seq.*

which have substantially aided their operations at little or no user cost.

On June 21, 1970, Penn Central petitioned for reorganization under Section 77 and shortly thereafter Trustees duly appointed and confirmed began to oversee its reorganization.

Penn Central had been in severe financial straits for several years. During the years ended December 31, 1968 and 1969, it had sustained ordinary income losses of $41,914,598 and $91,631,726, respectively.[5] After the Trustees took over, the massive losses continued to mount: ordinary income losses of $179,700,000 were sustained during the period from June 21, 1970 to December 31, 1970.[6]

The Trustees quickly determined that the prospects for improvement in Penn Central's operations, absent changes over which neither they nor the Reorganization Court had any control, were minimal, and they so reported to the Court. Prelim. Rep. Concerning Premises for Reorganization, Feb. 10, 1971 (J. Doc. No. 1). They specified there that there could be no hope of profitable operation without massive increases in freight shipments and revenues and without fundamental changes in four respects, which came to be known as the "conditions to viability": (1) elimination of passenger service losses; (2) plant rationalization (primarily through abandonment of excess or uneconomic lines); (3) more flexible rate and division procedures; and (4) elimination of excess labor costs. The Trustees con-

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[5] Penn Central Annual Report on Form A to the Interstate Commerce Commission ("ICC") for the year ended December 31, 1969 (includes operations of The New York, New Haven and Hartford Railroad Company from date of acquisition, December 31, 1968).

[6] Finding of Fact No. 4, 120-Day Decision (JA 84, 89-90). Subsequent citations to such Findings are cited as "FF — ". See also Affidavit of Ernest R. Varalli, March 21, 1974 (J. Doc. No. 19) (hereinafter "Varalli affid."), Ex. T-1.

cluded their very first report by emphasizing what is still the heart of the matter:

> "But the overriding problem of Penn Central remains—the problem that must be overcome if it is to stay in the private enterprise system. It is found in an obligation to perform as a public service company in certain areas and under certain conditions which simply do not lend themselves to profitable operations, no matter who the operator is, or how efficient. The only possible remedy here is for public authority to lend its hand to a speedy elimination of the conditions which produce the losses, or respond with adequate compensation if it insists upon a continuance of the conditions." *Id.* at 15.

To date none of the four specified conditions to viability has been achieved.[7] The issues presented by this appeal relate primarily to the constitutional adequacy of the Rail Act which, as events unfolded, emerged as the response of the "public authority".

The financial crisis continued to deepen. In order to avert an immediate and severe cash shortage, the Trustees issued $100 million in Trustees' Certificates, for which a federal guaranty was required.[8] In return for the guaranty, the Government received a lien ahead of existing creditors on substantially all of Penn Central's properties.[9]

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[7] 120-Day Decision (JA 88). See also 180-Day Decision (JA 126-28).

[8] Emergency Rail Services Act of 1970, 45 U.S.C. §§ 661 *et seq.*

[9] See Order No. 124 (Doc. No. 704). (References to "Doc. No. —" are to documents of record in the Penn Central reorganization proceedings.) $50 million principal amount of the Trustees' Certificates matures in January 1976 and presumably must be refunded at that time. See Affidavit of John S. Guest, March 25, 1974 (J. Doc. No. 20) (hereinafter "Guest affid.") at 9. It presently appears unlikely that the Trustees will be able to obtain the necessary financing from private sources.

In addition to the infusion of funds from a new paramount lien of that magnitude, the Trustees were required to, and did: (1) apply to rail operations an aggregate of $155 million from non-recurring cash items (Stip. No. 11(a), (b),[10] JA 206-07; FF 4, JA 89-90; Varalli affid., Ex. T-1, J. Doc. No. 19); (2) utilize approximately $157 million of non-rail income for rail operations (Stip. No. 11(c), JA 207);[11] and (3) defer payments of real estate taxes ($241 million), leased line rentals ($101 million) and interest on mortgage and collateral trust debt ($104 million) as well as interest on unsecured debt sufficient to bring the total of all such deferrals to $605 million (Stip. Nos. 12, 13, 14, JA 207-08; FF 4, JA 89-90; Varalli affid., Ex. T-1, J. Doc. No. 19). In addition, the Trustees deferred some $665 million of expenditures for maintenance of way. (Affidavit of Clarence E. Jackman, March 25, 1974 (J. Doc. No. 18) (hereinafter "Jackman affid."); FF 10, JA 91-92.)

Notwithstanding the massive proportions of these measures, taken separately or cumulatively, the Trustees were barely able to continue operations and were wholly unable to stem the tide of gigantic operating losses. Moreover, little progress was made in achieving any of the conditions to viability, and the Trustees' periodic reports on reorganization matters grew more pessimistic. As they reported on February 15, 1972:

> "If these three changes [plant rationalization, personnel reduction, passenger service compensa-

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[10] The parties below have agreed that certain facts set out in a stipulation dated April 15, 1974 entered in the record below are deemed to be true. References to "Stip. No. —" are to items of that stipulation (JA 203-11).

[11] Certain other efforts of the Trustees to obtain cash from non-recurring or non-rail sources were unsuccessful. See, *e.g., In re Penn Central Transp. Co.*, 484 F.2d 323 (3d Cir. 1973), holding that the sale of major income-producing real estate properties was inappropriate except as part of a plan of reorganization.

> tion] were not to be made—or if there were undue delay in making them—there would not be, in the judgment of the Trustees, the basis for reorganizing the Penn Central as a private enterprise. This conclusion is based on studies and analyses which show that *maximally effective self-help measures alone*—taken with the most reliable available estimates of traffic increases in the future—would result in continued losses during the next four years and would show only marginal earnings by 1976. *That would be too little and too late—for there would have been unconscionable and possibly unconstitutional erosion of the Debtor's estate in the meantime.* This judgment could only be invalidated by an unlikely confluence of favorable developments including a spectacular and sustained increase in revenues far beyond what is here forecast." J. Doc. No. 4 at 2. (Latter emphasis added.)

The emphasized passage of the report struck for the first time what was to be the keynote of the reorganization—and of this litigation—namely the "unconscionable and unconstitutional" results of continuing the railroad's operations in the face of intractable losses and erosion.

The Trustees' attempt to effectuate a traditional income-based reorganization of Penn Central through their own efforts and with the voluntary cooperation of other parties, including governmental authorities, shippers and labor, proved unavailing. The Trustees recognized this, and in their January 1, 1973 Report (J. Doc. No. 8 at 1), publicly avowed that the railroad was not reorganizable in a traditional sense, announcing that they "have concluded that without government financial assistance for improvement of the railroad, a reorganization of Penn Central cannot be achieved in 1976, as they had considered possible."

The financial assistance mentioned was to be used to improve Penn Central's plant and provide more serviceable

equipment so that projected traffic increases "upon which the reorganization depends" could be achieved. The Trustees shortly thereafter told the Court that the amount needed was between $600 million and $800 million. Trustees' Report, Feb. 1, 1973 (J. Doc. No. 9) at 2. And the Trustees again drove home the point:

> "It is clear that the status quo will not permit an income-based reorganization. Indeed, because of the accumulation of losses and unpaid priority charges, a continuation of present operations would do violence to the constitutional prohibition against the using of private property for a public purpose without adequate compensation." *Id.* at 7.

The continued emphasis by the Trustees on the constitutional problems of interim loss operations is noteworthy.

Notwithstanding Penn Central's deteriorating financial condition and darkening prospects, the Trustees still attempted to use whatever self-help measures they could in striving to effectuate the conditions to viability.

Piecemeal abandonments furnished no real response to the problems of Penn Central. Any significant doubt on that score was dispelled by studies of the potential viability of a hypothetical "core" Penn Central system developed by Wyer, Dick & Co. ("Wyer, Dick") for the Trustees.[12] These studies established that even if the most optimistic

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[12] The studies were introduced into evidence by the Trustees in the proceedings before the ICC on the plans of reorganization of Penn Central discussed below. Exhibits introduced in those proceedings are hereinafter cited as "ICC Ex. —." Statement of Charles C. Shannon, ICC Ex. 19. That record (in Fin. Dkt. No. 26241) was before the Court below in full (JA 199). Portions of that record have been reproduced in the Joint Documentary Submission lodged with this Court.

predicted conditions[13] were achieved instantly, including the instant abandonment of 6,000 route miles (30%) of trackage and the physical elimination of passenger operations (as distinct from passenger losses), the remaining 15,000 mile core of the Penn Central system could not generate income available for fixed charges until 1976.

Nevertheless, in order to mitigate the drain on the estate, the Trustees filed applications with the ICC to abandon 3,742 miles of track. As of July 1973, when the ICC ceased processing any abandonment applications because of the decision in *Harlem Valley Transp. Ass'n* v. *Stafford*, 360 F.Supp. 1057 (S.D.N.Y. 1973), *aff'd*, No. 73-2496 (2d Cir., June 18, 1974),[14] only some 1,400 miles of track had been authorized for abandonment.[15] Since January 2, 1974 the Trustees have requested authorization from the United States Railway Association ("USRA") to abandon approximately 1,528 miles of track under Section 304(b) of the Act (J. Doc. No. 65). USRA

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[13] The Wyer, Dick studies were based upon projections of the revenues potentially available to Penn Central for the five-year period of 1974-1978, made in May 1973 by Temple, Barker & Sloane ("TBS"), consultants to the Trustees. The projections were criticized as overly optimistic by Mr. Shannon, President of Wyer, Dick (ICC Ex. 19 at 9-14). The May 1973 projections were, in fact, the third such forecast made by TBS at the Trustees' request, and in each successive forecast the total freight tonnage forecast was revised downward. Statement of Carl S. Sloane, ICC Ex. 17 (J. Doc. No. 38) at 10. Mr. Sloane also acknowledged that "external factors" and "present circumstances" rendered the May 1973 forecasts optimistically unreliable. *Id.* at 20. And Mr. Shannon concluded that the viability study did not "form the basis for a responsible and feasible plan of reorganization" because the conditions on which it was predicated were "unlikely of achievement." ICC Ex. 19 at 25.

[14] There the court held that before any hearing on abandonment applications could be held, an environmental impact statement must be issued.

[15] Preliminary Report of ICC in Fin. Dkt. No. 26241 (J. Doc. No. 54 at 13) (hereinafter "ICC Report").

responded that no procedures for handling such requests had yet been determined (J. Doc. No. 66). All such applications thus landed in administrative limbo.

The Trustees' efforts to eliminate excess labor costs met no better success. The Trustees placed great stress on the multi-million dollar savings to be obtained through reduction in the number of persons constituting a train crew. This objective was, and remains, unacceptable to organized labor. In early 1973, after full compliance with the procedures of the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, the Trustees unilaterally posted new work rules designed to reduce crew sizes solely by means of attrition. A strike ensued which was quickly ended on February 9, 1973, not by negotiations between the parties, but by the passage of United States Senate Joint Resolution 59-2, nullifying the work rule changes and requiring the continuation of the status quo. The Trustees have not subsequently attempted self-help measures to resolve their major labor problems.

In the face of the still deepening crisis, and fully aware of the Trustees' futile efforts to achieve the conditions of viability by self-help, the Reorganization Court on March 6, 1973, on its own motion, entered Memorandum and Order No. 1137 (J. Doc. No. 28) directing the Trustees to file, not later than July 1, 1973, either a plan of reorganization of Penn Central or their proposals for liquidation. The Court stated:

> "Whether the constitutional limit [of interim erosion] has been exceeded depends primarily upon how the remaining assets are to be valued; and this in turn may well depend upon how those assets are to be used at the conclusion of this reorganization. Under any view of the matter, it seems clear that the point of unconstitutionality is fast approaching, if it has not already arrived.
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> "The essence of § 77 of the Bankruptcy Act is that the legal remedies normally available to creditors may be held in suspension for a reasonable time in order to permit rehabilitation of the enterprise. Whenever it appears that there is no genuine likelihood of ultimate success, the legal and constitutional justification for restraining creditors from exercising their normal remedies disappears. . . . [I]t is apparent that the required profitability cannot be achieved unless substantial further progress is made in the immediate future to meet the conditions upon which the projected profitability is based. . . .
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> ". . . On the basis of the record to date, it appears highly doubtful that the Debtor could properly be permitted to continue to operate on its present basis beyond October 1, 1973." *In re Penn Central Transp. Co.*, 355 F.Supp. 1343, 1344-46 (E.D. Pa. 1973).

Again, the emphasis on constitutional problems of continued operations should be noted.

The Trustees complied with the Court's directive and filed a plan of reorganization for Penn Central which, briefly stated, contemplated the orderly liquidation of Penn Central's rail assets and its reorganization around its other assets.[16] The plan was filed with the ICC, as were other plans proposed by the New Haven Trustee and Penn Central Company, and hearings before the ICC (Fin. Dkt. No. 26241), in which all interested parties participated, con-

[16] Shortly before the Trustees' plan was filed, fifteen Lessors ("Secondary Debtors") also filed petitions for reorganization under Section 77 in conjunction with the Penn Central reorganization proceedings. The Secondary Debtors own, or themselves lease from others, 9,304 miles (or 46.9%) of the 19,850 miles of road presently operated by Penn Central (JA 105, 212-13). None of the leases with the Secondary Debtors has been affirmed or rejected (JA 105). The proposed plan of reorganization also dealt with the Secondary Debtors, since their fate is inextricably intertwined with that of Penn Central.

tinued through the summer of 1973. On October 1, 1973, the ICC issued its "Preliminary Report", holding, *inter alia*, that the Trustees' plan was not "a plan of reorganization within the meaning of section 77(b) of the Bankruptcy Act"[17] and refusing to certify it or any other plan of reorganization to the Reorganization Court for further consideration. The ICC Report also stated that further hearings would be held in the matter. None was ever scheduled or held.

Following the refusal of the ICC to certify a plan of reorganization, the New Haven Trustee, on October 9, 1973, moved before the Reorganization Court for dismissal of the Penn Central reorganization proceedings under Section 77(g) and institution of an equity receivership as contemplated by Section 77(i) (J. Doc. No. 13).[18]

The Court held a hearing in October 1973 to consider the implications of the ICC order. At that hearing, the Under Secretary of Transportation reported to the Court on the status of the legislative effort (see excerpt at J. Doc. No. 24) and largely on his representations that adequate federal assistance was imminent, the Court agreed to bide its time.[19] It is fair to conclude that the Reorganization Court would have reluctantly terminated rail operations by the end of 1973 had not the Government held out the promise that help would be forthcoming.

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[17] ICC Report (J. Doc. No. 54) at 111.

[18] By petition filed in March, 1973 (J. Doc. No. 12), the New Haven Trustee had sought, *inter alia*, the fixing of a date for termination of operations. The petition was never set down for hearing.

[19] After the Act was passed, further petitions were filed by the Institutional Investors Penn Central Group and certain indenture trustees on March 7, 1974 seeking termination of rail operations (Doc. No. 7135) and by Penn Central Company on April 4, 1974 seeking termination of rail operations and severance of rail properties from non-rail properties (Doc. No. 7314). These petitions and the aforementioned motion of the New Haven Trustee have been briefed and argued to the Reorganization Court and are pending.

During 1973, the financial condition and prospects of Penn Central continued to worsen: the system lost $189 million from operations in 1973.[20] In early 1974 Penn Central had approximately $10,800,000 of installment payments due on equipment obligations which it was unable to meet and, accordingly, applied for an "emergency" grant under Section 213 of the Act (J. Doc. No. 14). However, the Secretary of Transportation refused to make an outright grant as apparently called for by the Act but insisted on acquiring a *pro tanto* interest in the Trustees' equity in the equipment involved equivalent to the amount of the payments made. Notwithstanding outright opposition to the transaction by some creditor interests and the position of most others that the transaction was contrary to the intent of the Act, the Reorganization Court approved the transaction, stating, "There is no alternative" (J. Doc. Nos. 29, 30). Later, on April 30, 1974, the Secretary authorized and the Reorganization Court approved an outright grant of an additional $18,000,000 under Section 213 to stave off yet another cash crisis (J. Doc. No. 31).

III. The Impact of Operations During Reorganization of the Penn Central Estate

The events described above provide merely a glimpse of the massive evidence before the Court below documenting the inexorable trend in the Penn Central reorganization proceedings towards continual and irreversible losses, the continued dissipation of non-recurring and non-rail income in non-remunerative rail operations, and the continued substantial deterioration of plant and equipment.

Some specific facts point up the magnitude of this financial and physical erosion more graphically:

(1) During the period from June 21, 1970 to December 31, 1973, Penn Central's operations resulted in losses in ordinary income, calculated in accordance with ICC regula-

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[20] FF 1, 4, JA 89-90; Varalli affid., J. Doc. No. 19, Ex. T-1.

tions, as follows (FF 1, 4, JA 89-90; Varalli affid., J. Doc. No. 19, Ex. T-1):

June 21, 1970 to December 31, 1970	$179,700,000
Year ended December 31, 1971	284,500,000
Year ended December 31, 1972	197,900,000
Year ended December 31, 1973	189,000,000
Total	$851,100,000

(2) During that period, non-recurring income approximating $155,300,000 was expended to sustain operations (FF 3, 4, JA 89-90; Varalli affid., J. Doc. No. 19, Ex. T-1).

(3) The amount set forth in (2) above does not include the additional amount of approximately $28,800,000 received under Section 213 of the Act (see FF 4, JA 90).

(4) During that period, $157,000,000 in non-rail income was utilized in operating Penn Central's rail properties (Stip. No. 11(c), JA 207, 211).

(5) During that period, unpaid and deferred real estate taxes, leased line rentals and interest on debt obligations aggregated approximately $605,900,000 (FF 2, 4, JA 89-90; Varalli affid., J. Doc. No. 19, Ex. T-1).

(6) Deferral of maintenance of way spread from branch, side and yard trackage to mainline trackage, and deterioration of portions of the main line accelerated. That in turn resulted in, among other things, slow orders being imposed in 1974 on 8,475 track miles, up from 2,100 track miles in 1970. A total of 6,900 track miles was classified by the Federal Rail Administration as not being in adequate condition to meet the minimum standard for operational track speed of 10 miles per hour (49 C.F.R. §§ 213 *et seq.*). The deterioration of the roadway increased train time, decreased service capacity and depressed the system revenues still further (FF 7, 8, 9, 10, JA 91-92; Jackman affid., J. Doc. No. 18, at 3-4).

(7) Even assuming annual expenditures of $225 to $250 million for normalized maintenance of way, an additional $665 million (in non-inflated dollars) must be expended to catch up with past deferred maintenance. The amount of deferred maintenance is so great that it would require eight years to make up, even if all the money were presently available (FF 10, JA 91-92; see Jackman affid., J. Doc. No. 18, at 4).

It cannot be seriously disputed that if Penn Central is forced to continue operations on the present basis, additional massive financial losses and deterioration of plant will result. The Reorganization Court found reasonable—upon uncontradicted competent expert testimony[21]—projected ordinary income losses for Penn Central in the years 1974-1978 of the following magnitude:

1974	$(237,700,000)
1975	(196,300,000)
1976	(136,000,000)
1977	(96,000,000)
1978	(56,200,000)

(FF 12-19, JA 92-95; Affidavit of Carl S. Sloane, March 25, 1974 (J. Doc. No. 16) (hereinafter "Sloane affid.") at 7-11; Varalli affid., J. Doc. No. 19, at 4, Ex. T-2).

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[21] This testimony was introduced at the 120-day hearing at which the United States was represented and had an opportunity to cross-examine and to offer rebuttal evidence. The Court indicated the probable availability of portions of the record there made in the plenary constitutional actions (J. Doc. No. 26 at 11,112). No contrary evidence was ever tendered by the United States; no appeal from the 120-Day Decision was taken by the United States; and inclusion of this evidence in the record below and in the submission to this Court was agreed to by the Government and USRA (JA 198, item 11; JA 6, item II-1). At no time, therefore, have Appellants in any form attempted to offer any countervailing evidence as to Penn Central's prospects, and the findings of the Reorganization Court as to the reasonably likely losses, accumulation of priority claims, and related matters are thus before this Court uncontradicted.

The foregoing projections are based upon assumed continued diversion to rail operations of non-rail income. The magnitude of ordinary income losses reasonably projected for the same period on a rail-operations-only basis was found to be as follows:

1974	$(236,700,000)
1975	(206,400,000)
1976	(153,900,000)
1977	(120,300,000)
1978	(82,300,000)

(FF 24, 25, JA 98-99; Varalli affid., J. Doc. No. 19, Ex. T-3).

Neither of these projections reflects the further costs of eliminating deferred maintenance (FF 27, JA 100). If, on the one hand, such costs—found by the Reorganization Court to be reasonably estimated at $665 million over eight years (FF 10, JA 91-92, n. 2)—were to be charged against operations, the resultant losses would be correspondingly greater. If, on the other hand, the amounts necessary to cure deferred maintenance are not expended, the physical plant of Penn Central will continue to deteriorate, with a resultant loss of traffic and accelerated decline in revenues. (FF 10, 22, JA 91-92, 97; Sloane affid., J. Doc. No. 16, at 11.)

It is also reasonable to expect that in the period 1974-1978, as much as $310,700,000 in local taxes, $137,100,000 in bond interest and $140,000,000 in leased line rentals will accrue, but not be paid. (FF 23, JA 98; Guest affid., J. Doc. No. 20, at 9-10.)

In summary, from the inception of the Penn Central reorganization proceedings, despite substantial efforts by the Trustees, a traditional income-based reorganization was never in the cards. It is, of course, now both conceded (Stip. Nos. 8, 9, JA 206) and finally found (JA 103) that such reorganization is not possible. The Trustees realized early that without substantial achievement of objectives

not within their control or that of the Reorganization Court — elimination of plant redundancy (primarily through major line abandonments), elimination of excess labor, full reimbursement for passenger service and improvement in rates and divisions--Penn Central's situation was hopeless. None of those conditions to viability came close to fruition. The inevitable result was that the financial prospects of Penn Central deteriorated calamitously.

IV. Proceedings under the Rail Act

By 1973, six Class I roads in the Northeast and Midwest, in addition to Penn Central, were seeking reorganization under Section 77.[22] And there was an imminent possibility that Penn Central or one or more of the other bankrupt lines might be forced to discontinue operations, whether by reason of lack of cash, physical deterioration or an order of a reorganization court to prevent unconstitutional erosion. Congress sought a solution to this crisis through most of 1973. The result is the Rail Act.

Proceeding under that Act, the Reorganization Court entered its 120-Day Decision on May 2, 1973 with respect to both Penn Central (JA 84-103) and the Secondary Debtors (JA 104-20). As to Penn Central, the Court held, in accordance with the views expressed by virtually every participant in the hearings, that Penn Central is not reorganizable on an income basis within a reasonable time

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[22] *In re Ann Arbor Railroad Company*, Bky. No. 4-90833, E.D. Mich.

In re Boston & Maine Corporation, Bky. No. 70-250-F, D. Mass.

In re Central Railroad Company of New Jersey, No. B401-67, D. N.J.

In re Erie Lackawanna Railway Company, No. B72-2838, N.D. Ohio.

In re Lehigh Valley Railroad Company, Bky. No. 70-342, E.D. Pa.

In re Reading Company, Bky. No. 71-828, E.D. Pa.

under Section 77 within the meaning of Section 207(b) of the Act (JA 84-103). Having so found, the Court considered it unnecessary to make the public interest determination contemplated by Section 207(b).[23]

Thereafter, the Reorganization Court, having held full evidentiary hearings, entered its 180-Day Decision finding that the Act does not provide a process which is fair and equitable to the estate of Penn Central in the following respects (JA 149-51):

> "1. The Act requires [Penn Central] to continue to operate the railroad, for its own account, until such time as the Final System Plan is implemented. There is no prospect that such operations can be conducted, except at huge losses. The Act makes no provision for compensation to the estate or its creditors for the resulting erosion.
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> 2. The Act does not permit judicial determinations with respect to the values of the properties to be conveyed, or the value and adequacy of the consideration to be paid for such properties, in advance of the conveyance, and the subsequent judicial review of these matters does not affect the finality of the conveyance.
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> 3. Since USRA, with the approval of Congress, is to determine the nature of the consideration to

[23] The New Haven Trustee (solely on jurisdictional grounds) and the Commonwealth of Pennsylvania appealed the 120-Day Decision to the Special Court, but the appeals were dismissed. Those parties have also appealed to the Third Circuit Court of Appeals on the same grounds. The Court may wish to take notice of the fact that the courts overseeing the reorganizations of the Erie Lackawanna and the Boston & Maine found that those lines were capable of being reorganized on an income basis within a reasonable time under Section 77 and that the public interest would be better served by continuing with such a reorganization. Order No. 234 (Doc. No. 688) in the Erie Lackawanna proceedings and Memorandum dated May 2, 1974 in the Boston & Maine proceedings.

be paid for the transferred assets, and judicial remedies are limited to reallocation of the securities proposed by USRA and the entry of a deficiency judgment against Conrail, the Act does not assure that the [Penn Central] estate will actually receive the equivalent of the 'constitutional minimum' value of the properties conveyed.

4. It is beyond the power of a reorganization court, including the Special Court, to order the conveyance of properties free and clear of liens in exchange for common stock, except perhaps to the extent that the sale price exceeds the net liquidation value of the property conveyed. This is particularly true where there is no guarantee of the value of the stock or its future earnings.

5. Implementation of the Final System Plan pursuant to the Act cannot be regarded as equivalent to consummation of a plan of reorganization, or a step in or part of such a plan of reorganization, because (a) the conveyances would become irrevocable before there would be any opportunity for participation by the estate or its creditors in the valuation process, (b) the conveyances would become irrevocable in advance of any judicial review of fairness, valuations, etc.; (c) the conveyances would become irrevocable before there could be any determination of the relative rights of creditors and the value of their security or their treatment in the reorganization process; the creditors would merely lose their liens on the properties conveyed.

6. Implementation of the Final System Plan cannot be legally justified as a sale of property by the Trustees, or as consummation of a reorganization plan, for the reasons specified above. To the extent that the Act represents an exercise of the power of eminent domain, it is unfair and inequitable, in that it does not provide for just compensation in cash or

its equivalent, assured in advance of the conveyance. There is no other basis upon which the constitutional validity, or the fairness and equity, of implementation of the Act can be upheld.

7. Under the provisions of the Act, the only judicial determinations which can have significant effect in protecting the rights of the railroad estates and their creditors must be made at a time when substantially all of the information pertinent to those judicial decisions is unknown and unknowable."[24]

Summary of Argument

The Court below did not, as Appellants would have it, launch an indiscriminate and premature attack upon the Rail Act. Rather, upon a fully developed record,[25] the Court found clear and present harm in the impact of certain provisions of the Act upon constitutionally protected interests of the plaintiffs. It used its equitable powers to tailor an injunctive decree to fit tightly the wrongs which it found. In this it was neither premature nor extravagant; it was correct and prudent. Its order is sustainable not only upon the grounds which it assigned for its action, but also upon other grounds which, in the exercise of its judicial restraint, it declined to reach.

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[24] The Reorganization Court reached the conclusion that the Act does not provide a process fair and equitable to the estates of the Secondary Debtors for the same and additional reasons (JA 153-56).

[25] No party has contended that the extensive record contains any genuine issue of material fact, and all parties proceeded on motions under Fed. R. Civ. P. 56. The bulk of the record was imported from the Penn Central reorganization proceedings, by agreement, and Judge Fullam, who has supervised that reorganization for over four years, was a member of the three-judge Court.

I.

The Court below found Section 304(f) of the Act to be unconstitutional in that it forced interim rail operations upon Penn Central until a Final System Plan was adopted. Since these operations were incontrovertibly at massive losses, the Court found that they posed a serious likelihood that the bankrupt estate would be unconstitutionally eroded before a Final System Plan could be effectuated. Holding that Section 303 of the Act did not assure compensation for the losses thus incurred, the Court concluded that the provisions were unconstitutional under the Fifth Amendment.

Appellants attack this conclusion upon the grounds that (a) the Act in their view does not require such continued interim operations; (b) the impact of compelled operations under existing financial conditions is not demonstrably confiscatory; and (c) even if interim operations at a loss were compelled, such a result is nonetheless constitutionally permissible because such operations are required by the public interest.

The Court below correctly appraised the record as to the imminence of harm to plaintiffs by virtue of the inexorable economic effect of plainly required interim operations. Given that harm the Court rightly refused to countenance a new rule of expropriation for industries affected with a public interest as was implicit in Appellants' position.

Section 304(f) forbids discontinuance of rail service or abandonment of lines to any significant degree pending completion of the Final System Plan. Indeed, that was the manifest purpose of Section 304(f) as is evident from its terms, its legislative history, and from subsequent utterances of its authors directed to those charged with its administration. The duration of these continued operations would be a minimum of 17 months and could extend indefinitely as either USRA requests legislative extensions

of time for its task,[26] or as Congress delays adoption of a Final System Plan. During this interval, permissive abandonments under Section 304(f) could not cure the effect of massive losses being sustained by the estate, nor would public groups likely acquiesce in any such abandonment program.

Because Section 304(f) in as many words precludes any federal court from authorizing abandonment or discontinuance of service, the Court below properly recognized that it had before it the last clear chance to prevent the procedures of the Act from exacting an unconstitutional toll of the estate and the claimants entitled to participate in it.

Upon the record, the interim operations required by the Act do confront the estate with the unavoidable prospect of enormous continuing losses and continued accumulation of huge priority claims. These continuing loss operations afflict the estate with a demonstrable likelihood of financial and physical erosion. This conclusion was amply justified upon an uncontested record of massive deficits in net operating income, the issuance of Trustees' Certificates priming the secured creditors, the aggregating of accrued but unpaid real estate taxes and leased line rentals, the deployment in hopelessly losing operations of non-recurring income and of income derived from non-rail enterprises, and the uncontested likelihood—found as fact by the Reorganization Court (JA 92-100)—that all these would

[26] A postponement of 120 days for presentation to Congress of the Final System Plan has now authoritatively been proposed in S. 4003 introduced by Senators Hartke, Magnuson, Cotton, Pearson and Beall on September 16, 1974 and that day referred to the Senate Committee on Commerce, the text of which, with introductory comments by Senator Hartke and supporting letters from the Chairman of USRA and the Chairman of the ICC, is printed in the Congressional Record of that date (daily ed.) at S16619-20. The Bill would extend by 120 days the statutory deadline for both the preliminary system plan and the Final System Plan, and would authorize an increase in USRA's administrative expenses from $26 million to $40 million.

continue at enormous rates, interminably. The finding of the Reorganization Court that Penn Central was not capable of an income-based reorganization set the further course of the Penn Central reorganization apart from those reorganization cases which were premised upon a feasible recapitalization of the debtor railroad so that railway operating income would adequately support the new capital structure.

Apart from the fact that the findings of the Reorganization Court on such subjects are entitled to special weight, *New Haven Inclusion Cases*, 399 U.S. 392, 463, Appellants are plainly wrong in their contention that erosion does not pose a demonstrably immediate threat to the Penn Central estate. Their contention that "appreciation" in the estate derived from general economic inflation offsets its erosion is wrong as a matter of law. Assuming *arguendo* that inflation did produce a net increase in the value of the properties of the estate, the investors in Penn Central are constitutionally entitled, once there ceases to be a reasonably likely prospect of reorganization, to place their funds in appreciating investments which are not sapped by staggering losses. Further, Appellants' figures, designed to demonstrate that the erosion has been offset by asset appreciation, are wholly unreliable. The Court was correct in recognizing the existence and inevitability of continued attrition of the estate, and protecting Appellees against its ravages.

Such compulsory operations to the manifest detriment of the estate are not constitutionally permissible in the public interest in the absence of either (a) assurance of just compensation or (b) reasonable present assurance that the outcome of the procedures under the Rail Act will produce at least the liquidation values to which the creditors of the estate are presently entitled, plus compensation for the erosion they sustain during the course of those procedures.

The vice of the Act in this respect is that it compels interim loss operations without providing either assurance of compensation or a reasonable present assurance of reorganizability. That this is done for an ostensible public purpose merely poses the constitutional question; it does not answer it. The Fifth Amendment presumes that takings are for a public use. It does not excuse the payment of just compensation on that account; it commands just compensation on that account.

This Court has always recognized the principle that when public purposes are to be served, in all fairness and equity the public rather than private parties should bear the costs. *Armstrong* v. *United States*, 364 U.S. 40, 49; *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 602. The cases have consistently recognized the difference between the uncompensated abatement of a nuisance which is permissible, and the uncompensated compulsory provision of a public good, which is not. Compare *Atchison, T. & S.F. Ry.* v. *Public Util. Comm'n*, 346 U.S. 346, with *Nashville, C., & St.L. Ry.* v. *Walters*, 294 U.S. 405. This well-settled distinction is basic to the line of cases, epitomized by *Brooks-Scanlon Co.* v. *Railroad Comm'n*, 251 U.S. 396, which hold it unconstitutional to compel continued hopelessly losing rail operations without compensation upon a claim that such operations are required by the public interest. Those cases embody a fundamental principle of constitutional law, have repeatedly been relied upon and are not, as Appellants suggest, obsolete.

All the cases in which the doctrine of railroad reorganization under Section 77 has been developed involved proceedings in which, by proof or by hypothesis, there existed a reasonable likelihood that upon recapitalization the enterprise could be reorganized and going concern values, in excess of then present liquidation values, could be achieved. Railroad investors do, under those cases, assume the risk that the accomplishment of such a re-

organization may require them to abstain for a reasonable time from the exercise of creditors' remedies. These cases do not stand for the proposition that, after such reasonable prospect of reorganization has been extinguished, a similar abstention can be forced upon the creditors without just compensation, or that successive ephemeral prospects of reorganization can be held out as justification for indefinite suspension of their rights. See, e.g., *New Haven Inclusion Cases*, 399 U.S. at 460-61, 466.

Here, as is apparently conceded (J. Doc. No. 64 at 68-69), the Rail Act in its terms does not provide adequate funding to assure just compensation for the interim erosion which the estates are, by its terms, compelled to suffer. Nor, upon the record, can it fairly be said that the Act holds out sufficient assurance of a reasonably likely reorganization to have required the Court below to abstain from granting the relief prayed for. An examination of the provisions of the Act indicates that its terms are materially inadequate to compensate for the assets ultimately to be conveyed and, *a fortiori*, are incapable of providing assurance of eventual recoupment of erosion losses. The interim operations are thus required by law under circumstances that preclude recovery of the values thereby lost to the estate either by direct compensation or reasonably foreseeable reorganization. The Court below correctly branded that result unconstitutional and enjoined it. Unlike the cramdown provision of Section 77 to which Appellants resort by analogy, no court has the power under the Act to furnish the requisite assurance of value, either by interim surveillance of the reorganization or by ultimate determination, in advance of consummation of the conveyances, that the Final System Plan is feasible or that the consideration afforded by the Act is fair and equitable.

Appellants take misguided comfort from the decision of this Court in the *New Haven Inclusion Cases*, 399 U.S.

392. Although the New Haven reorganization appears to have been the model for the Rail Act, the latter radically differs from the former in certain material respects which highlight the unconstitutional impositions of the Act. Most notably: The compulsory character of the Act contrasts with the voluntary nature of the New Haven inclusion. The absence of any judicial supervision of the procedures of the Act as they lead to inclusion in the Consolidated Rail Corporation created by the Act ("Conrail") contrasts with the careful scrutiny accorded the New Haven reorganization and the terms of its inclusion in Penn Central. And the assurance enjoyed by the New Haven investors (woebegone as it turned out to be) that they would receive an assured per parcel liquidation value for their properties when those properties were included in a mammoth railroad with assets of a value twenty times larger than the value of the conveyed assets, contrasts starkly with the legitimate pessimism that must be accorded the prospect that fair value for the conveyed rail properties can be eked out of a Conrail which amalgamates portions of the bankrupt railroads themselves.

II.

The deficiencies of compensation intrinsic to the Act are not met by any putative remedy at law under the Tucker Act.

Analysis of the Rail Act itself and a fair reading of its legislative history demonstrate that Congress made explicit provision in the Act (a) for a mechanism of compensation that was to satisfy the "constitutional minimum" to which the estates were entitled (and thus exhaust any cause of action which could lie in the Court of Claims) and (b) for a Special Court in which the valuation and compensation process was exclusively vested.

The legislative history and its epilogue show that Congress affirmatively intended that claimants against the bankrupt estates not have recourse to the United States Treasury for redress of any grievances allegedly done them under the Act. This conclusion is inescapable in the light of repeated declarations in the conference report, the reports of Senate and House Committees, and the statements of the authors and managers of the bill in the course of debate in both Houses. It is reemphasized further by the explicit statements of the members of the sponsoring House Committee in oversight hearings conducted after the Government and USRA had submitted to the Court below a brief which held out a Tucker Act remedy as an adequate remedy for any problems of the Act. Lest any doubt remain about the subject, thirty-seven members of Congress, including certain sponsors of the Act, have filed with this Court a brief *amicus curiae* which concludes with the categorical observation that if a deficiency judgment against the United States under the Tucker Act "is necessary to make this Act constitutional, the Act must fall since the legislative history and the language of the Act are clear that no deficiency judgment against the U.S. is authorized by the Act." Brief *Amicus Curiae* at 22.

All of this makes clear that the Tucker Act is not available to supplement the constitutional deficiencies of the Rail Act, as a matter of law. Moreover, the uncertainty created by the explicit declaration of Congress and Congressmen that such recourse would not be tolerated renders the putative remedy at law inadequate.

III.

The injunctive relief entered below was timely and proper. It was timely because under the provisions of the Act imminent constitutional harm threatened plaintiffs and there was no other appropriate method of redress.

The relief was proper because it was tailored to prevent only those wrongs which were clearly ripe and went only so far as necessary to prevent their occurrence. The injunctive provisions show, when read together, a compelling and proper concern that the Act ousted the federal courts from their proper functions of preventing and curing constitutional violations. Section 304(f), which provides for continued operations "notwithstanding" any contrary decree of a federal court, was enjoined only to the extent it purported to authorize disregard of such decrees. Section 303, which precludes the Special Court from refusing to transfer rail assets, irrespective of the inadequacy of compensation for erosion, was enjoined only insofar as inadequate compensation ensued from that mechanistic provision. So much of Section 207(b) as required dismissal of the pending Section 77 proceeding—plainly an *in terrorem* provision to inhibit the reorganization courts in the 180-day proceedings—was excised to abate that threat.

Finally, certification of a Final System Plan was enjoined, not irrationally, as Appellants suggest, but to preserve the continuing jurisdiction of the federal courts over the subject matter. By the terms of Section 303(b)(2) of the Act, upon certification of a Final System Plan, the procedures thereafter become mandatory, the harm is inexorable and "such conveyances [required by the Final System Plan] shall not be restrained or enjoined by any court." The injunction against certification of a plan was necessary to prevent ultimate ouster from jurisdiction of the federal courts and to protect the enforceability of the writs already issued.

None of this was an abuse of discretion; it was, instead, an extraordinarily astute use of discretion in the face of an Act posing enormous provocations to the equity jurisdiction of the Court below.

IV.

The restraint exercised by the Court below is further illustrated by the fact that it refrained from reaching several issues presented to it for decision and decided certain of the issues which it did dispose of on narrow rather than broad grounds. Its order is, therefore, sustainable, not only on the grounds which it assigned, but upon other grounds as well.

For example: the Act does effect an uncompensated taking of Appellees' property by means of compulsory conveyances without the just compensation required for such a taking. The provisions of the Act which the Court below enjoined were all integral parts of the uncompensated taking and the writ entered below is justifiable on that alternative ground.

Provisions of the Act, most particularly Sections 207 and 303, amend or supersede Section 77 and significantly affect the rights of creditors in respect of the bankrupt estate. They are, consequently, laws on the subject of bankruptcies, but they are in terms applicable only to a region defined in the Act as embracing seventeen states of the Northeast and Midwest. They run afoul of the constitutional command that laws on the subject of bankruptcies shall be "uniform throughout the United States." *Hanover Nat'l Bank* v. *Moyses*, 186 U.S. 181, 188. The coincidence that the only Class I railroads in reorganization lie within the region does not justify or permit a departure from the well-established rule that a bankruptcy law must in terms be geographically uniform. The provisions enjoined below are of this character and the writ enjoining their enforcement may be sustained on this alternative ground as well.

Finally, the procedures of the Act strip the federal judiciary of its power to exercise an informed discretion over the fundamental issue of whether the estate and its claim-

ants are receiving fair and equitable treatment. At the only juncture under the Act when the reorganization court is allowed to make a judgment about the fairness of the process of the Act, it is disabled by the provisions of the Act from knowing what the outcome of that process can be. When the Special Court can know what the outcome of the Final System Plan may be, it is specifically disabled from doing anything about it. No other court may intervene at all to protect the estate or its claimants once the Act takes effect over them. These provisions separately and together effect a deprivation of the property of Appellees without the fundamental elements of due process. The operative provisions of the Act that would lead to this result are also properly enjoined on that basis.

ARGUMENT

I.

The Rail Act is Unconstitutional in that It Requires Mandatory Interim Operations at Hopeless Losses Without Providing Assurance of a Legal Remedy to Furnish Fair and Just Compensation for Erosion Beyond Constitutional Limits.

The Court below held that Sections 304(f) and 303 of the Act offend the Fifth Amendment because they compel Penn Central to continue rail service during the indefinite period required under the Act to adopt the Final System Plan, without providing just compensation for the erosion of the Penn Central estate that the Court below determined was likely to occur during that interval.

Appellants attack that determination essentially on the grounds that: (a) such interim operations are not required; (b) the impact of such continuing operations at massive losses is not erosive of the estate; and (c) even if continued operations were required under conditions that eroded the

estate, such a result is constitutionally permissible because of the public interest character of the railroad industry.

Appellees urge this Court to reject these contentions.

(1) Appellants' first argument is based upon a labored reading of the statute designed to suggest that interim operations of Penn Central's system may not be required at all. This argument is at odds with the language, policy and history of the Act, as well as practical considerations which this Court should not ignore.

(2) Appellants' second contention asks this Court to find that all the parties to the reorganization proceeding, including the Penn Central Trustees, as well as all the courts which have examined the condition of the estate in recent months, are irresponsibly wrong in their uniform view that the massive losses being sustained by the estate will continue and will erode *someone's* interest in the estate during the interim period. This argument is based upon an unjustifiable optimism in the face of an appalling financial picture, and upon a construct of "erosion" which is wrong in theory and in fact.

(3) Finally, Appellants' third contention either requires a blind deference to Congressional hopes that the Act can create a possibility of successful reorganization where none before existed, in the teeth of clear evidence to the contrary, or invites this Court to announce an unprecedented rule that industries affected with a public interest may be temporarily expropriated without assurance of fair compensation. That argument, however, is unsupported and unsupportable by evidence in the record or by any precedent or principle of law to which this Court has ever shown hospitality.

A. The Act Does Mandate Interim Operation of the Penn Central System.

Section 304(f), which the Court below held required interim operations, reads in full as follows:

> "*Interim Abandonment.*—After the date of enactment of this Act, no railroad in reorganization may discontinue service or abandon any line of railroad other than in accordance with the provisions of this Act, unless it is authorized to do so by the Association [USRA] and unless no affected State or local or regional transportation authority reasonably opposes such action, notwithstanding any provision of any other Federal law, the constitution or law of any State, or decision or order of, or the pendency of any proceeding before any Federal or State court, agency, or authority."

Appellants' contention that this language can be read to *permit* termination of rail operations is unconvincing and was properly rejected below.

An ultimate purpose of the Act was to obviate any threat of termination of operations by any railroad in reorganization until the essential rail properties could be identified and transferred to Conrail. In service of this objective, Section 304(f) specifically provides that after the date of enactment "no railroad in reorganization may discontinue service or abandon any line of railroad other than in accordance with the provisions of this Act . . ." unless authorized to do so by USRA and unless there is no reasonable objection by affected states, localities or regions. The other provisions of the Act to which Section 304(f) refers are those governing abandonment of lines which, pursuant to a Final System Plan, the prior existence of which their terms assume, are not to be conveyed to Conrail or to other railroads. That determination, however, cannot be made until the Final System Plan emerges many months from now.

Were not the intention of Congress to preclude abandonments or service discontinuance until implementation of the Final System Plan—that is, to compel interim operations—plain enough from the language of Section 304(f), other Congressional utterances have left the matter well beyond doubt. Elsewhere in the Act itself, the intention to freeze operations as they were when the Act became effective is made equally explicit. Section 213(a), which authorizes the Secretary of Transportation to make limited payments to railroads pending the implementation of the Final System Plan, requires "that recipients must agree to maintain and provide service at a level no less than that in effect on the date of enactment of this Act." That provision was invoked in connection with the first payment under Section 213 to the Penn Central Trustees, and, over the objection of creditors, the Trustees entered into an agreement to maintain such service (J. Doc. No. 14).

Furthermore, the purpose of Section 304(f) was explicitly adverted to in the course of Senate debate on the conference bill which became the Rail Act. Under stiff questioning from Senator Allen, Senator Hartke, its Senate floor manager, explained:

> "Mr. Allen. I understand the Senator to say a moment ago that there would be no abandonment for 18 months.
>
> "Mr. Hartke. No. *I said there would be no abandonment in the region while the final system plan is being formulated.*
>
> "Mr. Allen. In other words, there is a moratorium on abandonment for 18 months.
>
> "Mr. Hartke. For the region that is correct. That is absolutely necessary. You cannot let the lines be abandoned and then try to put them back in business without a great deal of expense. That is one of the problems we are faced with." 119 Cong. Rec. S23783 (daily ed. Dec. 21, 1973) (Emphasis added).

A more explicit refutation of Appellants' permissive reading of the Act would be hard to imagine. That this was the Congressional purpose, however, could come as no surprise to Appellants since they were forcefully apprised of that intention by the House manager (and co-author of the Act) in his letter of April 26, 1974 to the Under Secretary of Transportation. See Trustees' Brief, Appendix B, at 7a, 8a. Angered by the prospect that Penn Central might be encouraged by the Department of Transportation to apply to USRA for the abandonment of "hopelessly uneconomic lines," Congressman Adams remonstrated in part as follows:

> "The purpose of this letter is to emphasize to you that such an endeavor by DOT and the Trustees of the Penn Central would be completely contrary to the intent of Congress in adopting sections 213, 215 and sections 304(f) of the Regional Rail Reorganization Act.
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> • • •
>
> "In summary, what I said then, and repeat to you now, is that *our intention was to preserve the status quo of rail service in the Northeast during that critical time* and to allow full public comment on abandonment proposals. The purpose of this procedure was twofold: first, to allow careful study of the structure of rail service in the Northeast and, secondarily, to allay public fears regarding wholesale abandonments of rail service. . . .
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> • • •
>
> "Therefore, it seems to me that DOT should give the strictest adherence to Congressional intent in administering the first stages of the lengthy planning process which the Act sets forth. To encourage USRA to allow a series of rail abandonments during the planning period would be both harmful to cooperation between Congress and the DOT, *and contrary to the intention of the Act.*" (Emphasis supplied.)

Therefore the Act in terms accurately expresses the intention of its authors, articulated before its passage and since, that there are to be no abandonments of even "hopelessly uneconomic lines" during the interim planning process. That process must last at least 17 months from the effective date of the Rail Act, and may well last much longer. Any postponement [27] of the deadlines set in the Act would necessarily increase the time span during which interim operations are compelled and erosion sustained. And, if the Congress reacted unfavorably to the Final System Plan when first submitted, further delays of unpredictable duration could eventuate while such objections are compromised.[28]

Nor is it persuasive for Appellants to argue that, upon application to USRA, it may be assumed that authorization to abandon lines would be forthcoming. In the first place, the overwhelming concern of USRA is the present operation of the lines which are candidates for inclusion in the Final System Plan; it strains credulity to expect USRA to authorize abandonment of lines in the absence of a prior determination that they will be surplus. Secondly, the right to terminate operations, which is at issue here is system-wide. The Wyer, Dick feasibility studies show that

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[27] Such a postponement is now being considered in Congress. See n. 26 at 25, *supra.*

[28] It is not entirely speculative to believe that such Congressional objections might well arise. There exists an obvious tension, for example, between the declared purpose of producing a self-sustaining rail operation (Rail Act, Section 101(b)(2)), and the provision of service adequate to meet the needs of the region (Rail Act, Section 101(b)(1)). These competing interests have already emerged as the preferred positions of different agencies charged with involvement in the planning process: the Department of Transportation emphasizes economic viability and the Rail Services Planning Office ("RSPO") of the ICC, established by the Act, emphasizes maximized services. Compare, *e.g.*, J. Doc. No. 62 with J. Doc. No. 63. These tensions will predictably find their way to the floor of Congress as it considers the Final System Plan in the context of pressure upon those members whose constituencies stand to lose significant rail service.

not even the elimination of over 6,000 route-miles of track combined with other unachievably optimistic preconditions could produce profitable operations. Whatever slim possibility there might be for USRA to authorize, with appropriate speed, abandonment of a particular segment of potentially surplus line, there is no practical likelihood that USRA would authorize the termination of service on the massive scale necessary to abate unconstitutional erosion of the Penn Central estate. To do so would be tantamount to an abandonment by USRA of its expectation of realizing any plausible Final System Plan.

Not only would such abandonments be insufficient to stanch the flow of losses, but serious objections could be expected from RSPO on the ground that such abandonments would be inimical to the public interest. These objections, together with those expressly contemplated by Section 304(f) from state, local and regional transportation authorities, would inevitably delay and might well stall altogether any program of abandonments, especially one sufficiently large to make a dent in the operating losses being incurred by the estate.

The fact that USRA itself does not consider Section 304 as an invitation to wholesale abandonments now is shown by its response to abandonment requests which have already been filed by the Penn Central Trustees, to the effect that USRA had no procedures for processing such requests (J. Doc. Nos. 65, 66).

It will not do to argue, as Appellants do, that the Penn Central estate would in any event have to undergo time-consuming abandonment procedures in the absence of the Rail Act. Even if such procedures are required the estate would nonetheless be "constitutionally entitled" to a certificate of abandonment from the ICC "acting with appropriate speed under § 1(18) of the Interstate Commerce Act." *New York, N.H. & H.R.R. First Mtg. 4% Bondholders' Comm.* v. *United States,* 305 F. Supp. 1049, 1055 (S.D.N.Y. 1969), *vacated on other grounds sub nom. New Haven Inclusion Cases,* 399 U.S. 392. See also *New Haven Inclusion Cases* at 459-67.

There exists, then, an explicit statutory command that interim operations be continued, and the massive losses that will thereby be sustained cannot be avoided with appropriate dispatch by recourse to any agency having authority to excuse the estate from the command of the Act.

To avoid the impact of the plain meaning of Section 304(f), Appellant USRA complains (USRA Brief at 61-66) that the Court below misread the Act. The section, so goes the argument, "could and should have been construed to confer approval power [with respect to interim abandonments and service discontinuances] only within constitutional limits as the courts may declare them." *Id.* at 64. USRA goes on to argue that "[a] Reorganization Court finding it constitutionally necessary to order a discontinuance of service or abandonment of properties would have as much power both to make this finding and to have the resulting orders carried out without the injunction issued by the district court as it has in light of the injunction." *Id.* at 67-68.

USRA's argument in this regard flies in the face of the very language of Section 304(f) forbidding any railroad in reorganization from discontinuing service or abandoning any line of railroad "*notwithstanding any provision of any . . . decision or order of . . . any Federal court.*" By the terms of the Act itself the reorganization courts and all other federal courts, including, presumably, this Court, are explicitly ousted of their jurisdiction to order discontinuance or abandonment.[29] USRA's argument is tantamount to a contention that the statute can be sustained only if it means the exact reverse of what it says.[30]

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[29] Indeed, this concern with court-ordered terminations is consistent with the Congressional apprehension over the likelihood of such an event which stimulated passage of the Act in the first place.

[30] The Court below framed its injunction to restrain the enforcement of Section 304(f) only "with respect to any abandonment, cessation, or reduction of service which has been or may hereafter be determined by a court of competent jurisdiction to be necessary

(Footnote continued)

In short, the Act does compel continued loss operations and its constitutionality must be appraised, as it was below, in light of that grim fact of life.

B. Penn Central Interim Operations Impose Enormous Losses, Accumulate Priority Claims and Cause Erosion of the Value of the Estate.

From inception the Penn Central reorganization proceedings have had an indisputable history of mammoth and irreversible losses, extensive accumulation of prior claims and erosion of the value of the estate. All these are matters in the record here, as is the fact that similar losses, accumulations of priority claims and financial and physical erosion will continue unabated so long as Penn Central is required to continue rail operations.

1. *Post-Bankruptcy Financial Results through December 31, 1973.*

From June 21, 1970 through December 31, 1973, Penn Central's ordinary income losses aggregated $851 million (FF 1, 4, JA 89-90; Varalli affid., J. Doc. No. 19, Ex. T-1).

During this period the growth of priority claims kept pace with the losses:

(a) Trustees' Certificates were issued in the amount of $100 million (FF 3, 4, JA 89-90; Stip. No. 15, JA 208);

(b) Unpaid and accrued taxes accumulated to the extent of $241 million (JA 37; FF 2, 4, JA 89-90; Varalli affid., J. Doc. No. 19, Ex. T-1); and

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(Continued footnote)

for the preservation of rights guaranteed by the United States Constitution." The remedy was couched to excise from the Act language which otherwise would prevent any judicial recourse by an aggrieved owner or creditor, the same language which USRA would excise by creative interpretation. But the language is in the Act, and wrongly so; the Court in enjoining its enforcement was plainly not precipitous. See Point III, *infra*, at 103-04.

(c) Unpaid leased line rentals accrued in the amount of $101 million (JA 37; FF 2, 4, JA 89-90; Varalli affid., J. Doc. No. 19, Ex. T-1; Stip. No. 13, JA 208).

These three items of post-bankruptcy priority claims alone total $442 million.

Of equal importance is the source of funds expended and forever lost through their application to deficit rail operations. In addition to operating funds, other funds so applied during the period June 21, 1970–December 31, 1973, included non-recurring income in the amount of $155.3 million (including the $100 million in proceeds from Trustees' Certificates) and approximately $157 million of income from non-rail operations (JA 36-37; FF 3, 4, JA 89-90; Varalli affid., J. Doc. No. 19, Ex. T-1; Stip. No. 11(a), (c), JA 206-07, 211). During this period the Trustees also had the benefit of cash available by reason of the deferral of $104 million of interest on mortgage and collateral trust debt (FF 2, 4, JA 89-90; Varalli affid., J. Doc. No. 19, Ex. T-1; Stip. No. 14, JA 208). While these amounts are included in the operating loss figure, they measure the extent to which the losses were held to even that figure by draining resources from non-operating corners of the enterprise.

2. *Reasonably Foreseeable Future Financial Results after December 31, 1973.*

The record here leaves no doubt that similar massive income losses, accumulations of prior claims and deferrals will continue so long as rail operations by Penn Central are mandated. The Reorganization Court found, on undisputed expert evidence, that it is reasonable to project that during the five-year period ending December 31, 1978:

(a) Additional ordinary losses will aggregate approximately $722.2 million;

(b) Additional accrued but unpaid taxes will amount to approximately $310.7 million;

(c) Additional deferred leased line rentals will approximate $140 million; and

(d) Additional unpaid interest will accrue to the extent of $137.1 million.

(FF 12-20, 23, JA 92-96, 98; Sloane affid., J. Doc. No. 16, at 7-11; Varalli affid., J. Doc. No. 19, at 4, Ex. T-2; Guest affid., J. Doc. No. 20, at 9-10.)

On the not necessarily realistic assumption that a Final System Plan may be implemented toward the end of 1975, it is instructive that the comparable estimated figures (derived from the same sources) for only the two years 1974 and 1975 are as follows:

(a) Additional ordinary losses will approximate $434 million;

(b) Additional accrued but unpaid taxes will amount to approximately $118.2 million;

(c) Additional deferred leased line rentals will approximate $55.9 million; and

(d) Additional unpaid interest will accrue to the extent of $164.2 million.

(FF 12-20, 23, JA 92-96, 98; Sloane affid., J. Doc. No. 16, at 7-11; Varalli affid., J. Doc. No. 19, at 4, Ex. T-2; Guest affid., J. Doc. No. 20, at 9-10.)

Thus, the combination of financial results found to have occurred during the reorganization proceedings through December 31, 1973 with those found to be reasonably expected to occur in the next two years (the earliest point in time at which the effectuation of a Final System Plan could reasonably be expected) shows the following:

(a) Ordinary losses—$1.285 billion;

(b) Accrued but unpaid taxes—$359.2 million;

(c) Deferred leased line rentals—$156.9 million; and

(d) Unpaid interest—$268.2 million.

Faced with undisputed evidence of such tremendous sustained and expected losses and accumulations of prior claims, the Reorganization Court had no choice but to hold, as it did, that Penn Central could not be reorganized on an income basis within a reasonable period of time.

3. *Erosion in the Value of the Estate.*

The United States alleges that there is no adequate record evidence of erosion of the value of the estate and further claims, without citation of authority, that the basis for evaluating the impact of continuing operations on Penn Central's estate is simply a matter of comparing the amount of accumulated priority claims with the amount of alleged increases of value of carefully selected assets of the estate (U.S. Br. at 67-70).

The contention that the record is bare of adequate evidence to show erosion cannot be supported. There was abundant evidence before the Court below to justify its conclusion that the mounting losses charged to the estate would imminently harm at the very least some of the claimants who were plaintiffs in the suits before it.

Income losses must have an effect on the value of the estate; obviously funds have been expended in operations which otherwise would have defrayed obligations accrued by the Trustees. The diversion of such funds to operations in order to cover losses of such magnitude necessarily decreases the values in the estate available to satisfy claims of stockholders and creditors by creating accumulations of post-bankruptcy priority claims. One index of the effect of such losses on the value of the estate is the decrease in stockholders' equity from approximately $1,500 million at

December 31, 1970[31] to approximately $684 million at December 31, 1973.[32]

Even this measure of erosion, which shows a decrease in excess of $800 million in the value of the estate, does not fully reflect two important components in any measure of the extent of erosion. The first is the aggregate amount of accumulated prior claims, admitted by the United States to be at least $457 million (U.S. Br. at 67). With post-bankruptcy income losses of $851 million and $457 million in admitted post-bankruptcy prior claims, it is inconceivable that there has been no decrease in the value of the estate available to claimants, as the United States argues. Secondly, testing the extent of erosion by the diminution of stockholders' equity does not take into account the decreases in value of non-depreciable property (such as track) by reason of inadequate maintenance. The Reorganization Court has found that, even assuming annual expenditures of $225 to $250 million for normalized maintenance of way, an additional $665 million in current dollars must be expended to remedy past deferrals (FF 10, JA 91-92; see Jackman affid., J. Doc. No. 18, at 4).

USRA argues that inflation in the value of assets may be used to offset the accumulation of prior administrative claims[33] (USRA Br. at 79), and states that "other courts"

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[31] Form A for 1970 (J. Doc. No. 34 at 201).

[32] Form R-1 for 1973 (J. Doc. No. 37 at 11).

[33] A comparison is noteworthy between portions of Part D of the Appendix (pp. 67-70) to the United States brief and Part III of the "Appendix on Fact Issues" (pp. A-14 to A-19) attached to the brief of Appellants (including the United States and USRA) filed with the Special Court in connection with their appeals from the 180-Day Decision.

In both cases, the specified portion of the Appendices represents an attempt to show that increases in the value of assets of the estate since bankruptcy offset the accumulation of prior administra-

(Footnote continued)

have so held, citing only a footnote to *In re Boston & Maine Corp.*, 484 F.2d 369 (1st Cir. 1973). Even that reliance is misplaced. The cited footnote is merely descriptive of a particular fact in a particular situation and does not purport to establish a rule of law. The point there at issue was one of standing to challenge the propriety of continuing the reorganization proceedings where, in that court's view, there was ample hope of a successful conclusion. Moreover, at a time when inflation is so great as to increase asset values to the extent that, as Appellants appear to claim, huge operating losses and prior claims are virtually rendered of no effect in calculating the value of the estate, Appellants' theory becomes particularly inequitable, in that claimants are deprived of their right to withdraw their capital from an enterprise in which the appreciations caused by an inflationary economy are offset by massive operating losses, and to reinvest in other enterprises reflecting such appreciations in value without offsetting losses. The right to withdraw capital from such

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(Continued footnote)
tive claims. Also in both cases the major element of such alleged increases is "Increases in the Value of the Plant Equipment [*sic*]." There, however, the similarity ends. In the brief filed by Appellants with the Special Court, dated August 5, 1974, the amount of such increase was alleged to be between $45 and $100 million. On the other hand, the brief filed by the United States with this Court, on the basis of the identical record, claims that such increases range between $85 and $360 million. The increase in figures, which were inexplicable to begin with, is itself nowhere explained.

In both the brief filed with the Special Court and the brief filed with this Court, Appellants acknowledge the accumulation of prior administrative claims in at least the amount of $457 million. In the Special Court brief the total increase in value of the specified assets was alleged to be between $227.2 and $314.2 million, resulting in a showing of acknowledged erosion, in excess of claimed appreciation, on Appellants' own basis, of from $142.8 to $229.8 million. This erosion is 2.5 to 4 times the amount of erosion ($60 million) which Judge Anderson found impermissible in the New Haven reorganization proceedings. See *In re New York, N.H. & H.R.R.*, 304 F. Supp. 793, 800 (D. Conn. 1969), *aff'd in part sub nom. New Haven Inclusion Cases*, 399 U.S. 392, 466.

losing investments is, of course, squarely recognized in *Brooks-Scanlon Co.* v. *Railroad Comm'n,* 251 U.S. 396. And this conforms to the purpose of a Section 77 reorganization, which is to attempt to develop an enterprise which has going concern value, not to maintain an irreversibly losing status quo, offset only by inflationary increases in asset values.[34]

The Court below was, therefore, correct in holding that continued operations under the Act would foreseeably threaten the Penn Central estate and its stockholder and creditors. It was neither premature nor unsound in this conclusion.

The constitutional significance of such compulsory operations turns on the necessity for and availability of methods of recouping such losses under the Act. To that we now turn.

C. Compulsory Interim Operations are Unconstitutional in the Absence of Reasonable Present Assurance of Reorganizability under the Act or an Assurance of Just Compensation.

1. *The Public Interest in Continued Service Does Not Justify Mandatory, Uncompensated Interim Operations.*

Appellants urge this Court to reverse, in part upon the ground that the public interest requires the Penn Central estate to bear compulsory, uncompensated erosion because that risk is attached to investments in the railroad industry by virtue of its public service character. That argument extends beyond any limit previously recognized by this Court the impositions that may be laid upon invest-

[34] In arguing that the value of the estate has increased since bankruptcy, the United States also argues (U.S. Br. at 68) that since the Trustees spent approximately $358 million on track replacement, the value of the estate must necessarily have been substantially increased. This argument cannot be sustained because (among many other reasons), as discussed above, the amount of deferred maintenance of way greatly exceeds that amount.

ors in an industry affected by the public interest and, as applied in this case, is unsupportable by principle or precedent.

The thesis of the proponents of the Act is that continued operations and submission to the hazards of ultimate conveyance are necessary to achieve the continued rail service that Congress has declared to be in the public interest (Sections 101(a), 206(a)). But, as Judge Fullam trenchantly observed in concurring below, "the magnitude of the public interest in continued rail service cannot justify treating these rail properties as if they were already public property" (JA 79).

It is a seminal principle of our constitutional structure that the public should bear the cost of devoting private property to public uses. That continued interim operation to the detriment of the estate may be required by the public interest is the beginning, not the end, of the constitutional inquiry under the Fifth Amendment.

This Court has long recognized the elementary character of this principle. It was succinctly framed (per Brandeis, J.) in *Louisville Joint Stock Land Bank* v. *Radford,* 295 U.S. 555, 602:

> "For the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public."

See also *Armstrong* v. *United States,* 364 U.S. 40, 49.

The invocation of the public interest so freely employed by Appellants does not have the talismanic force which they ascribe to it. Conceding that the rail properties of the estate are being put to public use, there remains the question of whether they may be put to that use by governmental compulsion at the cost of their private owners.

The principle that private property may not be put coercively to public use without compensation has developed a doctrinal refinement as this Court has explored the frontier between regulation and takings. The cases read together seem to hold that the Government, in the exercise of its police power, may diminish or extinguish the value of property, without compensation, but within quantitative limits, in order to abate a nuisance which that property produces. See, e.g., *Atchison, T. & S.F. Ry.* v. *Public Util. Comm'n,* 346 U.S. 346 (railroad properly assessed the costs of removing hazardous grade crossings which it constructed); *Miller* v. *Schoene,* 276 U.S. 272 (trees may be destroyed to prevent spread of disease).

There is no suggestion that the Government has set about abating a nuisance here; instead it seeks to create an affirmative public advantage. This Court has consistently recognized that the compulsory commitment of property interests for the production of a public good is different from the exaction that may be justified in nuisance abatement cases, and has held that, when property is put by force of law to the production of an affirmative public good, just compensation is required. See, e.g., *Nashville, C., & St. L. Ry.* v. *Walters,* 294 U.S. 405 (railroad cannot be required to bear costs of improving traffic flow on adjacent highway).

Moreover, the "principle of fairness" expressed in the Fifth Amendment (*United States* v. *Dickinson,* 331 U.S. 745, 748), which forms the basis of its "political ethics" (*United States* v. *Cors,* 337 U.S. 325, 332), recognizes quantitative limits on the exaction that the putative public

interest can compel. The question in such cases, so Justice Holmes put it, "narrows itself to the magnitude of the burden imposed." *Interstate Consol. St. Ry.* v. *Massachusetts,* 207 U.S. 79, 87. See also *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 413, 415.

The Act neither attempts to abate a nuisance created by Penn Central nor does it impose burdens of inconsequential magnitude on the estate. On the contrary, it imposes enormous economic burdens on the estate of Penn Central and upon Appellees for the purpose of achieving explicitly defined affirmative public advantages. It is far outside the ambit of uncompensated regulation tolerated by the Fifth Amendment.

This principle has been applied specifically to the compulsory continued operation of losing railroads. *Brooks-Scanlon Co.* v. *Railroad Comm'n,* 251 U.S. 396; *Bullock* v. *Railroad Comm'n,* 254 U.S. 513; *Railroad Comm'n* v. *Eastern Texas R.R.,* 264 U.S. 79. These cases all stand for the proposition that a hopelessly unprofitable railroad enterprise cannot be compelled to continue operations in order to serve an asserted public need, in the absence of compensation, over the objection of its owners and creditors.

Appellants' view of the *Brooks-Scanlon* line of cases appears to be somewhat ambivalent. While admitting, however grudgingly, that *Brooks-Scanlon* and its progeny may still be good law, Appellants nevertheless suggest that the authoritative force of these cases is dissipated because their constitutional doctrine was announced in the context of small railroads, prior to the advent of Section 77. The suggestion is plainly frivolous. In the first place, as discussed above, the *Brooks-Scanlon* cases reflect a fundamental constitutional principle that confiscation of private property to service affirmative public needs, without compensation, is unfair. The advent of Section 77 did not and could not alter that constitutional insight.

In the second place, the reorganization court in the *New Haven* case specifically reviewed the validity of the *Brooks-Scanlon* line, and, over vigorous objections to its authority lodged by the ICC, held:

> "This court, therefore, concludes that *Brooks-Scanlon* and subsequent cases, reaffirming the validity of its holding, are still applicable and determinative." *In re New York, N.H. & H.R.R.*, 304 F. Supp. 793, 804 (D. Conn. 1969).

That opinion of Judge Anderson was reviewed and quoted extensively with approval by this Court in the *New Haven Inclusion Cases*, 399 U.S. 392. See also *In re Penn Central Transp. Co.*, 494 F.2d 270 (3d Cir.), *petition for cert. filed*, 42 U.S.L.W. 3633 (U.S. May 8, 1974) (No. 73-1672) ("*Columbus Options*"); *New York, N.H. & H.R.R. First Mtg. 4% Bondholders' Comm.* v. *United States*, 305 F.Supp. 1049, 1055 (S.D.N.Y. 1969). The rule derived from these cases and the fundamental constitutional concern for fairness which they express is applicable here. Absent compensation, or "a reasonable prospect of profitable operation in the future"[35] (that is, reorganization), Appellees may not be forced by law to continue operations of their lines at relentless losses to serve a public purpose.

Nor is the Court, in the context of this case, compelled to choose between the *Brooks-Scanlon* line of cases and the line of cases epitomized by *Continental Ill. Nat'l Bank & Trust Co.* v. *Chicago, R.I. & P.Ry.*, 294 U.S. 648, and *Reconstruction Finance Corp.* v. *Denver & R. G. W. R.R.*, 328 U.S. 495. In the context of this litigation, these lines of cases converge.

The *Brooks-Scanlon* cases unequivocally hold that a carrier cannot be compelled to carry on its business at a

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[35] *Bullock* v. *Railroad Comm'n*, 254 U.S. 513, 521. *Accord, Railroad Comm'n* v. *Eastern Texas R.R.*, 264 U.S. 79, 84.

loss out of concern for the public interest without just compensation. Here, that is exactly what the Act compels.

Continental Bank, and other cases like it arising under Section 77, do, indeed, permit some postponement of a secured creditor's remedy of foreclosure of his lien in the public interest and in the pursuit of a feasible, fair and equitable reorganization. All of these cases, however, proceeded upon the explicit assumption that reorganization of the railroad in question was demonstrably feasible. The cases repeatedly assert that the secured creditor, though required to postpone his remedy, was at least entitled to "full compensatory treatment" for the rights which he enjoyed. See, e.g., *Ecker* v. *Western Pac. R.R.*, 318 U.S. 448, 487; *Group of Institutional Investors* v. *Chicago, Mil., St. P. & Pac. R.R.*, 318 U.S. 523, 565-66; *Consolidated Rock Products Co.* v. *Du Bois*, 312 U.S. 510, 528-30. The reorganization cases simply do not stand for the proposition that a secured creditor may constitutionally be compelled to stand by while a hopelessly losing railroad is the object, for an undetermined period of time, of attempts at resuscitation which do not furnish a reasonable likelihood of success, and in any event, make no provision for the depletion of the value of his lien during the period of his sufferance.[36]

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[36] In working out the balance required by the *Brooks-Scanlon* and *Continental Bank* lines of cases, the lower courts have for years occupied themselves with attempts to reconcile in particular cases the public interest in continued rail operations and the interest of the estate in avoiding confiscation. From those cases has emerged a set of standards which, in essence, draws the line between the permissible postponement of remedies authorized by *Continental Bank*, and the confiscation forbidden by *Brooks-Scanlon*, by ascertaining whether or not there exists a reasonably likely prospect of reorganization that will yield going-concern value, in excess of liquidation values, that is, so long as there exists "a real prospect of compensating advantage . . . through a successful reorganization." *Central R.R. of N.J.* v. *Manufacturers Hanover Trust Co.*, 421 F.2d 604, 608 (3d Cir. 1970), *cert. denied*, 398 U.S. 949; *In re Riker Del. Corp.*, 385 F.2d

(*Footnote continued*)

2. *The Rail Act Does Not Afford Any Reasonable Prospect of Likely Reorganization for the Penn Central Estate.*

Appellants quite clearly have not shown—nor, on the basis of a scrutiny of the Act in light of the Penn Central experience, could they possibly have shown—that the Act furnishes that prospect of feasible reorganizability required under the cases to warrant continued loss operations of Penn Central over Appellees' objections.

On the contrary, a review of the provisions of the Act, in the context of the record before the Court below, establishes the futility of pinning the constitutional propriety of continued operations to the ephemeral prospect of reorganization under the Act. For example:

(a) *Conrail will not be materially different from Penn Central.* The addition of the Reading, the Lehigh Valley, the Central Railroad of New Jersey and the Ann Arbor, four small bankrupt lines, will not materially alter the basic configuration of Conrail as a Penn Central, merely renamed. These railroads combined can be expected to contribute no more than 10% of Conrail's trackage and revenues.[37]

(*Continued footnote*)

124, 126 (3d Cir. 1967). See also *In re Third Ave. Transit Corp.*, 198 F.2d 703 (2d Cir. 1952); and *Columbus Options*. The last of these cases specifically addressed the issue, much emphasized by Appellants here, that the requisite showing of reorganizability can be presumed, or accepted on the *ipse dixit* of Congress, in light of the Rail Act. The court there specifically rejected the entirely executory provisions of the Act as an inadequate substitute for a judicial finding of prospective reorganizability sufficient to require continued abstention on the part of the creditors. Judicial notice of the passage of the Act, and of its terms, the court held, "cannot serve to enlarge the power of the reorganization court and the ICC to subject the property of secured creditors to a taking while, like Mr. Micawber, they wait for something to turn up." 494 F.2d at 283.

[37] The smaller lines account for about 11% of present trackage and 8% of present revenue ton-miles. "Rail Service in the Midwest and Northeast Region", a Report by the Secretary of Transportation dated Feb. 1, 1974, submitted pursuant to Section 204 of the Act (hereinafter "DOT Report"), Vol. I at 7 (J. Doc. No. 62).

The new Conrail will, in fact, be nothing but the old bankrupt Penn Central with inconsequential bankrupt appendages.

(b) *Conrail will face the same problems as Penn Central.* Since Penn Central can be expected to comprise about 90% of the System, Conrail will be facing, to all intents and purposes, the same problems that the Penn Central Trustees have fought over the past four years. If anything, Conrail's problems will be exacerbated by the laudable but expensive public service goals imposed by Section 206(a) of the Act. The conflict between these goals and economic considerations is obvious—and well illustrated by the Evaluation of the DOT Report prepared by RSPO in which RSPO says that, at its public hearings:

> "'Financial viability' was criticized again and again as an improper criterion upon which to base the decision for continuation of rail service. Rather, 'public need' emerged as the more appropriate benchmark for measuring rail service." J. Doc. No. 63 at 13.

(c) *Conrail has no reasonable prospect of viability.* No feasibility study for Conrail has ever been published, and none appears in the legislative history of the Act. Notwithstanding Appellants' extended insistence that the Act is designed to provide "new solutions" (USRA Br. at 24-40), the Act does not address itself to such fundamental problems as shifting industrial trends, changes in factory locations, and the competitive advantages enjoyed by truckers or the discriminatory division of tariffs—all of which were cited in the Congressional hearings.[38] The reason is obvious. There can be no quick and easy solution to problems of that kind—which is why the Conrail concept had a dubious future from its inception.

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[38] The absence of any prospect that the Trustees could effect these "fundamental changes" was specifically referred to by the Reorganization Court as a basis for its conclusion that the Penn Central was not reorganizable (JA 88).

Moreover, Conrail is not the concept that Congress originally envisioned because it can no longer include the Erie Lackawanna or the Boston & Maine. Whatever dim prospects Conrail might have had with those lines subject to the Rail Act faded with their withdrawal. The Erie carries about twice as much tonnage as Reading, Lehigh and Jersey Central combined, and the inclusion of Erie would have increased Conrail's tonnage by more than 15%.[39] The exclusion of Erie not only deprives Conrail of this tonnage, but leaves Erie in the picture as a competitor battling to lure away even more business.

(d) *Conrail is an untried concept in railroad operations.* Appellants seem to recognize that Conrail will be little more than a reincarnation of Penn Central. They argue, however, that the reincarnation will be more lively than the original because the Act has satisfied the conditions of viability postulated by the Penn Central Trustees.[40] In succeeding paragraphs we will show that the Act cannot, in fact, satisfy these conditions. However, before proceeding to that discussion, it is important to note that the Penn Central viability studies were not projections for a conventional railroad. Quite the contrary, the viability studies projected a new kind of railroad never before tested in operation. Neither the Penn Central Trustees nor anyone else could promise that such a railroad would run at all. As the Trustees told the Reorganization Court in 1972:

> "It should be understood that the rail networks described above are not comparable to any existing railroad, particularly in the territory served by Penn Central. The 11,000 mile road to a great degree, and the 15,000 mile road to a lesser degree, represent a

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[39] Statistics taken from the DOT Report (J. Doc. No. 62) Vol. I at 7.

[40] Trustees' Report of February 15, 1972 (J. Doc. No. 4), recapitulated in their Report of January 1, 1973 (J. Doc. No. 8).

> new type of transportation system consisting of main lines and high density feeder lines. The concept requires scattered shippers not located in highly industrialized areas to come to the railroad rather than having the railroad come to them." (J. Doc. No. 7, Annex 1 at 1)

It is one thing for the Federal Government to pin its hope of solving the rail crisis on a new and untried concept of railroad operation. It is a totally different thing to ask the Penn Central claimants to accept it as the equivalent of U.S. dollars.

(e) *The Penn Central Trustees' viability condition concerning abandonments will not be satisfied.* The first condition of viability postulated by the Penn Central Trustees was that the railroad plant be rationalized by eliminating excess lines. While the new Act might in theory provide a means for meeting this condition, practical political considerations point in the opposite direction. Local interests will fight significant abandonment of local lines.[41] The pressures that Congress will be under to expand the Conrail system are foreshadowed in the RSPO Evaluation of the DOT Report (J. Doc. No. 63) at 9-10:

> "The DOT Report was seen by the public witnesses as based largely on the premise that if all lines which do not make a profit are removed, the rail system will be profitable. At every hearing, the belief was voiced that the concept of large-scale abandonment as a cure for the evils of unprofitability is the wrong approach, advanced at the wrong time, and for the wrong reasons.

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[41] Rail service continuation subsidies under Title IV of the Act are not a satisfactory answer because (a) the amount authorized for the federal share is plainly too small and (b) local communities are hard put to finance their existing services and do not have the resources to finance their share of rail service, which has not heretofore been their responsibility.

> "Certainly, it was the possibility of rail service discontinuance and abandonment which raised the greatest public furor. Witness after witness described the adverse economic, social, and environmental impact such actions would have on communities. It was contended that rail services discontinuance would result in market distortions, economic depression and social dislocations. Moreover, it was repeatedly stated that rail discontinuance is inconsistent with our national environmental and energy conservation policies. Decreased rail service would result in increased truck transport and greater consumption of scarce energy resources, more pollution, and increased pressures on land use for additional highway construction. Public sentiment was strong that these factors must be of primary importance in determining the final rail plan."

More important, the Wyer, Dick studies, completed after the Trustees first stated their conditions of viability, show that large-scale abandonment of lines is not the panacea proponents of the Act make it out to be. If, as the Wyer, Dick studies show, a 15,000 mile Penn Central system is not viable, it is hardly likely that a similar Conrail system (made up primarily of Penn Central lines) could be.

(f) *The Penn Central Trustees' viability condition concerning unnecessary employees will not be satisfied.* The Act makes no impact on the Penn Central Trustees' second condition, the elimination of unnecessary labor expense. Appellants stress the acknowledged fact that the Act provides $250 million for displaced employees, but they ignore the fact that the Act provides no means to achieve improved productivity by eliminating unnecessary employees.

The Penn Central Trustees' Report of February 15, 1972 (J. Doc. No. 4) sets a goal of eliminating approxi-

mately 9,800 train and engine service employees. Their report of July 1, 1972 (J. Doc. No. 6) states that this goal cannot be achieved except through negotiations with the affected unions on a national basis. The Act does nothing to change this situation. Indeed, the DOT Report, after observing that "one of the greatest opportunities for increasing productivity is in finding ways to change inflexible labor rules to permit better utilization of both labor and capital,"—precisely the point of the Trustees' labor condition—goes on to acknowledge that the Act "does not provide any direct mechanism for making such changes . . ." DOT Report (J. Doc. No. 62) at 8.

(g) *The Penn Central Trustees' viability condition concerning passenger service will not be satisfied.* The Act does not satisfy the Penn Central Trustees' condition of viability with respect to passenger service. While the Act may ultimately provide full compensation for passenger service, it does not satisfy the fundamental assumption of the Penn Central viability studies that the core rail system "will handle freight only and passenger operations will not constitute a burden in any way. This assumption goes beyond the concept that passenger service is self-sustaining; it assumes, in essence, that the passenger service does not exist."[42]

Furthermore, the viability studies' assumptions would require the provision of a new freight route from Boston to Washington so as to permit the exclusive use of the existing corridor for passenger service. The problems inherent in attempting to run slow-moving freight trains and increasingly high speed Metroliners over the same tracks are reflected in the RSPO recommendation that USRA:

> ". . . should consider alternate means of handling freight traffic now moving over the Northeast

[42] Trustees' Report of October 1, 1972 (J. Doc. No. 7) Annex 1, ¶ III; Exhibit T-7 to Affidavit of Nelson A. Sharfman, dated March 21, 1974 (J. Doc. No. 17).

> passenger corridor between Boston, New York City, and Washington. The Final System Plan should include and provide for the improvement of routes which would make it possible to remove as much freight traffic as possible from the corridor." RSPO Report (J. Doc. No. 63) at 3.

The Act makes no provision for carrying out this essential condition.

(h) *The Penn Central Trustees' viability condition concerning traffic and revenues will not be satisfied.* The final, and perhaps most vital, condition of viability postulated by the Penn Central Trustees is the achievement of the traffic and revenue potentials forecast by Temple, Barker & Sloane. (See J. Doc. No. 38; FF 12-22, JA 92-98.) The basic assumptions of the Temple, Barker & Sloane studies appear in Attachment 4 to the Trustees' Plan for Reorganization dated April 1, 1972 (J. Doc. No. 5). They include an assumption that Penn Central will have adequate plant and equipment to carry the forecast tonnage and to maintain service at or above current levels, and the assumption that there will be increased productivity from manpower, equipment and plant. (See also FF 13, JA 92-93.) The importance of these factors was recently emphasized by the Executive Vice President of Temple, Barker & Sloane thus:

> "Finally, by way of introduction, it is of critical importance to note that in our February 1974 forecast, TBS is projecting traffic that is *potentially* available to Penn Central. As was the case in our previous three forecasts, the Trustees requested that TBS assume in its latest forecast that Penn Central has sufficient plant, equipment and manpower to provide the quality of service that shippers can reasonably expect from railroads; and the present forecast is predicated on this key assumption. In

> the course, however, of developing this latest forecast, evidence was obtained from shippers which now leads me to state with a reasonable degree of confidence that the current state of Penn Central's plant and equipment will render PC incapable of fully realizing the potential traffic and revenues forecast for it."[43]

As noted above, the Act does not provide a mechanism for increasing manpower productivity to satisfy the Temple, Barker & Sloane assumptions. Similarly, it does not provide nearly adequate resources for rehabilitating and modernizing Penn Central's equipment and plant, nor does it provide any funds for Conrail's working capital. The Trustees reported as early as February 1, 1973 (J. Doc. No. 9) that as much as $800 million would be required for rehabilitation and modernization. That figure has since been increased by additional deferred maintenance and inflation[44] and would be further increased by the inclusion of other bankrupt lines in the Conrail system. To meet this need the new Act provides that only $1 billion of USRA obligations be issued to Conrail, of which only $500 million must be allocated to rehabilitation and modernization. The amount is clearly inadequate for Penn Central alone upon the facts found by the Reorganization Court (JA 92). What is worse, however, any funds advanced under these provisions of the Act will apparently constitute a first lien on the Conrail properties ranking prior to the claims of the present Penn Central creditors.

It is important to reiterate that Appellants offered *no* evidence below to show that Conrail was likely to be viable, but rested upon the record submitted to the Court and on the facial terms of the Act.

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[43] Sloane affid. (J. Doc. No. 16) at 2. See also FF 22, JA 97-98.

[44] Jackman affid. (J. Doc. No. 18); FF 10 and footnote thereto, JA 91-92.

The conclusion is inevitable: immediately before the Act became law there was concededly no light at the end of the Penn Central tunnel.[45] The Reorganization Court, whose findings on such matters are customarily accorded great weight here,[46] made detailed findings which fleshed out that bare stipulation and concluded that a railroad of any configuration that could plausibly be designed from the Penn Central would not have any reasonable prospect of viability (JA 92-102) in the absence of special provisions meeting the Trustees' conditions which the Act patently fails to afford.

The introduction of Conrail does not change the situation in any material way. The addition of a few thousand miles of unprofitable track and the adoption of a hopeful new name are not enough to alter the outlook for viability. On the basis of the Act as it now stands, Conrail has no better prospects.

3. *The Act Provides No Assurance of Payment for the Taking by Interim Erosion.*

Congress could have provided for payment of compensation for interim erosion in at least two ways: it could have provided direct payments to subsidize the losing interim operations or it could have provided that the final payment for the rail properties compulsorily conveyed to Conrail include assured compensation for the imposed interim losses.[47] It did neither. Rather the burden of interim losses from operating Penn Central for the public purpose was left upon the estate and its creditors.

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[45] See Stip. No. 9, JA 206.

[46] See, e.g., *New Haven Inclusion Cases*, 399 U.S. 392, 463; *Reconstruction Finance Corp.* v. *Denver & R.G.W.R.R.*, 328 U.S. 495, 533.

[47] Even this procedure would have required legislative ingenuity, since the erosion is being felt system-wide, and the conveyances presumably will be less extensive.

(a) *Interim payments provided are inadequate.*

The Act does have provisions which were evidently intended to relate to interim operations. However, if in fact these were intended to provide some degree of compensation for burdens of interim operations, they are wholly inadequate.

Section 213, the only provision of the Act which provides funds which may be used for operations during the planning period, authorizes the Secretary of Transportation to make payments for certain specific purposes:

> "(a) *Emergency Assistance.*—The Secretary is authorized, pending the implementation of the final system plan, to pay to the trustees of railroads in reorganization such sums as are necessary for the continued provision of essential transportation services by such railroads. Such payments shall be made by the Secretary upon such reasonable terms and conditions as the Secretary establishes, except that recipients must agree to maintain and provide service at a level no less than that in effect on the date of enactment of this Act.
>
> (b) *Authorization for Appropriations.*—There are authorized to be appropriated to the Secretary for carrying out this section such sums as are necessary, not to exceed $85,000,000, to remain available until expended."

The $85,000,000 is plainly not enough to effect even a dent in the massive interim losses anticipated for Penn Central alone, much less for the other bankrupt lines which might comprise parts of Conrail. The Government was well aware that Section 213 money would be of no major significance. John Barnum, Under Secretary of the Department of Transportation, advised the Senate Commerce Committee that the $85,000,000 was "merely the amount

which we thought should be provided in the form of a grant to the bankrupt railroads so that they would be able to meet their payrolls Friday and not run out of cash."[48] And Counsel to the Department of Transportation conceded to the Penn Central Reorganization Court that even for the purposes intended, the $85,000,000 had been calculated on faulty premises (J. Doc. No. 25).[49]

The second provision in the Act relating to interim payments is Section 215, which provides funds for the acquisition, maintenance or improvement of rail properties to be included under the Final System Plan. However, that section provides that Conrail need not compensate a railroad for that portion of the value of rail properties transferred to it which is attributable to such acquisition, maintenance or improvement. The section thus does not so much compensate for interim erosion as it creates a charge against subsequent compensation. Moreover, the provision does nothing at all to help with the maintenance of rail properties which, though required to be kept in operation under Section 304(f), are not to be included in the Final System Plan. The section plainly does not constitute any compensation for required interim erosion.

Given the history of Penn Central losses equalling $851,000,000 for the period June 21, 1970 until December 31, 1973 and the findings of the Reorganization Court that the losses will continue unabated, the Court below had no choice but to hold that:

> "It becomes quickly apparent that the limited amounts of these funds—available to railroads in

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[48] Hearings on S. 2188 before Senate Commerce Comm., 93d Cong., 1st Sess. at 65 (Nov. 15, 1973).

[49] For a further emphatic statement that "the granting of financial assistance to protect against further erosion of the estate, is not in accordance with the purpose for which the funds under § 213 of the Act have been appropriated, see Letter of Federal Rail Administrator Ingram to the Trustee of the Central Railroad of New Jersey (Trustees' Br., Annex A, at 5a).

reorganization in the region—have not been specially designated to meet challenges of unconstitutional erosion." (JA 31)

(b) *The Act fails to provide compensation which is adequate in medium and amount to assure fair value for the assets to be conveyed and still less does it provide redress for interim erosion.*[50]

The Act neither authorizes the Special Court to provide recompense, nor requires Conrail or USRA to make direct payment for interim erosion. The burden of such losses was specifically left with the bankrupt railroads' estates.

Appellants, however, claim that the Special Court may somehow fix the compensation to remedy erosion by including such amounts in the "constitutional minimum" to be provided under Section 303. Upon this basis they then contend that the Court below was premature and improvident in concerning itself with the adequacy of the compensatory mechanism set out in Section 303 (see, e.g., USRA Brief at 71). The problem with this approach, of course, lies in the fact that reliance on Section 303 requires rather than excuses a study of the adequacy of its compensatory mechanism. And that study in turn involves a consideration of the extent to which those procedures provide adequate assurance of compensation for the conveyed rail assets and have the clear potential of yielding values in excess of the amounts required to meet that cost, so as to defray the burdens of interim erosion. The Special Court does not have any method by which it can increase the amount of compensation available under the Act and

[50] The New Haven Trustee has cross-appealed and the Penn Central Trustees have appealed, *inter alia,* from so much of the judgment below as determined (by a 2-1 vote) that the constitutional challenges to the ultimate conveyance provisions of the Act were premature. While Appellees here have not joined in those appeals, they do concur in the arguments expressed at New Haven Trustee's Brief at 24-92 and Penn Central Trustees' Brief at 48-62.

the Final System Plan for the rail assets conveyed. If, as seems inevitable, the value of the compensation realizable under the Act turns out to be *less* than the fair value of the assets transferred to Conrail, there will obviously be no way in which the Special Court can also compensate the estate for two years' erosion. Yet that is plainly the prospect, and the Court below properly and necessarily reached the issue now.

We therefore turn to an examination of the workings of Section 303 which, Appellees submit, reveals its inadequacy both for the purpose it was ostensibly to serve and the new assignment which Appellants ask this Court to read into it.

The Act ultimately requires a non-consensual transfer of title in the rail assets from the estate of Penn Central with a simultaneous extinction of liens on those assets. At no point do any of the relevant parties—Trustees, stockholder, secured or unsecured creditors, or reorganization judge—have any option about the disposition of the property once the estate has been committed to the process of the Act. None of these propositions seems to be, nor can they be, seriously controverted.

Whether this peculiar process results in a condemnation under the eminent domain power of Congress or an exchange of assets under the bankruptcy power may be hard to discern. In either case, however, it is constitutionally indispensible that there be in the process of the Act an assurance that those whose property is transferred by virtue of its mandatory terms will be justly compensated for their losses.

Assuming that the Act is not regarded as an exercise of the power of eminent domain, Section 303 nonetheless falls far short of meeting the Fifth Amendment requirement of just compensation. The compensation payable under the Act is woefully inadequate to equal the constitutional mini-

mum value of the properties to be taken, and the Act permits Appellees no recourse by which they might recover the amount by which such minimum value exceeds the amounts payable under the Act. Still less is there any procedure by which a bill for interim erosion can be added to the claims against the compensation afforded by the Act with any hope—let alone assurance—that it could be paid. In short, the Act would take Appellees' property in the interim and ultimately, without assuring them that just compensation would be paid in all events.

(i) *Kind and amount of compensation under the Act.* The Act provides that payment for rail properties conveyed to Conrail is to consist solely of common stock of Conrail, other unspecified securities referred to in Section 206(i) (and, if Congress concurs pursuant to such section, obligations of USRA not to exceed $500 million, which might be guaranteed by the United States), and other undefined "benefits" accruing to the estate by reason of the transfer. If the Special Court should determine, pursuant to Section 303 (c), that the value of such consideration is less than the fair value of the properties conveyed, the *only* remedies allowed it by the statute are (a) an order reallocating the securities issued to the various estates; (b) an order requiring the provision of additional Conrail securities designated in the Final System Plan; and (c) an order entering a deficiency judgment against Conrail.

The common stock of Conrail can have value only insofar as Conrail will be a viable entity generating income in excess of costs and fixed charges. In light of the dismal prognosis for the bankrupt lines, parts of which will ultimately comprise Conrail, in light of the failure of the Act to deal with the problems which beset Penn Central and given the public service goals which must be served by Conrail (Section 206), the common stock will have little, if any, value. But whatever be the ultimate value of the common stock, there can be no dispute that there presently

exists sufficient doubt about that value to require consideration of the other potential sources of compensation available to the Special Court.

Securities of Conrail other than common stock and USRA obligations could possibly be included in the package of compensation to go to the estates of the bankrupt railroads. However, even if proper under the Act,[51] the addition of such securities to the Conrail mix could not solve the problem.

First, if Conrail issued debt secured by liens on all the property transferred, the mere existence of these securities would substantially decrease the intrinsic market value, if

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[51] Appellees believe, however, that the issuance of a substantial amount of Conrail secured debt to pay for the rail assets would fly in the face of the Act's design for Conrail. Debt secured by liens on the properties transferred would add nothing to the real value of Appellees' compensation unless the debt were senior and carried adequately secured fixed charges. Appellees cannot regard seriously any implication by the Government that the Act contemplated that the USRA obligations (and any other United States debt) would be junior. (Cf. Rail Act, § 211(e)(3) and (f).) Further, use of a substantial amount of Conrail debt to pay the estates would render superfluous Section 301(d), which clearly contemplates that the Government would initially control Conrail because of its debt investments therein.

Reliance on substantial Conrail debt to pay the estates would also subvert the Act's intent that the capital structure of Conrail be based on pro forma earnings (as constructed by USRA), "including such debt capitalization as shall be reasonably deemed to conform to the requirements of the public interest with respect to railroad debt securities, including the adequacy of fixed charges" (§ 206(e)). A Conrail saddled with substantial first priority secured debt could borrow only with great difficulty, if at all, a burden hardly in the public interest. Also ignored would be the Act's intent that securities issued by Conrail in exchange for the rail properties be such as "will minimize any actual or potential debt burden on [Conrail]" (§ 206(i)) and that Conrail adopt and implement employee stock ownership plans (§ 206(e) (3)), presumably using stock that has some real value after Conrail issues its securities to pay for the rail assets.

any, of the common stock.[52] Second, it must be assumed that such senior securities would carry with them rights to interest or dividends in order to be marketable;[53] however, payment of interest or dividends would result in a continual cash drain on Conrail's resources, thus further reducing the value of its common stock. Moreover, there could be no assurance that payments of interest or dividends could be made. Third, the existence of secured debt on Conrail's properties would render further borrowing by Conrail difficult and expensive, if possible at all. Last, that USRA *may* include Conrail debt securities in the Final System Plan does not supply the necessary assurance that the estate and the creditors will be paid the constitutional minimum value of the properties conveyed to Conrail, even assuming such securities could, if included, add value to the total package.

Finally, the Act provides only one remedy—a deficiency judgment against Conrail—in the event that the Special Court finds that Conrail's securities, as authorized by the Act and designated in the Final System Plan, cannot pro-

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[52] If senior securities were issued to investors for cash, rather than to pay for acquired assets and interim erosion, the reverse might well be the case in that Conrail would receive funds for operations and rehabilitation of its properties, the judicious use of which could increase Conrail's earning power thus giving rise to a concomitant increase in the value of its common stock. This, unfortunately, is not the situation hypothesized here. Senior securities issued in exchange for transferred rail properties would not bring needed operating funds to Conrail, but would only increase its already difficult task of making ends meet.

[53] If the right to receive interest or dividends on the senior securities should be postponed for a period of years after their issuance, the value of such securities would have to be severely discounted for purposes of determining the "constitutional minimum." If the securities carried no rights to interest or dividends, their value would not only be greatly discounted, but they would then represent only a right to foreclose at maturity, in effect, a very expensive ticket to another Section 77 proceeding.

vide that requisite value. But the deficiency judgment must necessarily reduce the value of the common stock, the inadequacy of which requires the entry of the judgment in the first place. Thus, whether described as "essentially circuitous" (JA 77) or as a "relatively pointless" (JA 137) remedy, the Conrail deficiency judgment cannot cure the constitutional inadequacy. No party has presented any analysis which claims significant value for the judgment or which otherwise supports a contrary conclusion.

(ii) *Inadequacy of compensation on any theory of valuation.* USRA is (contingent upon subsequent Congressional ratification) authorized to provide in the Final System Plan for the issuance of up to $500 million of debt obligations of USRA, which may be guaranteed by the United States Government, for use by Conrail in paying for rail assets. Once it is appreciated that the value of the stock and other securities of Conrail is not necessarily equal to the value of the rail assets of Penn Central to be conveyed, and that the deficiency judgment is "essentially circuitous," the only remaining test of the constitutional adequacy of Section 303 is an assessment as to whether and under what circumstances this $500 million of theoretically available debt securities would provide the Penn Central estate with a total package of securities whose value would equal the constitutional minimum value of the rail properties conveyed. Appellees submit that the assessment made by the Reorganization Court in the 180-Day Decision was correct: whether the Act be regarded as an eminent domain statute or as a reorganization statute, its provisions are on their face incapable of providing compensation equal to the constitutional minimum value, whatever standard may be employed to measure that value.

The evidence before the Reorganization Court on valuation of Penn Central's rail properties consisted primarily

of a Day & Zimmermann study filed with the ICC,[54] which estimates the value as of December 31, 1970 of the physical assets of Penn Central and all its leased lines, exclusive of the Park Avenue properties, and includes, in part, land not required for rail use and railroad lines which USRA might determine should be abandoned rather than included in a Final System Plan. It is, of course, impossible to show at this time what portion of the assets studied by Day & Zimmermann would be included in a Final System Plan. It is reasonable and conservative to project, however, that in terms of the value of all physical assets of Penn Central and its leased lines studied by Day & Zimmermann, the properties designated in a Final System Plan would be likely to comprise not less than 50% of the total value of the physical assets of the Penn Central System.[55]

Two different approaches to valuation were presented by the Day & Zimmermann study, one based on a continued rail use methodology and the other based on an assumed liquidation for non-rail use. In the case of the latter methodology, a present value of a projected stream of future liquidation proceeds was also calculated. In sum-

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[54] Day & Zimmermann, Inc., "The PCTC Physical Asset Valuation Study," April, 1973; Revised May 1973 as Appendix 1 to Exhibit T-21 (witness: Carlisle) in ICC Fin. Dkt. No. 26241 (J. Doc. No. 40).

[55] For example, the New Haven Trustee's Plan of Reorganization, dated June 27, 1973, submitted to and considered by the ICC in its September 28, 1973 Report, called for a reduction in route miles from some 19,000 route miles actually operated now to 11,000 route miles. The 11,000 mile "core system" would have required substantially more than half the total value of the physical assets studied by Day & Zimmermann.

Moreover, Penn Central comprises over 19,000 of the aggregate 26,000 route miles in the region potentially covered by the Act. With the Erie and Boston & Maine out of Conrail, it becomes manifestly impossible to structure Conrail without at least 50% of Penn Central.

mary, the results of the Day & Zimmermann study were as follows:

Assumption as to "Highest and Best Use"	Total Value of Wholly-Owned Assets, Penn Central and Leased Lines as of December 31, 1970
Continued Railroad Use	$13,858,493,000
Liquidation for Non-Rail Uses:	
Estimated Gross Proceeds of Sales over a Period of Years	$ 3,532,110,000
Present Value of Estimated Net Proceeds, after deducting interest factor and all expenses of sale and of preservation of assets pending sale	$ 1,995,778,000[56]

These valuations provide substantial evidence[57] upon which it may properly be concluded that even if all $500 million of USRA securities available for such use were committed to the Penn Central estate, it would not constitute payment in full for the value of the Penn Central properties likely to be included in the Conrail system; but rather that, as the Reorganization Court held, ". . . there is every reason to suppose that the included properties would be worth considerably more than $500 million" (JA 137).

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[56] The present value approach results in *negative* values being assigned to certain leased lines; for example, New York Connecting R.R. has an assumed negative value of $2,898,000, after deducting $8,844,000 as the net cost of demolishing its bridges and tunnels. This is an aspect of the "scrap value" approach which is totally inconsistent with preservation of an essential national asset.

[57] In addition, Penn Central's Annual Report for 1973, prepared by Haskins & Sells, certified public accountants (Doc. No. 7813), shows, as of December 31, 1973, Penn Central's rail properties to have a book value (after depreciation and certain reserves) in excess of $2.5 billion.

The conclusion that the Act simply does not provide enough value of any kind to pay the constitutional minimum value of the conveyed rail assets alone does not at all depend upon the valuation standard applied. Both the estimated value for continued rail use ($13.5 billion) and the estimated liquidation value ($3.5 billion) clearly greatly exceed the value which could be provided by the Act's compensation mechanisms.[58] Even the Day & Zimmermann discounted scrap value approach, an approach which Appellees contend would be wholly erroneous, produces a value of approximately $1 billion on the assumption that only 50% in value of the Penn Central assets would be included in the Final System Plan.

Finally, mention should be made of a novel theory of valuation which Appellants pressed below and in the Special Court, although it does not yet appear in their briefs here. That is the proposition, unsupported by any authority, that if going concern value based upon earning capacity is *less* than liquidation value, the latter is no measure of the "constitutional minimum." As the Reorganization Court noted in the 180-Day Decision, this theory of valuation appears in the legislative history to be the basic rationale of the Rail Act:

> "The legislative history of the Act suggests that many responsible public officials may be proceeding on the assumption that the common stock of Conrail

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[58] Appellees believe that if rail property is mandatorily taken by the Government for continued rail use, the required just compensation should include an incremental value in recognition of the unique and, for practical purposes, irreplaceable character of the assets when taken for continued use. See *In re Port Authority Trans-Hudson Corp.*, 20 N.Y.2d 457, 231 N.E.2d 734 (1967), *cert. denied*, 390 U.S. 1002; *In re City of New York (Fifth Avenue Coach Lines, Inc.)*, 18 N.Y.2d 212, 219 N.E.2d 410 (1966), *appeal dismissed*, 386 U.S. 778. As noted in the text, however, the proper valuation approach need not be decided here because the Act's provisions cannot pass constitutional muster under any approach.

> (*i.e.*, the capitalized value of its prospective earnings) necessarily and automatically establishes the value of the rail assets conveyed to Conrail, even if those assets had a higher liquidation value, and even though their value for 'highest and best use' might be much greater." (JA 138)

Appellees contend that this position is wrong as a matter of law. The *New Haven Inclusion Cases* plainly held that the bondholders there were receiving a value reflecting "the highest and best use of their properties" (399 U.S. at 482, n. 80), and described that value as being the equivalent of "the right to liquidate and a per-parcel sale that is theirs by virtue of their mortgage liens" (399 U.S. at 489-90). The Court defended this value against a challenge by Penn Central predicated on the truism that it was paying liquidation value for property which had a lower (or negative) going concern value, by noting that the bondholders' right to liquidation value derived from their state-created liens (399 U.S. at 499).

New Haven Inclusion Cases[59] thus reinforces the proposition that liquidation is the highest and best use of the operating property of a hopelessly losing enterprise. This too stems from the investors' right to withdraw their capital from hopelessly non-remunerative use. *Brooks-Scanlon Co.* v. *Railroad Comm'n*, 251 U.S. 396. And that use then determines the value that must be reflected in any *compelled* conveyance.

Appellants' intimation below that less will suffice, and the apparent assumption of Congress in the Act that the "constitutional minimum" can be less than liquidation value is simply wrong. Of course, to the extent that Appellants seek to excuse the absence of assured liquidation values in the Act on this theory, they implicitly acknowledge

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[59] See also *In re New York, N.H. & H. R.R.*, 289 F. Supp. 451, 454-55 (D. Conn. 1968).

that no *surplus* over such liquidation value is provided in the Act to defray the burden of interim erosion.

(c) *The Act fails to provide any procedures which could assure the requisite fair value for the properties conveyed and compensation for interim erosion.*

This Court has long held that the procedures set out in Section 77 are constitutional because they provide mechanisms by which "full compensatory treatment" can be accorded claimants against the estate, in order of their priority. *Consolidated Rock Products Co.* v. *Du Bois,* 312 U.S. 510, 528-30; *Group of Institutional Investors* v. *Chicago, Mil., St. P. & Pac. R.R.,* 318 U.S. 523. *Ecker* v. *Western Pac. R.R.,* 318 U.S. 448, 565-66, recognized that such treatment could not be formulistic, but depended on the existence of procedures which assured that the informed judgment of the ICC and the reorganization court would be brought to bear on "all relevant factors" in giving prior approval to any exchange of securities required by a reorganization plan.

The essence of this case law is that creditors are entitled to procedures which provide reasonable assurance that they will receive the fair equivalent of their property, in order of absolute priority, before their property may be taken from them in bankruptcy. *Louisville Joint Stock Land Bank* v. *Radford,* 295 U.S. 555; *Wright* v. *Vinton Branch of the Mountain Trust Bank,* 300 U.S. 440; *Wright* v. *Union Central Life Ins. Co.,* 311 U.S. 273, 278. The processes of the Rail Act preclude any such assurance.

In the first place, the Special Court's Section 303 powers do not assure fair and equitable treatment. Congress provided in Section 206(d)(1) that the transfers to Conrail "shall be . . . in exchange for stock and other securities of [Conrail]." Consistent with that intent, the Special Court, which has the power to determine the fairness of the exchanges mandated by the Act, but only after they are consummated, initially decides whether the transfers

to Conrail and the exchange of securities are in the public interest and are fair and equitable to the estate of each railroad. The remedy granted to the Special Court to cure any failure of the exchange to meet the fair and equitable standard is: first, to reallocate those securities of Conrail, specified in the Final System Plan, which had been deposited with it prior to the transfer, among the various railroads; second, if the lack of fairness and equity is not thereby cured, to order Conrail to provide additional securities of Conrail or the limited obligations of USRA, if any, specified in the Final System Plan, as may be necessary; finally, "if the lack of fairness and equity cannot be *completely cured*" by these first two steps, then the Special Court "shall . . . enter a judgment against [Conrail]." Section 303(c)(2)(C). (Emphasis supplied.)

These procedures fail to assure receipt of the constitutional minimum for the obvious reason that no assurance whatsoever exists that there are sufficient assets available to the Special Court pursuant to Section 303(c) to enable it to provide a total value in the package of Conrail securities which will equal the value of the rail properties taken. Presumably, this is precisely the reason for the inclusion in Section 303(c)(2)(C) of a power to order a judgment against Conrail. Thus, while the processes of the Act necessarily contemplate a deficiency judgment, there is, as Judge Fullam's concurrence below points out, "no assurance that the price fixed by the Special Court can be paid, under the statutory scheme" (JA 79). The compensation procedures of the Act are inadequate, then, first because they are illusory.

The Special Court, moreover, is hamstrung by the Act. Unlike an ordinary reorganization court confronted by a plan of reorganization which is not feasible, the Special Court cannot refuse to order the mandated transfers and the exchange of securities required by Section 303.

The Act provides explicitly that "the Special Court *shall*, within ten days after the deposit" of the securities

called for by the Final System Plan order the Trustees of railroads in reorganization to convey "forthwith" to Conrail the rail assets specified in the Final System Plan and "shall itself order the conveyance" of lessors' interests called for by the Final System Plan. In case this explicit language of Section 303(b) did not carry clearly enough the intent to defer consideration of compensation until the conveyances had been irrevocably consummated, Section 303(c) further provides that the Special Court shall decide whether the exchanges are fair and equitable "*after* the rail properties have been conveyed to [Conrail] and profitable railroads operating in the region under subsection (b) of this section . . ." (Emphasis supplied.)

It is crystal clear from the legislative history that Congress meant exactly what it said. In the Report of the Senate Committee on Commerce on S. 2767, the Committee submitted its explanation of Section 303(b) of that bill, which itself was carried unchanged in this respect directly into the Act:

> "The conveyances are to be free and clear of liens and encumbrances and may not be judicially restrained or enjoined. . . . Because of the public interest in permitting the new Corporation [Conrail] to obtain all the rail properties it will need so that it may commence operations at the earliest practicable time, *the special court is not given any discretion in making the order requiring conveyance.*" [60] (Emphasis supplied.)

The Act further underscores the determination to forestall valuation of the assets until after they have been conveyed by its specific provision that the "conveyances shall not be restrained or enjoined by any court." Section 303(b)(2).

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[60] S. Rep. No. 93-601, 93d Cong., 1st Sess., Dec. 6, 1973 at 33.

Not only are the procedures of the Act illusory, then; they are so constructed as to preclude the Special Court or any other court from interfering with the inexorable conveyances that they prescribe.[61] No court, therefore, possesses the power to scrutinize the Final System Plan in advance of conveyances and to prevent a conveyance which appears almost certain to be confiscatory. Far from assuring just compensation for interim erosion as well as the assets ultimately conveyed, the procedures of the Act go to great lengths to dissipate the assurances normally afforded by procedures under Section 77 of the Bankruptcy Act.

The procedures under the Act are not analogous to the Section 77(e) cramdown. The Rail Act procedures cannot be sustained by analogy to the "cramdown" provision of Section 77(e) of the Bankruptcy Act. The cramdown power is set in a context which is wholly absent in the Rail Act. Section 77 affords securityholders in a railroad reorganization the opportunity to be heard and then to vote before their property rights may be adjusted in the reorganization. This provision is consistent with the long history of legislation regarding the composition and adjustment of debts, both in England and the United States, and recognizes the safeguard of claimants' interests implicit in the consensual underpinning for railroad reorganizations.

The cramdown is designed to prevent an obstinate class of claimants from arbitrarily withholding its assent and

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[61] It does not appear that Appellants press upon this Court the argument urged upon the Special Court that, notwithstanding the contrary language of its organic Act, it possesses some inherent power to make a "prima facie review" of the Final System Plan before ordering the conveyances. In any event, since the interval between delivery of the Final System Plan and the mandated transfers may be as little as eleven days, it would be impossible for the Special Court to rest any such decision upon an informed independent judgment of its fairness.

thereby frustrating a reorganization plan which is fair and equitable and in the public interest.[62] However, the cramdown is permitted only if the court finds, after hearing, that the plan makes adequate provision for fair and equitable treatment of the interests or claims of those rejecting it and that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all relevant facts.

The cramdown provision, therefore, grows out of a combination of consensual arrangement and informed judicial scrutiny in advance of the consummation of the reorganization plan. The Rail Act eliminates both of these underpinnings of the cramdown provision; it neither permits the exercise of enlightened self-interest to protect the rights of the claimants through the provision of a vote, nor allows any court the opportunity of informed judicial supervision of the terms of the exchange in advance of their occurrence.

There is no precedent for compelling such exchanges in the absence of both assent and prior judicial determination that they are fair and equitable.

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[62] It is improbable that the cramdown power is intended to be available where, as here, there is general objection to the plan by all classes of claimants. As the leading commentator puts it:

> "[T]heoretically the judge may confirm a plan where no classes at all have assented to it . . . .
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> • • •
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> The language [of § 77(e)] is broad enough to permit this. But aside from questions as to constitutionality, it is difficult to conceive of a plan being 'fair and equitable' . . . which is disapproved by all the classes. Such disapproval would in itself forcefully indicate that that judge confirming such a plan was wrong in determining the commercial expediency of the plan, which the classes are usually better qualified to determine than the judge . . . . There seems little doubt that the provision will be applied only to small, obstructing, dissenting groups after most of the other classes have indicated their approval of the plan." 5 Collier, *Bankruptcy* § 77.19 at 555 and n.10 (14th ed. 1974).

D. *New Haven Inclusion Cases*, 399 U.S. 392, Does Not Support the Constitutionality of the Rail Act, but Exposes its Unconstitutionality.

Appellants and *Amici Curiae* all confirm the understanding derived from the legislative history that the Act is consciously based on the New Haven reorganization and allegedly draws constitutional support from the decisions handed down in its course. Appellees here defer to the New Haven Trustee's review of the relevant history of that proceeding which, we are informed, he will present in his Appellee's brief. In view of the emphasis placed upon the New Haven precedent, however, Appellees here do emphasize certain particulars which demonstrate that the defenders of the Rail Act are misguided in the comfort they draw from that proceeding:

In *New Haven,* the rail properties of the debtor were conveyed to the newly merged Penn Central, a corporate colossus having assets with a value more than twenty times the value of the acquired New Haven properties. The size of Penn Central, the corporate history of its components, and the economic prospects for the merged company as developed in the long Penn Central merger proceeding, all led to a confidence that the underwritten value of the stock of Penn Central would furnish fair intrinsic value, especially when taken together with the conditions and protections ordered in advance by the reorganization court. Even so, when it became apparent (because of the filing of the Penn Central reorganization petition) that there was doubt about the value of the Penn Central stock, this Court remanded the matter to the District Court observing that:

> "The fairness and equity that are the essence of a § 77 proceeding forbid our approval of a payment for the transferred New Haven properties that may be worth only a fraction of its purported value." *New Haven Inclusion Cases,* 399 U.S. 392, 488; and compare generally *Id.* at 483-89.

Here, by contrast, there is no pre-existing corporate entity to which the rail properties of Penn Central can be conveyed; rather, the conveyed assets *are* the totality of operating assets of Conrail and the prospective earning power of Conrail turns entirely on its capacity to wring a profit from those bankrupt lines. There does not exist behind the Conrail stock even the measure of assurance, forlorn as it turned out to be, that underwrote the value of the Penn Central common stock delivered to the New Haven. No court under the Act may circumscribe with conditions the compensation to be afforded the Penn Central estate under its terms and no court, not even this one, has the power to do what this Court did in the *New Haven* case, namely, remit the cause for reconsideration in light of doubt about the intrinsic value of the securities constituting consideration for the conveyed rail properties.

In *New Haven,* the "light at the end of the tunnel" at all times was thought by all parties involved to be real; here, excepting only the Government and USRA, all parties —including the Trustees, secured creditors, unsecured creditors and the stockholder—agree that the hope of reorganization afforded by the Act upon its own terms is ephemeral.

In *New Haven,* all the parties agreed that, from the point of view of the estate, continued operation until the inclusion was accomplished was better than liquidation. Here Appellees and the Trustees, creditors and the stockholder have strenuously opposed the indeterminate continuation of loss operations required by the Act until the Final System Plan emerges and Conrail is born.

In *New Haven,* the bondholders, motivated by the considerations mentioned just above, consented to inclusion by a substantial majority and then bided their time. Here the consents of Appellees have not been solicited and the Act affords them no opportunity to register their vigorous

opposition in any operative way. They have, however, protested, by every means available, the otherwise inexorable processes of the Act, in this action, by a motion to terminate rail operations and by pressing their objections to the Act and its processes in the proceedings required by Section 207(b) of the Act. This general rising against the impositions of the Act, further illustrated by the companion appeals before this Court, is clearly not the cavil of an obstructionist minority. It is also a far cry from the position taken by the majority of private interests in the *New Haven* case.

In *New Haven*, the reorganization court had continuous surveillance of the reorganization effort to be effected by inclusion in the Penn Central merger so that:

> (a) It could and did pass upon the plan of reorganization and the proposed inclusion; the Reorganization Court under the Act would have no such power.
>
> (b) It could and did pass upon, modify, and ultimately determine the value for which the New Haven assets would be conveyed to the merged Penn Central, in which capacity it reviewed the elaborate record of two separate ICC valuation proceedings; the Reorganization Court under the Act would have no such power.
>
> (c) It could and did pass upon the feasibility and continued vitality of the inclusion as time passed from its first proposal to the event of its consummation; the Reorganization Court under the Act would have no such power.
>
> (d) It could and did determine that if inclusion were not effected by a date certain (December 31, 1968), it would have been unreasonably delayed and, notwithstanding its once bright hope, the New Haven would be shut down; the Reorganization Court under the Act would have no such power.

In short, at each step of the way the New Haven court had decisive control of the estate which was *in custodia legis* before it. The Rail Act ousts the Reorganization Court here of that power, denies the Special Court comparable powers and strips Appellees of the protection that such powers would afford.

It is not irrelevant to note that, despite these significant differences, including the vastly superior prospect of success, the substantial approbation of the private interests, the scrutiny of the ICC and the surveillance of the court, the New Haven inclusion in Penn Central turned out to be an unmitigated disaster. If, as Appellees contend, a reasonably likely prospect of feasible reorganization is required as the constitutional predicate for continued loss operations, the New Haven experience, fraught with distinctions and cataclysmic in result, hardly provides a basis for optimism here.

* * *

The Act, therefore, contains neither an assurance of just compensation or fair value for rail assets to be conveyed, nor the financial components necessary to provide such assurance, nor mechanisms—judicial or consensual—to protect the estate from loss of its property in the absence of such assurance. These shortcomings not only affect the compensation which may come due for the ultimate conveyances but also preclude the prospect of compensation for interim erosion. They are failures of constitutional magnitude which the Court below was right to declare as such and to enjoin.

II.

There is No Adequate Remedy at Law Available to Appellees under the Tucker Act.

Appellants urge this Court to hold that the Tucker Act [63] provides an adequate remedy at law for the perceived constitutional inadequacies of the Rail Act and, upon that ground, to vacate the injunctions issued below.[64]

The same Appellants have also conceded, however, that in the absence of a Tucker Act remedy a serious constitutional issue does indeed exist with regard to the propriety of the Act.[65]

Preliminarily, Appellees contend that one of the grounds of decision employed by this Court in *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, to reject precisely the same contention when urged by the Government there is equally applicable here. In addition to deciding that there was substantial doubt as to whether a taking by the

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[63] The Tucker Act provides in pertinent part:

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . ."

[64] Even if the Tucker Act were an adequate remedy at law, it is apparent that the declaratory relief afforded below should not be set aside on that ground. Fed.R.Civ. P. 57 specifically provides that "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." Here, such declaratory relief is plainly appropriate, if Appellees are right on the merits, if for no other reason than to foreclose subsequent quarrels in the Court of Claims over whether there were in fact constitutional wrongs done them. See *Altvater* v. *Freeman,* 319 U.S. 359; *Delaney* v. *Carter Oil Co.,* 174 F.2d 314, 317 (10th Cir. 1949), *cert. denied,* 338 U.S. 824.

[65] See, e.g., USRA Br. at 40; Trustees' Br. at 30.

President, which was unauthorized by the Congress, could form the basis of a claim under the Tucker Act, the Court noted that the "seizure and governmental operation of these going businesses were bound to result in many present and future damages of such nature as to be difficult, if not incapable, of measurement." *Id.* at 585. Viewing the case that way, and in the light of the facts presented below, enormous difficulties are readily foreseeable in identifying and measuring the damages that could be inflicted upon Appellees by the compulsory interim operations mandated by Section 304(f) and the complicated set of conveyances ultimately contemplated by Section 303.[66]

Nor does the fact that in *Youngstown* the President had ordered direct Government operation of the steel mills materially change the complexity and dimension of these problems. The compulsory operation, for an indeterminate period even by existing managements, for a public purpose and under force of law, generated in *Youngstown* and would generate here difficulties of damage assessment of the kind that, in part, motivated this Court to disregard the Tucker Act as a plausible remedy in *Youngstown*.

Moreover, an analysis of the Act and its legislative history makes clear that, even apart from these practical considerations, the option of a Tucker Act remedy does not in fact exist. It is plain from such a review that the Act creates procedures which: (a) are intended to exhaust the claims upon which a Tucker Act remedy could hypothetically be sought; (b) are intended to vest in the Special Court exclusive jurisdiction with respect to compensation for the amount constitutionally owed the bankrupt estates;

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[66] Among these problems are, for example, the marshalling of divisional mortgages in relation to properties operated and the respective profitability of the several parts of the system, as well as the distribution of proceeds upon ultimate conveyance; the proper distribution of the burden and the "benefit" of labor protection under the Act; and, of course, the calculus of erosion which has already produced a considerable literature in this case.

and (c) accurately reflect the explicit Congressional intention that claimants against the estates of railroads in reorganization be denied recourse to the United States Treasury for any deficiencies in compensation under the mechanics of the Act.

A. The Statutory Scheme of the Act on Its Face Purports to be Exclusive and Exhaustive.

The provisions of the Act comprise a self-contained structure for the adoption of the Final System Plan which determines the properties to be transferred to Conrail and the manner and measure of payment to be afforded in exchange. This process by its terms is exclusive, preemptive and exhaustive of any cause of action against the United States.

The Act clearly sets up a preemptive system of judicial participation with respect to the Final System Plan. Section 209 mandates the empanelling of the Special Court and the consolidation before it of "all judicial proceedings with respect to the final system plan." Section 303(c) endows the Special Court with the duty to review the consideration to be received for the properties conveyed and ultimately the authority to enter a deficiency judgment against Conrail. The exclusive appeal from the Special Court's findings is provided for in Section 303(d).[67]

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[67] Section 303(d) provides that:

"A finding or determination entered pursuant to subsection (c) of this section may be appealed directly to the Supreme Court of the United States in the same manner that an injunction order may be appealed under section 1253 of title 28, United States Code: Provided, *That such appeal is exclusive* and shall be filed in the Supreme Court not more than 5 days after such finding or determination is entered by the special court. The Supreme Court shall dismiss any such appeal within 7 days after the entry of such an appeal if it determines that such an appeal would not be in the interest of an expeditious conclusion of the proceedings and shall grant the highest priority to the determination of any such appeals which it determines not to dismiss." (Emphasis added.)

The very nature of the mode of exchange set out in the Act reinforces the conclusion that Congress legislated what it believes to be an exclusive method for both measuring and satisfying Appellees' rights to just compensation for their property transferred to Conrail. Congress provided in Section 206(d)(1) that the transfers to Conrail "shall be . . . in exchange for stock and other securities of [Conrail]." Consistent with that intent, the Special Court, which has the power to determine the fairness of the exchanges mandated by USRA, decides, after the fact, whether the transfers to Conrail and the exchange of securities are in the public interest and are fair and equitable to the estate of each railroad. The remedy granted to the Special Court to cure any failure of the exchange to meet the fair and equitable standard is: first, to reallocate among the various railroads those securities of Conrail which had been deposited with it prior to the transfers; second, if the lack of fairness and equity is not thereby cured, to order Conrail to provide additional securities of Conrail or the limited obligations of USRA, specified in the Final System Plan, as may be necessary; and finally, "if the lack of fairness and equity cannot be completely cured" by these first two steps, then the Special Court "shall . . . enter a judgment against [Conrail]" (Section 303(c)(2)(C)). In Section 303 (c)(3), the Act prescribes the applicable standard of completeness to be "the constitutional minimum standard of fairness and equity."

Congress clearly determined, then, that the deficiency judgment against Conrail—which, under Section 209, only the Special Court has subject matter jurisdiction to render —was to be the means by which any shortfall below the "constitutional minimum" was to be "completely cured." Of course, if the deficiency judgment is intended to be the *complete cure* of such a constitutional deficiency it must by that fact have been intended to extinguish the claim for such a shortfall which is said to be available in the Court of Claims. There simply is no room for inference from the

statutory scheme that any recourse was left to the public coffers.

The *Amicus Curiae* Brief submitted herein by thirty-seven members of the House of Representatives (including the principal authors and managers of the Act on the House side) makes clear, if it was not already clear, the legislative intent underlying passage of the Act. The Brief states in pertinent part (pp. 17-22):

> "The Tucker Act, 28 U.S.C. 1491 (1970), waiver of the sovereign's jurisdictional immunity was enacted to provide adequate opportunity for expeditious and orderly determination of claims against the government. The Tucker Act deals with the five limited areas of liability to which the government consents. The five areas do not purport to deal with the upholding of other Acts of Congress. This Court has never relied upon the presence of the Tucker Act to uphold the constitutionality of another Act of Congress.
>
> "The logic employed in attempting to argue that the Rail Act is constitutional because of a potential Tucker Act remedy is indeed strained. Each and every act of Congress of a similar nature, irrespective of the amount of authorization or the process provided for in any such act, could be constitutionally upheld on the grounds that a future Tucker Act remedy might be invoked. The intent of Congress in passing the Tucker Act was not to insure the constitutionality of potential unconstitutional laws and such a precedent would be very dangerous.
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> ". . . there is no question that in considering the process under this Act the 93rd Congress, specifically the House of Representatives, rejected giving the Federal Courts the key to the Treasury which

> would result from an open-ended deficiency judgment against the United States. The legislative history of this Act is emphatic in restricting the total amount of funds to be used in carrying out the reorganization process authorized by the Act.
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> "If this Court should decide at this time that a mechanism of a deficiency judgment against the United States under the Tucker Act is necessary to make this Act constitutional, the the [sic] Act must fall since the legislative history and the language of the Act are clear that no deficiency judgment against the U.S. is authorized by the Act."

As Congress envisioned it, then, only the Special Court is to review the exchange of securities for rail properties, and as to its functions its jurisdiction was plainly intended to be exclusive. No other agency, court or entity, including the Court of Claims, was given such authority.

As a practical matter (questions of the adequacy of the consideration apart), it makes some sense to vest the Special Court with such an exclusive and preclusive role. That Court, in determining the fairness of the consideration, must allocate the securities of Conrail among the various estates of the bankrupt railroads. This allocation obviously can only be made by a court competent to ascertain the values of all the properties transferred by the various railroads pursuant to the Final System Plan. It is impossible to believe that Congress went to such great pains to create this new tribunal and endow it with the special and unique function of allocating Conrail securities among the various railroads, and at the same time contemplated that the estates of the railroads should undergo still another, duplicate proceeding in the Court of Claims to supplement the inadequate consideration awarded by the Special Court.

As Appellants contend, there is no doubt that Congress thought that the consideration available under the terms of the Act would be sufficient to afford a "constitutional minimum." It is equally certain that Congress explicitly intended not to open the doors of the Treasury either by the terms of the Act or under any other statute should the compensation provisions of the Act be found unconstitutional. It simply does not follow that because Congress had hoped that the Act by its own terms would be constitutional, this Court can exercise legislative creativity to adopt a construction of the Act, which actually amounts to the antithesis of the Congressional intent, all to save the Act from its unconstitutionality.

B. The Legislative History is Consistent Only With the Exclusion of a Remedy in the Court of Claims.

The entire history of the Act is instinct with the Congressional intent not to afford the bankrupt estates or their creditors recourse to the federal treasury in the event the compensation provided under the Act proved constitutionally inadequate. Appellants have suggested (USRA Br. at 17, 58) that, in contesting the existence of a Tucker Act remedy upon such a reading of the legislative intent as above described, Appellees are imputing to Congress a willful constitutional violation. Appellees need not and do not attribute any such heinous intent to Congress. Appellees merely take the Congress at its word: if the procedures of the Act are inadequate on their own terms to provide constitutional compensation to the estate, then Congress wishes another opportunity to examine the entire question in order to determine the nature and amount of any federal investment that should be made in the revitalization of the region's railroads.[68]

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[68] Indeed, Appellees have some difficulty with the position adopted here by the Government, in face of so explicit a legislative understanding as we shall presently review. That position essentially involves the Executive Branch in an effort to elicit from the Judiciary a construction of the Act manifestly at odds with the intent and expectation of the Legislative Branch.

This intent is evident from a review of the Act as it went through the drafting process, from the various Committee reports dealing with it, from the floor debates, most particularly including the specific explanations of its managers in both Houses, and finally from the retrospective view afforded by oversight hearings and the *Amicus* Brief.

To begin with, Congress fashioned the Act in the model of a Section 77 reorganization for the purpose of avoiding judicial characterization of the Act's processes as a "taking." The reason for the use of a reorganization construct is apparent throughout the legislative history. Congress wanted to cure the Northeast rail crisis "at the lowest possible cost to the general taxpayer." Section 101(b)(6). In order to avoid Fifth Amendment claims for just compensation by the estates of the bankrupt railroads, the drafters imported language, such as the phrase "fair and equitable," from Section 77, and excised language from early drafts of the Act requiring "mandatory consolidations of all properties of bankrupt railroads."[69] For example, the substitute provision in House Bill 9142 articulates the first goal of the Final System Plan as follows:

> "Section 303(a). The final system plan shall be formulated in the light of the following goals—(1) the objective of creating, *through a process of reorganization,* a financially self-sustaining rail service system. . . ." (Emphasis supplied.)

Similarly, the final version of the Act which emerged from the Conference Committee contained fourteen separate references to the Act as a "reorganization." The language of Section 207 and the history underlying the drafting of it is all to the effect that Congress tried to create in Sec-

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[69] Section 303(a) of the Subcommittee Print—H.R. 9142, dated August 2, 1973 with Changes Proposed by Messrs. Shoup and Adams.

tion 207 a constitutionally adequate procedure comparable to the Section 77 judicial options.

Congress persistently refused throughout the legislative process to make the full faith and credit of the United States available to guarantee or underwrite Conrail securities or the deficiency judgment or otherwise to open the Treasury directly or indirectly. One striking example lies in the comparison of the report of the Senate Commerce Committee on S. 2767, the Senate version of the bill (S. Rep. No. 93-601, 93d Cong., 1st Sess., Dec. 6, 1973), and the final conference report on the bill as passed. In the former, the Senate Commerce Committee, in explaining Section 206(i), which provided that the Final System Plan might include terms and conditions for securities to be issued by what has become Conrail, stated that, "Some form of Federal guarantee of the value of the Corporation stock may be one such arrangement which the planners may consider." *Id.* at 28. The report went on to note that no such guarantee could become effective without affirmative joint resolution of Congress. Even as so limited, however, the Conference Committee ruled out such a possibility and the eventual bill was explicitly intended to exclude even the possibility of such a guarantee of Conrail stock. The conference report specifically states:

> "The conferees agreed that the arrangements recommended by the planners under Section 206(i) shall not include any form of Federal guarantee of the value of the Corporation stock."[70]

The conferees thus returned to a position which had been consistently expressed by prior committee reports. See, e.g., Explanation of Legislation Pertaining to the Midwest and Northeast Rail Crisis, Senate Commerce Comm., 93d Cong., 1st Sess. (Nov. 15, 1973) at 17 where it is observed

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[70] H. R. Rep. No. 93-744, 93d Cong., 1st Sess. 56 (Dec. 20, 1973).

that "The limitations on the amount of obligations Fannie Rae [now USRA] is allowed to issue *would determine what the maximum exposure of the Federal Government would be.*" (Emphasis added.)

That Congress passed the Act in this form and upon this understanding is made clearer still by study of the debates.

The debates in both the House and the Senate are replete with explanations of the scheme of the Act as providing non-governmental compensation to the estates of the bankrupt railroads thus saving the American taxpayers from paying billions in just compensation to the estates. Perhaps the most important of these exchanges occurred during the discussion on the conference report accompanying H.R. 9142 in a colloquy between two of the "Managers on the Part of the House" on December 20, 1973:

> "Mr. Kuykendall. Mr. Speaker, I would like to ask the gentleman from Washington one point, and that is the matter of the deficiency judgment. There was a lot of colloquy in the original debate which expressed fears that the Federal Court had the key to the Treasury.
>
> "Will the gentleman give us his interpretation of the guarantees we have to keep that from happening in the court proceedings?
>
> "Mr. Adams. Mr. Speaker, there is a definite limitation on the total amount that can be authorized under this bill. Any amounts that go beyond that, or the shifting of the way in which it is spent, is to be approved by an Act of Congress, to be signed by the President. . . . [I]t was the clear intent of the managers that any amount other than common stock [of Conrail] was to be at the lowest possible limit to meet the constitutional guarantees.
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> • • •

"Mr. Kuykendall. There is no way the Federal Court may assess the taxpayers or this Congress on the judgments of the creditors, is that correct?

"Mr. Adams. The gentleman is correct.

"Mr. Kuykendall. There is no way they can assess the Congress for the money?

"Mr. Adams. The gentleman is correct." [71]

The *Amicus* Brief (pp. 21, 1a-3a) filed by, among others, those who spoke the words, clearly believes the Court below correctly caught their meaning (JA 49-50). Also illustrative is a statement made by the co-drafter of the House Bill, H.R. 9142, Congressman Adams:

". . . we have done everything possible in the legislative history surrounding this bill to make certain that no more than the constitutional minimum for liquidation as defined by the Supreme Court will be paid by the new corporation for the properties obtained from the bankrupt estates. In addition, we have limited the amount of Government loan guarantees that can be used for acquisition so that taxpayers are protected both by legislative history guided by the determination of the Court and by an absolute limit on the amount of Government guaranteed loans that can be used.

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". . . There is a specific limitation in the final bill which says no more than $200 million of Government loan guarantees can be used for acquisition in any event, so if the court in 5 to 10 years should come in with a higher value, the only judgment would be against this new corporation [Conrail] that is there." [72]

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[71] 119 Cong. Rec. H11876 (daily ed. Dec. 20, 1973).

[72] 119 Cong. Rec. H9732, 9742 (daily ed. Nov. 8, 1973).

Congressman Metcalfe, a member of the Transportation and Aeronautics Subcommittee which reported the bill to the House Committee on Interstate and Foreign Commerce, speaking on behalf of the bill, stated that:

> ". . . I think that those who look upon this as a 'billion dollar bonanza' are using terms which are misleading to the American people. Title VI of the bill is concerned with financial arrangements and obligations of the association. Under this section the Federal Government will guarantee obligations of the association up to $1 billion. This will not be at any cost to the Federal Government. Under this title the Federal Government is guaranteeing loans, not granting subsidies."[73]

Moments later, Congressman Shoup, a co-author of H.R. 9142, observed that the Special Court would have to either enter a deficiency judgment against Conrail itself "or require that the assets be returned to the bankrupt railroad."[74]

On the same occasion, Congressman Conte, espousing the purported virtues of the Act, explained that it rationalizes the railroads "within the private sector. It calls for no great and continuing influx of Federal funds."[75]

Consistent with the remarks made in the House, when asked by Senator Beall to "describe the total amounts of money involved" in the process of the Rail Act, the manager of the Senate bill, Senator Hartke, listed only the authorization on the face of the Act for grants, debt guarantees and labor protection.[76] Indeed, Senator Hartke went on to express the view that a Court of Claims case might be created by *not* passing the Rail Act.[77]

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[73] 119 Cong. Rec. H9741 (daily ed. Nov. 8, 1973).

[74] 119 Cong. Rec. H9742 (daily ed. Nov. 8, 1973).

[75] 119 Cong. Rec. H9746 (daily ed. Nov. 8, 1973).

[76] 119 Cong. Rec. S23777-78 (daily ed. Dec. 21, 1973).

[77] 119 Cong. Rec. S23783-84 (daily ed. Dec. 21, 1973).

It is significant that nowhere is there a single comment either in the House or the Senate evidencing intent to appropriate additional funds should the Act's provisions prove to be insufficient.

After argument below, Oversight Hearings were held by the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce to inquire into the Tucker Act position argued below by USRA and the Government, and to make it clearer still that recourse to the Treasury via the Court of Claims was not intended by Congress. In these hearings, Congressman Dingell chastised Appellants for taking the legal position below that a Tucker Act remedy is available:

> ". . . I believe the actions of the Department of Transportation and the Department of Justice, as of this point, are in the gravest error and constitute a clear misconstruction of the intentions of the Congress with regard to the Northeast Rail legislation and constitute what may properly even be charged as a potential throwaway, or giveaway of millions or perhaps even billions of dollars of the taxpayers' money in the clearest defiance of the express intent of the Congress as set forth in the reports, the debate and in the clear language of the legislation, which we are presently scrutinizing in this gathering here today. (pp. 253-4)
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> "I wish to reiterate my outrage in the situation which I see going on before us. I wish to state that, it is, again, in my view, the clearest and most extraordinary defiance of the clearly expressed intention of the Congress with the portent of perhaps millions or perhaps even billions of dollars of taxpayers' money being dissipated to persons who have no proper and rightful claim on it, either under the Constitution or the law.

> "I think, for the Department of Justice, or the Department of Transportation to engage in the kind of brief that I have seen here before us today, essentially agreeing with the rape of the public Treasury, is a scandal of the greatest dimension, and I think it may necessarily fall upon this committee or one of our subcommittees to look into and to inquire into why this kind of extraordinary action has been taken in terms of a total and clear misconstruction of the attitude of the Congress and the intention of the Congress when we passed the legislation." (pp. 254-55)

Congressman Dingell continued, quoting from a memorandum prepared for the Committee by the Library of Congress:

> ". . . 'It should be noted that any claim which is granted by the court of claims must be paid by appropriated funds of the United States. The testimony sets the potential value of the rail properties of the Penn Central at as much as $12 billion to $14 billion.'
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> "That is the potential liability of the taxpayers here. That is, if this matter is not handled with great care by the Attorney General and the Executive Departments, 'the scrap or salvage value alone is estimated to be at least $2 billion. Such enormous potential expense would certainly have been brought to the attention of the Congress at the time of the passage of the Act, but the statement of the floor managers of the Act in the House and Senate contained no such mention.'
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> • • •
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> "But I want to make it plain that the floor managers, and, Mr. Adams, Mr. Kuykendall and Mr. Staggers over in the House and other Members, the language of the bill the Report clearly indicated there was no intention of imposing this kind of contingent liability upon the people with enactment of the Northeast legislation." (pp. 290-91).

Congressman Kuykendall, joining in the expression of dismay over the position advanced below on the Tucker Act, and, quoting his exchange with Congressman Adams during debate, emphasized his belief that the colloquy represented what the Committee promised the Congress of the United States as to the availability of further call on federal funds by virtue of the Act. And he reiterated that, if the compensation provisions of the Act were unconstitutional, "then, we will go back to the drawing board, if necessary." *Id.* at 252.

On the same occasion, Congressman Skubitz adopted and read into the record a portion of the Library of Congress memorandum which, after quoting the Conference Report passage quoted *supra* at 91, went on to say (*Id.* at 284-85):

> "It hardly appears reasonable that the Congressional managers of the Act would so explicitly exclude the possibility of a Federal guarantee of the value of Con-Rail stock if a similar guarantee were available through the back door by means of the Tucker Act.
>
> "It is a far more reasonable conclusion that the Congress intended to preclude all Federal guarantees regardless of their source. In short, the creditors may pursue the assets securing their liens insofar as possible. They cannot, however, assert them on the Federal Treasury."

In short, the House Committee from which the Rail Act originally emerged has gone to extraordinary lengths to repudiate any attribution to Congress of an intention to leave open any recourse to the Treasury under the Tucker Act.

C. In Light of the History and Language of the Rail Act, the Tucker Act "Remedy" Cannot Be Adequate.

Given this clear Congressional instruction, it is improvident to assume, as Appellants do, that Congress would appropriate funds to pay a Tucker Act claim when in the first instance Congress refused to authorize such funds after full consideration of the financial aspects of the rail crisis. The probable result of the operation of the Act, if allowed to proceed to fruition, is another crisis (and perhaps another Section 77 proceeding) caused by Conrail's inability to pay the deficiency judgment against it.[78] If such a crisis should come to pass, Congress, upon returning "to the drawing board," might choose a variety of remedies—an obvious one being withdrawal of consent to be sued in the Court of Claims and enactment of yet another legislative attempt to keep the rails running and again to "assure" creditors of that "constitutional minimum standard of fairness and equity." Section 303(c)(3). This round would, of course, find Appellees as unsecured judgment creditors and shareholders, years down the road, having suffered further erosion of the assets potentially available to satisfy claims.

One can only assume that Congress will not be any more willing to compensate Appellees for their losses should the Court of Claims enter a judgment than it was when it considered and rejected such compensation in enacting the Act. Appellants are asking this Court to reach a wholly speculative conclusion that Congress, rather than choosing other, less onerous remedies, would drain the Treasury to pay a judgment of hundreds of millions or billions of dollars which would have been entered in the first instance, by the terms of its own Act, against a private entity, Conrail.

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[78] Of course, the Tucker Act remedy is required only at the point that the Conrail judgment is returned unsatisfied, an event that itself presupposes the insolvency of Conrail.

Such a judgment is unprecedented in the history of the Court of Claims[79] and even if such a judgment be entered, Congress could refuse to appropriate the funds to meet such a judgment.[80] *Glidden Co.* v. *Zdanok,* 370 U.S. 530, relied on by Appellant USRA (USRA Br. at 60), does not indicate a contrary result. Examining whether the Court of Claims was an Article III court so that its judges could properly sit on the benches of other federal courts, this Court held that the functions of the Court of Claims were sufficiently judicial in nature to bring its jurisdiction within Article III. One aspect which the Court singled out in its opinion for special treatment was the Court of Claims' lack of enforcement power for claims in excess of $100,000. While the Court noted that Congress had refused to pay a Court of Claims judgment against the United States 15 times in 70 years, it nevertheless held that the judicial power of the Court of Claims was not so severely impaired as to place it outside the ambit of Article III. The holding of *Glidden* does not stand for the proposition that the Court of Claims may enforce its own judgments, or that Congress

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[79] A review of the annual reports of the Clerk of the Court of Claims indicates that the largest judgment ever rendered by that Court amounted to $31,761,207.57, exclusive of interest. This judgment was actually four judgments rendered in consolidated cases and rendered pursuant to joint motion and stipulation as to the amount. *Confederated Bands of Ute Indians* v. *United States,* 117 Ct. Cl. 433 (1950). Broken down, the judgments were $24,296,127; $6,037,567.72; $623,686.18; and $803,826.48. The actions were brought pursuant to a special statute, Act of June 28, 1938, 52 Stat. 1209, 75th Cong., 3d Sess., as amended, which gave the Court of Claims jurisdiction to render judgment against the United States arising out of, *inter alia,* the ceding of Indian lands to the United States pursuant to a federal statute passed in 1880. The Government's liability was established in 100 Ct. Cl. 413 (1943). A related decision as to valuation standards and other matters appears at 112 Ct. Cl. 123 (1948). The $31,761,207.57 was appropriated by Congress in the Supplemental Appropriation Act of September 27, 1950, 64 Stat. 1044, 1064, 81st Cong., 2d Sess.

[80] 31 U.S.C. §724a; 28 U.S.C. § 2518.

may not refuse to appropriate funds to pay a judgment of that court when it so chooses,[81] or that demonstrated Congressional resistance to any such appropriation may not be considered, in a proper case, on the issue of whether the Tucker Act remedy is sufficiently certain to be "adequate."[82]

Congress having explicitly made the Treasury immune to recourse under the Act, this Court should not assume that Congress would turn full circle to afford funds which it quite consciously refused to provide in the operation of the Act. The Court below found that the Act was designed as a self-contained mechanism for the complete effectuation of the Final System Plan without resort to the Court of Claims.

> "For this court to interpret the Act in a manner contrary to its explicit terms, contrary to the express representations of the bill's managers at the conference committee discussions, and to construe this Act in a manner which will expose the United States Treasury to presently incalculable, but, in any event, substantially formidable claims would be a flagrant violation of the separation of powers doctrine. If

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[81] Indeed, Article I, Section 9, Clause 7 of the Constitution plainly reserves to Congress the power to appropriate and requires such a step as a prerequisite to payment of federal funds. The unremitting Congressional hostility to the use of that power in this situation simply cannot be ignored in appraising the likelihood of Appellees' achieving monetary redress of their constitutional grievances.

[82] *Hurley* v. *Kincaid*, 285 U.S. 95, also relied on by Appellant USRA (Br. at 41, 45, 69), is also not controlling. There all parties conceded that, if flooding of plaintiff's property occurred, a condemnation pursuant to a valid statute would have taken place. Here no such recognition exists, either as to the validity of the Rail Act, or as to the legal characterization of its consequences as a taking. The multifold complexity in damage calculations noted in *Youngstown, supra*, also sets this case apart from *Hurley*'s very simple set of facts.

> we did this, the judiciary would truly have become the 'law-giver' for substantial federal appropriations; this in itself would raise serious constitutional problems.
>
> "To accept the government defendants' contention would require judicial legislation on a grand, if not arrogant, scale. Justice Holmes told us 'I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.' [*Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 221 (Holmes, J., dissenting)]. To read a Tucker Act remedy into the Act would be a movement of the mass and not simply the particles. We simply lack such power." (JA 52-53)

In this view, Appellees submit, the District Court was eminently correct.

Appellees contend, therefore, that the Tucker Act is clearly unavailable. But even *uncertainty* about the availability of the remedy defeats it as "an adequate remedy at law." *American Life Ins. Co.* v. *Stewart*, 300 U.S. 203, 214-15; *Davis* v. *Wakelee*, 156 U.S. 680, 688. See also *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 585; *Bohler* v. *Callaway*, 267 U.S. 479, 488; *Union Pac. R.R.* v. *Board of County Comm'rs*, 247 U.S. 282, 285-86.

It is illusory to expect the Tucker Act to afford final refuge for Appellees, either under the Act, or under any rationally foreseeable set of circumstances in which it might become necessary. Accordingly, there was no adequate remedy available to Appellees to redress the wrongs threatened by the Act that could have justified the Court below in withholding injunctive relief.

III.

Injunctive Relief Granted Below was Timely and Proper.

In addition to their substantive quarrels with the District Court decision below, Appellants challenge the injunction issued on the ground that it was premature and extravagant in its scope. It was neither.

Appellants' contention that the injunction was premature derives almost entirely from their perception of the merits of the case. Thus they argue that since no unconstitutional erosion is visited by the Act upon the estate of Penn Central, it is untimely to enjoin the provisions of the Act which command its continued operations (see, e.g., USRA Br. at 62-63). Such substantive contentions have already been addressed.

If the Court below was correct on the merits in perceiving imminent constitutional harm to Appellees, then no valid separate argument exists that the Court below should have postponed granting relief. The argument based on timeliness, then, rises or falls with the arguments on the merits and is not truly an independent objection to the Court's order.

The propriety of the order, both as to timeliness and scope, is further demonstrated by the fact that, pursuant to the terms of the Act, the Court below could not have postponed such relief, even if it had so desired. Once the provisions of the Act embrace the estate of a railroad in reorganization, a network of provisions in the Act effectively precludes any subsequent judicial intervention to halt or deflect its inexorable processes. Upon finding those processes involved a constitutional wrong to Appellees, there was no later point in the course of the Act at which the District Court could have afforded the relief it granted below.

Indeed, it is the design and effect of the Rail Act that the federal judiciary be excluded from any such role, and the Act in this respect is at least thorough.

The several decretal paragraphs of the injunction issued below all reflect sensitivity to the ouster of the federal courts from subsequent opportunities to grant similar relief and are thoroughly justifiable as to timeliness and reach, separately and together, in light of that pervasive exclusionary effect.

Section 304(f) of the Act, as we have already pointed out, specifically commands continued operations notwithstanding any decision of any federal court. That provision effectively prevents the Reorganization Court, or any other court, from fixing, at some later date, when the issue is thought to be more mature, a point of unconstitutional erosion requiring abandonment, cessation or reduction of services. The injunction below merely excises that prohibition; it enjoins the defendants from taking any action to enforce the provisions of Section 304(f) "with respect to any abandonment, cessation, or reduction of service which has been or may hereafter be determined by a court of competent jurisdiction to be necessary for the preservation of rights guaranteed by the United States Constitution." (JA 82)

The problem with the argument put, for example, by USRA (USRA Br. at 64-68) that the injunction adds nothnig to the existing power of reorganization courts to order such service reductions is that it disregards the explicit contrary language of the statute. The injunction below preserves that option to the reorganization courts where the Act would foreclose it. Since interim operations have been compulsory under the Act since January 2, 1974, and since there were pending before the Penn. Central Reorganization Court petitions and motions directed to the reduction or termination of service on constitutional grounds, it can hardly be said that the issue was premature. Nor on its

face is the writ sweeping; it is finely tuned to the wrong perceived by the Court to be imminent and to the apparent elimination of any other judicial relief.

Section 207(b) of the Act was not stricken down prematurely nor more broadly than necessary. That section prescribed a series of judicial steps required to be completed by July 2, 1974. Those procedures were the subject of constitutional attack on many grounds. The effect of the decision on the 180th day, if the terms of the Act were allowed to stand, would have been either the irretrievable commitment of the estate to reorganization under the Act or dismissal of the Section 77 proceedings. The Act furnished no possibility of postponing that determination or of creating any new option but those prescribed by its terms. And, plainly, the requirement that the pending reorganization proceeding be dismissed upon a 180-day finding adverse to the Act was an *in terrorem* provision designed to make it excruciatingly difficult for the Reorganization Court to decide against the Act.

Faced with this situation the three-judge Court, barely a week before the deadline, enjoined only so much of Section 207(b) as prescribed dismissal upon a finding adverse to the Act. It can hardly be said that the injunction was premature. And, again, the Court excised from the Act by its writ only so much as was necessary to eliminate the unconstitutional imposition upon the Reorganization Court of a rule of decision novel to bankruptcy law, coercive in its effect and unconstitutionally non-uniform.

Both the United States and USRA save their most severe criticism for the first decretal paragraph of the order, which enjoins USRA from certifying a Final System Plan to the Special Court pursuant to Section 209(c) of the Act. Both Appellants claim that they can perceive no injury which this provision sets right. They brand it as unnecessary and broadly suggest that it is vaguely irrational (U.S. Br. at 55-57; USRA Br. at 73-74).

This provision of the injunction, like all the others, was fashioned in the light of the pervasive Congressional intent to oust federal courts from the jurisdiction to monitor the ongoing procedures of the Act as they affect the interests of the estate and its claimants. It was necessary to enjoin the certification of the Final System Plan because that certification, under the provisions of the Act, triggers a set of other statutory provisions which make it impossible for any court to restrain or modify even the most glaringly unconstitutional imposition in the name of the Final System Plan.

For example, Section 209(a) specifies as follows:

> "Notwithstanding any other provision of law, the final system plan which is adopted by the Association and which becomes effective after review by the Congress is not subject to review by any court except in accordance with this section. After the final system plan becomes effective under section 208 of this title, it may be reviewed with respect to matters concerning the value of the rail properties to be conveyed under the plan and the value of the consideration to be received for such properties."

The proviso allowing valuation review to the Special Court in turn leads one to Section 303 of the Act. As we have already pointed out, the Special Court has no discretion to prevent the consummation of conveyances called for by the Final System Plan. So the proviso in Section 209(a) cannot operate, under the terms of Section 303, to permit the Special Court to enjoin an unconstitutional transfer pursuant to the certified Final System Plan.

And to close the circle, Section 303(b)(2) ends with the specific provision: "Such conveyances [called for by the certified Final System Plan] shall not be restrained or enjoined by any Court."

Thus, once the Final System Plan is certified, *no* federal court has equity power to enjoin its unconstitutional application to the estate of the Penn Central, under the terms of the Act as written. It is plain, moreover, that this is fully expressive of the Congressional intent. The prohibition against injunctions directed to the Final System Plan has been part and parcel of the Act since it first appeared in the House as H.R. 9142, and the same language as appears in the Act was contained in the Senate version of this bill, S. 2767. The intent of these sections, as drafted, and as passed, was to preclude litigation over the constitutional rights of claimants against the estate in advance of the conveyance of rail assets to Conrail. Writing with reference to the House version, the Committee on Interstate and Foreign Commerce, in reporting the bill out, made this explicit.

> "Section 502(f) provides that the conveyances of rail properties are to be free and clear of any liens and encumbrances, and that the conveyances are not to be deferred because of any controversy over valuation. This provision is of central importance to the expeditious implementation of this Act. It is the intent of the Committee that the rail properties designated in the Final System Plan be conveyed first, and that any and all litigation concerning the amount or type of payment or consideration take place thereafter. The timely implementation of the Final System Plan cannot be obstructed by controversy over the payment for the properties. The Committee is of the opinion that provisions of this title of the Act, and especially the provision for deficiency judgment and payment of obligations of the Association provided in the preceding subsection, are more than adequate to guarantee that the creditors of the bankrupt railroad will receive all that they may Constitutionally claim. In view of

these extraordinary protections, no litigation should be permitted to delay the Final System Plan."[83]

As has already been noted (*supra* at 76), a similar view was expressed in the report of the Senate Committee on Commerce accompanying S. 2767 to the floor, to the express effect that "the special court is not given any discretion in making the order requiring conveyance."[84]

Certification of the Final System Plan, therefore, would trigger a set of provisions, the effect of which would have been to exclude the Special Court, the Reorganization Court, and any other court from enjoining any unconstitutional features of the Final System Plan.

The District Court therefore enjoined certification. It was important that the Court take that step. In the first place, it obviates any future contention that the injunctive provision with regard to Section 304(f), insofar as that order makes room for future judicial determination that service reductions or terminations are constitutionally required, is itself subject to defeasance by certification of the Final System Plan. It was, in short, an appropriate writ to preserve the vitality and integrity of its other injunctive relief.

Furthermore, to the extent that the Court below (by a majority) held that it was premature to consider the constitutional challenges addressed to the ultimate conveyance provisions of the Act, enjoining the certification of the Final System Plan was indispensable to any future opportunity to examine them. If the certification had not been enjoined, the effect of the decision below would have

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[83] H.R. No. 93-620, 93d Cong., 1st Sess., at 54-55.

[84] S. Rep. No. 93-601, 93d Cong., 1st Sess., at 33. As the conference report on the Act as passed states, the conference bill followed the Senate amendment subject to technical and clarifying changes not affecting this point. H.R. Rep. No. 93-744, 93d Cong., 1st Sess., at 58.

been to put the ultimate conveyance beyond any constitutional challenge: until the point of certification, on the Court's analysis, it would be premature to consider such a challenge; but from and after the point of certification, the Act forbids any court to consider a constitutional challenge to the conveyances. The same event which would ripen the claim would defeat the subject matter jurisdiction of any court entitled to hear it. The injunction against certification, then, was necessary to prevent an absurd result.[85]

Far from being an extravagant abuse of equitable discretion, the relief granted below was fashioned to cope with an extraordinary set of statutory circumstances. Its terms were obviously developed with restraint, and it met only so much of the constitutional problems posed by the Act as threatened constitutional harm to the plaintiffs below and precluded subsequent equitable relief in any forum. The exercise of this astute discretion should not be disturbed by this Court.

IV.

The Order Entered Below may be Sustained on Other Grounds not Reached by the District Court.

The Court below was not, as Appellants would have it, excessively zealous; it was, if anything, cautious to a fault. It declined to rule on certain challenges posed below on the ground of prematurity, and it selected narrow grounds on which to sustain its declaration that the Act is unconstitu-

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[85] It is open to doubt that the provisions of the Act which deny to federal courts the power to enjoin the conveyances are themselves unconstitutional. See, e.g., *Lockerty* v. *Phillips*, 319 U.S. 182. The Court below, therefore, could not, with any assurance, prevent the constitutional conundrum from developing by the expedient of striking down the prohibitory language of Sections 209(a) and 303 (b)(2).

tional, rather than multiple, broader grounds which were argued to it.

While Appellees have not cross-appealed from the District Court's abstention from adjudicating certain of the matters before it, they do concur with the views expressed by the New Haven Trustee and by the Penn Central Trustees in their cross-appeal and appeal, respectively. More to the present point, however, Appellees here contend that the injunctive relief afforded them below was sustainable, not only upon the grounds assigned by the Court below, but upon other grounds not reached. This Court should not disturb the decision below since it can rest on wide and varied bases in addition to those already argued herein.

Specifically, Sections 207(b), 303 and 304(f), which were in certain particulars declared unconstitutional, and the unconstitutional effect of which was restrained by injunctive orders directed to Sections 207(b), 209 and 304(f), are unconstitutional and properly enjoined for the further reasons that: (a) they effect a taking of the property of Appellees without just compensation required by the Fifth Amendment; (b) they separately and cumulatively amend or supersede Section 77 of the Bankruptcy Act, and therefore constitute a law with respect to bankruptcies which is void because, by its very terms, it is not uniform throughout the United States; and (c) the provisions taken together deprive Appellees of their property without due process of law.

Appellees now turn briefly to these additional bases upon which the order of the Court below may be sustained.

A. The Act Takes Appellees' Property for Public Use Without Just Compensation.

The Act operates to take Appellees' properties by a series of steps, each of which has mandatory consequences leading inexorably to the eventual conveyance and extinction of their right to enforce their liens against the ap-

propriate rail properties. See Sections 207(b), 209, 303. To preserve the physical integrity of the railroad for ultimate conveyance, and to ensure service in the interim, abandonments in the planning period are forbidden. Section 304(f). The declaratory judgments and injunctions contained in the order below with respect to these provisions are amply and alternatively justified in that they authorize an uncompensated taking of Appellees' property.

The end result of this legislated process is that Appellees' properties are taken from them, and whatever be its Congressional characterization, its legally significant elements are indistinguishable from those of a condemnation:

First, Appellees' property and their rights to enforce and realize upon their liens secured by the rail properties to be transferred are taken from them.

Second, the transfer to Conrail and the concomitant taking of Appellees' properties are effected by legislative and executive fiat for a declared public purpose.

Third, Appellees have absolutely no choice with respect to the transfer of their property. Thus, at no time in the process is Appellees' consent to the taking, or for that matter the consent of the Trustees of Penn Central, solicited or required. More to the point, there is no moment in the statutory sequence of events at which either the Trustees, creditors or the stockholder of Penn Central could, by reasonably withholding their consent, prevent the prescribed conveyance.

In short, the Act prescribes a series of steps which follow automatically one upon the other, at the end of which title to Penn Central's designated rail properties will have been conveyed and Appellees' liens on such property will have been extinguished, without their consent, all for a public purpose. That is condemnation. *Armstrong* v. *United States,* 364 U.S. 40, 48-49; *Louisville Joint Stock Land Bank* v. *Radford,* 295 U.S. 555.

Congress apparently sought to avoid that legal consequence by vesting ostensible choices in the Reorganization Court under Section 207(b). But the "choices" are no choices at all and the attempt fails as a matter of law.

Analysis of Section 207(b) shows the illusory character of the options which supposedly devolve on the Reorganization Court. First, a distinction: there is a radical difference between a court's finding of fact, on the one hand, and a court's choice of what to do about the fact found, on the other. Findings emanate from the evidence, choices from discretion. A court enjoys no choice to find a true fact false or a false fact true: the result is compelled by the evidence, objectively examined.

What Section 207(b) assigns to the Reorganization Court is the duty to make findings, not the opportunity to make choices. From these findings flow mandatory consequences about which the Reorganization Court has no discretion, no option, no choice, at all.

Assuming without conceding that choice in the Reorganization Court could substitute for choice in the owner, it is apparent that no such choice is vested in that Court by the Act. The supposed "choices" are illusory and the compulsory taking is as naked as if it had been spelled out, candidly, in forthright terms.

Congress was well aware of the exact nature of the tasks it asked the Reorganization Court to perform. On several occasions during the legislative process, Claude S. Brinegar, the Secretary of Transportation, warned Congress that its proposed transfer provisions—in the forms which on such occasions the provisions had assumed—should be amended in order to preclude a court's later finding them to effect a condemnation (see JA 214). Notwithstanding these admonitions, Congress passed and the President signed the Act in almost precisely the form Mr. Brinegar criticized. "All other options available to the railroad" are indeed "foreclosed by the statute," and Mr.

Brinegar's conclusion is correct: "what you have is, in legal effect, a condemnation." (JA 215)

For this condemnation, no just compensation is provided by the Act. It has long been settled that the Fifth Amendment requires that compensation for a taking be paid in legal tender of the United States. *Almota Farmers Elev. & Whse. Co.* v. *United States*, 409 U.S. 470; *United States* v. *Reynolds*, 397 U.S. 14; *United States* v. *Miller*, 317 U.S. 369; *Olson* v. *United States*, 292 U.S. 246; *Vanhorne's Lessee* v. *Dorrance*, 2 U.S. (2 Dall.) 304. The Act's requirement that Conrail pay for Penn Central's rail properties with Conrail securities (including USRA obligations) and other undefined benefits clearly renders the Act unconstitutional on its face under the doctrine enunciated in the cited cases. Congress not only failed to provide for payment in cash, moreover, but provided for payment principally in the unseasoned equity of a new, untested corporation, the yet unidentified operating assets of which will be those very assets now held by bankrupt railroads which cannot operate them profitably. The Act thus requires the estates to accept compensation which is wholly speculative as to value, a provision utterly at odds with both the principle underlying the requirement that compensation be paid in cash and, of course, violative of the requirement itself.[86]

B. To the Extent the Act is a Bankruptcy Act, It is Void Because It is not Geographically Uniform.

Appellants and *Amici Curiae* attempt to avoid the constitutional thrust of the eminent domain objection by arguing, on the basis of authority developed in railroad

[86] Moreover, since the liens of Appellees are extinguished *in toto* to the extent they attach to conveyed assets, they are compensable, *in toto*, in cash under the Fifth Amendment. *Armstrong* v. *United States*, 364 U.S. 40. Appellants' position that a deficiency judgment in cash will cure the "shortfall" in value in Conrail securities does not meet the constitutional test.

reorganization cases under the Bankruptcy Act, that creditors' remedies may be postponed, and securities exchanged, without the provision of just compensation in money or its perfect equivalent. However wrong the application of those principles may be in the context of this case, it is clear that they derive from the bankruptcy clause of the Constitution, Art. I, Section 8, Clause 4.

The Act contains provisions: (a) forbidding reorganization courts to halt interim operations and the losses thereby sustained (e.g., § 304(f)); (b) substituting new rules of decision for pending reorganization proceedings (§ 207(b)); and (c) providing for the transfer, free and clear of liens, of the rail assets of the railroads in reorganization, with a determination that the exchange is "fair and equitable" made after, rather than before, the exchange is completed. All of these provisions amend or supersede provisions of Section 77. The intent and effect of all of these provisions is to alter the course of existing reorganization proceedings in the defined region so that a different result will ensue from that which could be arrived at under Section 77. To do this, the Act plainly affects the contractual rights of creditors with respect to the debtor's estate in ways not now contemplated by Section 77.

No case has been cited by Appellants to justify the proposition that creditors' remedies may be altered under the commerce power; it appears to be recognized that such alteration is the very essence of the bankruptcy power. Therefore, to the extent that Congress intended a reorganization, rather than a condemnation, it must have intended to derive its power from the bankruptcy clause. And that clause is unequivocal that, in the exercise of the bankruptcy power, Congress must avoid explicit geographical non-uniformity. *Hanover Nat'l Bank* v. *Moyses,* 186 U.S. 181. It cannot be subject to serious controversy that the Act has effect only in the region which it defines, in accordance with its express terms. Unlike the *Head Money*

Cases, 112 U.S. 580, where the uniformity requirement was found to have been satisfied by an act which, though uniform in terms, happened to fit only one area of the country, this Act is not uniform in terms. The coincidental fact that, if it were drafted with appropriate geographic uniformity, it might apply only to the same region cannot save it if anything substantial is to be left to the uniformity requirement of the bankruptcy clause.

To endow the Congress with the authority to make geographically non-uniform laws with respect to bankruptcies, accompanied by the authority to alter creditors' remedies in industries allegedly affected with a public interest, would be to lay the groundwork for discriminatory legislation of a kind which the bankruptcy clause obviously intended to prevent.

Since the sections of the Act which were the subject of the injunctions below are all to the effect described above, whether considered separately or together, the order below is separately justifiable on this ground as well.

C. The Processes of the Act Deprive Appellees and the Penn Central Estate of Due Process of Law.

The Reorganization Court has held that the Act does not provide a process fair and equitable to the Penn Central estate upon numerous grounds related to the likely impact of the Act upon the estate. No other determination could have been made—or can here be made—consistent with procedural due process.

A finding that the Rail Act can provide a fair and equitable process would of necessity rest either on sheer speculation about significant matters now unknown and unknowable or upon a judicial discard of Section 207(b) as a meaningful provision of the Act. The former result obtains if the Court were to suffer an impossible and unconstitutional burden of proof to be imposed upon Appellees by Section 207(b). The latter would result from acqui-

escence in Appellants' contention that the Court must defer to the estimate of success accorded the Act by its Congressional authors. Neither view comports with basic notions of due process.

In the first place, the Act contains no adequate standards which the Reorganization Court could apply in making any finding that the process would be fair and equitable; and secondly, whatever standards be presumed, it was literally impossible to make any factual record sufficient to sustain the burden as it is set out in the Act.

With respect to the absence of standards to be employed in rendering the 180-day finding, the language of Section 207(b), to the extent that it is understandable, suggests that the Reorganization Court was to apply the traditional "fair and equitable" standard of Section 77 to the sequence of procedural steps of the Act. But those concepts only have meaning as to specific transactions embodied in a specific proposed plan of reorganization and are used in Section 77 to describe attributes of a specific, identified proposal. The words are not used in Section 77 to describe a process, the future outcome of which is unknown and unknowable at the time the standard must be applied. They lose all content when used to measure the abstract process as outlined in the Act.

The parties in the 180-day hearings assumed that the determination called for by Section 207(b) was somehow to be a measure, by some undefined standard, of the likelihood of a fair and equitable process. Necessarily the measure of the fairness of the process must refer to the measure of the adequacy of the result and of the adequacy of the exchange provided for by the Act. See *New Haven Inclusion Cases*, 399 U.S. at 434.

Presumably, then, the burden placed upon Appellees would have been to demonstrate that the process is not, by some degree of probability, likely to afford a fair and equitable result to the Penn Central estate. However,

because of the time at which such evidence was required, the record upon which it could have rested was by necessity not existent. By the time of the 180-day hearing, neither the Final System Plan nor the preliminary system plan had been adopted; thus Appellees did not know (1) the identity of the Penn Central properties to be conveyed; (2) the value of the properties to be transferred; (3) the amount of Conrail's securities to be received in exchange for the properties; (4) the value of Conrail securities or any of the critical determinants of that value (such as assets, capital structure, traffic patterns, earnings prospects, fixed charges); (5) the existence, identity and value, if any, of the other putative "benefits"; or (6) the value and collectibility of any judgment which may be rendered against Conrail. Consequently, as stated by Judge Fullam in his concurrence below, there was no record available on which to render a determination that a process fair and equitable to the Penn Central estate would result. (JA 78-79)

Therefore, the only opportunity—the 180-day point—afforded to Appellees to avoid confiscation of their properties was itself fatally defective because Appellees were given no effective opportunity to be heard as to why their properties should be excluded from the Act's mandatory taking provisions. The Act offered no standards giving meaning to the 180-day finding and, to the extent Appellees or the Reorganization Court could have divined any standards, the resulting burden of proof forced upon Appellees was inherently impossible to satisfy. Appellees were thus required to engage in a syllogistic exercise in which the major premise was undefined and the minor premise was unknowable.

Differently put, a decision that the Act does provide a fair and equitable process would have been tantamount to a holding that Congress had in effect created an unconstitutional presumption. Pursuant to the terms of Section

207(b), and as noted by the Reorganization Court (JA 125), the failure to enter any findings results in Penn Central's subjection to the mandatory transfer provisions of the Act. Thus, if the Reorganization Court had found itself stymied, its failure to enter any findings would have been equivalent to a finding that the Act *does* provide a process which would be fair and equitable; a "no-finding" is *presumed* to be a finding that the process would be fair and equitable. Congress has thus created a presumption without rational connection between the ultimate result presumed (fairness and equitableness) and the basis therefor (an inability, based on factual ignorance, to enter the findings). By virtue of this provision, the less one knows about the outcome of the process, the more certainly it is presumed to be fair. That is an irrational presumption, and violative of due process. *Vlandis* v. *Kline*, 412 U.S. 441; *Leary* v. *United States*, 395 U.S. 6; *United States* v. *Romano*, 382 U.S. 136; *United States* v. *Gainey*, 380 U.S. 63; *Tot* v. *United States*, 319 U.S. 463. Of course, by making the presumption practically irrebuttable, the Act moves the irrational presumption to the border of conclusiveness.

Moreover, once committed to the terms of the Act, its processes are inexorable. As already argued, the Act shuts off all equitable recourse that Appellees might otherwise have had to protect themselves against the unconstitutional effect of the Act as applied to them. Simultaneously, the procedures of the Act most explicitly and inevitably would take the property of the estate and extinguish Appellees' liens, without any opportunity on their part to be heard or to obtain equitable relief against such mandatory conveyances. By denying Appellees the right to be heard and to obtain such relief, the Act in the most literal way deprives them of their property without due process of law.

The provisions of the Act enjoined below, if allowed to take effect in accordance with their terms, would have

had the consequences described above. While the Court below did not rest its declaratory judgment or its injunction upon the ground that the Act was violative of due process, its order can be sustained on that alternative ground.

CONCLUSION

The order of the District Court declaring Sections 303, 304(f) and 207(b) of the Regional Rail Reorganization Act of 1973 to be unconstitutional in the particulars therein specified and enjoining the operation, execution, or enforcement of Sections 209(c), 304(f) and 207(b) in the manner and to the extent therein specified, should be, in all respects, affirmed.

Respectfully submitted,

LOUIS A. CRACO
1 Chase Manhattan Plaza
New York, New York 10005

FREDERIC L. BALLARD
1035 Land Title Building
Philadelphia, Pa. 19110
Attorneys for Appellees

Of Counsel:

WALTER H. BROWN, JR.
THOMAS L. BRYAN
MICHAEL B. TARGOFF
CORNELIUS T. FINNEGAN, III
REBECCA T. HALBROOK

WILLKIE FARR & GALLAGHER
1 Chase Manhattan Plaza
New York, New York 10005

ALAN S. FELLHEIMER

BALLARD, SPAHR, ANDREWS
& INGERSOLL
1035 Land Title Building
Philadelphia, Pa. 19110

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Constitutional provisions and statutes involved	2
Statement	12
Summary of argument	13
Argument:	
I. Appellant's claim that the Rail Act will effect a taking of his property without just compensation is not ripe for adjudication	16
II. Neither the creditors of the debtor railroads nor the railroads themselves are constitutionally entitled to receive cash under the Rail Act	24
A. The Rail Act operates as a reorganization statute under which creditors have no constitutional right to payment of their claims in cash	26
1. The railroad enterprise which will survive the merger effected by the Rail Act will not be a federal instrumentality	29
2. A reorganization plan may be imposed on a bankrupt railroad without securing the consent of its owners and creditors	31
B. The debtor railroads would not be entitled to receive cash for their rail properties even under a condemnation statute	34

Arguments—Continued
III. The absence of any provision for a judicial determination of the fairness and equity of the consideration to be paid for the debtor railroads' rail properties does not render the Rail Act invalid ---------- Page 37
IV. The Rail Act is not invalid as a geographically nonuniform law on the subject of bankruptcies ---------- 40
Conclusion ---------- 41

CITATIONS

Cases:

Almota Farmers Elevator & Warehouse Co. v. *United States*, 409 U.S. 470 ---------- 35
Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288 ---------- 17
Bauman v. *Ross*, 167 U.S. 548 ---------- 35
Communist Party v. *Subversive Activities Control Board*, 367 U.S. 1 ---------- 17–18
Consolidated Rock Co. v. *DuBois*, 312 U.S. 510 ---------- 26
Continental Bank v. *Rock Island Ry*, 294 U.S. 648 ---------- 26, 29
Eccles v. *Peoples Bank*, 333 U.S. 426 ---------- 17
Ecker v. *Western Pacific R. Corp.*, 318 U.S. 448 ---------- 26, 28
Epperson v. *Arkansas*, 393 U.S. 97 ---------- 18
Golden v. *Zwickler*, 394 U.S. 103 ---------- 17
Group of Investors v. *Milwaukee R. Co.*, 318 U.S. 523 ---------- 26
In the Matter of Penn Central Transportation Co., E.D. Pa., Bky. No. 70–347, Order No. 1596, decided July 1, 1974 ---------- 19
Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U.S. 123 ---------- 17
Mitchell v. *W. T. Grant Co.*, No. 72–6160, decided May 13, 1974 ---------- 39
Monongahela Navigation Co. v. *United States*, 148 U.S. 312 ---------- 35, 36
New Haven Inclusion Cases 399 U.S. 392 ---------- 28
New York, New Haven & Hartford R. Co., In re, 16 F. Supp. 504 ---------- 33
Poe v. *Ullman*, 367 U.S. 497 ---------- 18
Reconstruction Finance Corporation v. *Denver & Rio Grande W. R. Co.*, 328 U.S. 495 ---------- 26, 33
Roe v. *Wade*, 410 U.S. 113 ---------- 17

Cases—Continued Page
Satterlee v. *Matthewson*, 2 Pet. 380 35
United Public Workers v. *Mitchell*, 330 U.S. 75 18
United States v. *Miller*, 317 U.S. 369 35
United States v. *1,000 Acres*, 162 F. Supp. 219 35
Vanhorne's Lessee v. *Dorrance*, 2 Dall. 304 35
Wright v. *Union Central Life Insurance Co.*, 311 U.S. 273 ..... 26, 32
Constitution and statutes:
United States Constitution:
Article I, section 8, cl. 3 2
Article I, section 8, cl. 4 2
Article III 17, 18
Fifth amendment 2
Bankruptcy Act, 47 Stat. 1474, as added and amended:
Section 77, 11 U.S.C. 205 ..... 27, 28, 32, 33, 38
Section 77(e), 11 U.S.C. 250(e) 33, 34, 37
Internal Revenue Code of 1954; Section 368(a)(1), 26 U.S.C. 368(a)(1) 31
Regional Rail Reorganization Act of 1973, Pub. L. 93-236, 87 Stat. 985, *et seq* 3
Section 101(b)(2) 28
Section 102(6) 28
Section 206 19
Section 206(c)(1) 21
Section 206(d) 22
Section 206(i) 22
Section 207(b) 3, 27, 40
Section 208 40
Section 208(a) 4
Section 209(a) 5
Section 209(b) 19, 22
Section 209(c) 23, 37
Section 210(b) 22, 29
Section 211(c) 29
Section 301(b) 29
Section 301(d) 29
Section 301(f) 30
Section 301(g) 30
Section 303 ..... 16, 24, 38
Section 303(a) 6, 23, 37, 40
Section 303(b) 37

Constitution and statutes—Continued

	Page
Section 303(b)(1)	7
Section 303(b)(2)	8, 23
Section 303(b)(3)	8
Section 303(b)(4)	9
Section 303(c)(1)	9, 21, 38
Section 303(c)(2)	10, 22, 38
Section 303(c)(3)	11
Section 303(c)(4)	11
Section 303(d)	12, 38
Section 304(a)	21
Section 304(b)	21
Section 304(c)(2)	22
Section 403(a)	22
Tucker Act, 28 U.S.C. 1491	12
28 U.S.C. 1651(a)	40

Miscellaneous:

A.L.I., *Restatement of the Law of Judgments* (1942)	23
5 Collier, *Bankruptcy* (14th ed.)	27, 34
120 Cong. Rec. S16619 (daily ed., September 16, 1974)	19

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-166

RICHARD JOYCE SMITH, TRUSTEE OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE FEDERAL APPELLEES[1]

OPINION BELOW

The opinion of the three-judge district court (J. App. 9–81)[2] is not yet reported.

JURISDICTION

The order of the three-judge district court (J. App. 82–83) was entered on June 25, 1974. The notice of appeal (J. App. 385) was filed on July 3, 1974, and

[1] This brief is submitted on behalf of all federal parties other than the United States Railway Association, a federally-established nonprofit corporation, which is represented by separate counsel.

[2] "J. App." refers to the Joint Appendix lodged in this Court.

the jurisdictional statement was filed on August 23, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.[3]

QUESTIONS PRESENTED

1. Whether appellant's claim that the Rail Act will effect a taking of his trust property without just compensation is ripe for adjudication.

2. Whether the creditors of the debtor railroads or the railroads themselves are constitutionally entitled to receive cash under the Rail Act.

3. Whether the absence of any provision for a prior judicial determination of the fairness and equity of the consideration to be paid for the debtor railroads' rail properties renders the Rail Act invalid.

4. Whether the Rail Act is invalid as a geographically nonuniform law on the subject of bankruptcies.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, § 8, cls. 3 and 4 of the Constitution in pertinent part provides:

> The Congress shall have Power * * *
>
> * * * * * *
>
> To regulate Commerce with foreign Nations, and among the several States * * *;
>
> To establish * * * uniform Laws on the subject of Bankruptcies throughout the United States; * * *.

The Fifth Amendment to the Constitution in pertinent part provides:

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[3] By stipulation of counsel for the parties, and in the interest of expeditious consideration of the merits of this case, we are lodging this brief in advance of the noting of probable jurisdiction, which we do not oppose.

> No person shall be * * * deprived of * * * property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sections 207, 208, 209, and 303 of the Regional Rail Reorganization Act of 1973, Pub. L. 93–236, 87 Stat. 985, 998–1000, 1005–1008, in pertinent part provide:[4]

> Section 207(b) Within 120 days after the date of enactment of this Act each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by continuing the present reorganization proceedings than by a reorganization under this Act. Within 60 days after the submission of the report by the Office, under section 205(d)(1) of this title, on the Secretary's report on rail services in the region, each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether or not such railroad shall be reorganized by means of transferring some of its rail properties to the Corporation pursuant to the provisions of this Act. Because of the strong public interest in the continuance of rail transportation in the region pursuant to a system plan devised under the provisions of this Act, each such court shall order that the reorganization be

[4] The Rail Act in its entirety is set forth at J. App. 393–431.

proceeded with pursuant to this Act unless it (1) has found that the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by such a reorganization than by a reorganization under this Act, or (2) finds that this Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization in which case it shall dismiss the reorganization proceeding. * * *

(c) Within 420 days after the date of enactment of this Act, the executive committee of the Association shall prepare and submit a final system plan for the approval of the Board of Directors of the Association. * * * The submission shall reflect evaluation of all responses and summaries of responses received, testimony at any public hearings, and the results of additional study and review. Within 30 days thereafter, the Board of Directors of the Association shall by a majority vote of all its members approve a final system plan * * *. * * *

Section 208(a) The Board of Directors of the Association shall deliver the final system plan adopted by the Association to both Houses of Congress and to the Committee on Interstate and Foreign Commerce of the House of Representatives and the Committee on Commerce of the Senate. The final system plan shall be deemed approved at the end of the first period of 60 calendar days of continuous session of Congress after such date of transmittal unless either the House of Representatives or the Senate passes a resolution during such

period stating that it does not favor the final system plan.

(b) If either the House or the Senate passes a resolution of disapproval under subsection (a) of this section, the Association, with the cooperation and assistance of the Secretary and the Office, shall prepare, determine, and adopt a revised final system plan. Each such revised plan shall be submitted to Congress for review pursuant to subsection (a) of this section. * * *

Section 209(a) Notwithstanding any other provision of law, the final system plan which is adopted by the Association and which becomes effective after review by the Congress is not subject to review by any court except in accordance with this section. After the final system plan becomes effective under section 208 of this title, it may be reviewed with respect to matters concerning the value of the rail properties to be conveyed under the plan and the value of the consideration to be received for such properties.

(b) Within 30 days after the date of enactment of this Act, the Association shall make application to the judicial panel on multi-district litigation authorized by section 1407 of title 28, United States Code, for the consolidation in a single, three-judge district court of the United States of all judicial proceedings with respect to the final system plan. Within 30 days after such application is received, the panel shall make the consolidation in a district court (cited herein as the "special court") which the panel determines to be convenient to the parties and the one most likely to be able to conduct any proceedings under this section

559-322—74——2

with the least delay and the greatest possible fairness and ability. * * *

(c) Within 90 days after its effective date, the Association shall deliver a certified copy of the final system plan to the special court and shall certify to the special court—

(1) which rail properties of the respective railroads in reorganization in the region and of any railroad leased, operated, or controlled by such railroads in reorganization are to be transferred to the Corporation, in accordance with the final system plan;

(2) which rail properties of the respective railroads in reorganization in the region or railroads leased, operated, or controlled by such railroads in reorganization are to be conveyed to profitable railroads, in accordance with the final system plan;

(3) the amount, terms, and value of the securities of the Corporation (including any obligations of the Association) to be exchanged for those rail properties to be transferred to the Corporation pursuant to the final system plan, and as indicated in paragraph (1) of this subsection; and

(4) that the transfer of rail properties in exchange for securities of the Corporation (including any obligations of the Association) and other benefits is fair and equitable and in the public interest.

* * *

Section 303(a) Within 10 days after delivery of a certified copy of a final system plan pursuant to section 209(c) of this Act—

(1) the Corporation, in exchange for the rail properties of the railroads in reorganization in the region and of railroads leased, operated, or controlled by railroads in reorganization in the region to be transferred to the Corporation, shall deposit with the special court all of the stock and other securities of the Corporation and obligations of the Association designated in the final system plan to be exchanged for such rail properties;

(2) each profitable railroad operating in the region purchasing rail properties from a railroad in reorganization in the region, or from a railroad leased, operated, or controlled by a railroad in reorganization in the region, as provided in the final system plan shall deposit with the special court the compensation to be paid for such rail properties.

(b)(1) The special court shall, within 10 days after deposit under subsection (a) of this section of the securities of the Corporation, obligations of the Association, and compensation from the profitable railroads operating in the region, order the trustee or trustees of each railroad in reorganization in the region to convey forthwith to the Corporation and the respective profitable railroads operating in the region, all right, title, and interest in the rail properties of such railroad in reorganization and shall itself order the conveyance of all right, title, and interest in the rail properties of any railroad leased, operated, or controlled by such railroad in reorganization that are to be conveyed to them under the final system plan

as certified to such court under section 209(d) of this Act.

(2) All rail properties conveyed to the Corporation and the respective profitable railroads operating in the region under this section shall be conveyed free and clear of any liens or encumbrances, but subject to such leases and agreements as shall have previously burdened such properties or bound the owner or operator thereof in pursuance of an arrangement with any State, or local or regional transportation authority under which financial support from such State, or local or regional transportation authority was being provided at the time of enactment of this Act for the continuance of rail passenger service or any lien or encumbrance of no greater than 5 years' duration which is necessary for contractual performance by any person of duties related to public health or sanitation. Such conveyances shall not be restrained or enjoined by any court.

(3) Notwithstanding anything to the contrary contained in this Act, if railroad rolling stock is included in the rail properties to be conveyed, such conveyance may only be effected if the profitable railroad operating in the region or the Corporation to whom the conveyance is made assumes all of the obligations under any conditional sale agreement, equipment trust agreement, or lease in respect to such rolling stock and such conveyance is made subject thereto; and the provisions of this Act shall not affect the title and interests of any lessor, equipment trust trustee, or conditional sale vendee or assignee under such conditional sale agreement, equipment trust agreement or lease

under section 77(j) of the Bankruptcy Act (11 U.S.C. 205(j)).

(4) Notwithstanding anything to the contrary contained in this Act, if a railroad in reorganization has leased rail properties from a lessor that is neither a railroad nor controlled by or affiliated with a railroad, and such lease has been approved by the lessee railroad's reorganization court prior to the date of enactment of this Act, conveyance of such lease may only be effected if the Corporation or the profitable railroad to whom the conveyance is made assumes all of the terms and conditions specified in the lease, including the obligation to pay the specified rent to the non-railroad lessor.

(c)(1) After the rail properties have been conveyed to the Corporation and profitable railroads operating in the region under subsection (b) of this section, the special court, giving due consideration to the findings contained in the final system plan, shall decide—

(A) whether the transfers or conveyances—

(i) of rail properties of each railroad in reorganization, or of each railroad leased, operated, or controlled by a railroad in reorganization, to the Corporation in exchange for the securities and the other benefits accruing to such railroad as a result of such exchange, as provided in the final system plan and this Act, and

(ii) of rail properties of each railroad in reorganization, or of each railroad leased, operated, or

controlled by a railroad in reorganization, to a profitable railroad operating in the region, in accordance with the final system plan,

are in the public interest and are fair and equitable to the estate of each railroad in reorganization in accordance with the standard of fairness and equity applicable to the approval of a plan of reorganization or a step in such a plan under section 77 of the Bankruptcy Act (11 U.S.C. 205), or fair and equitable to a railroad that is not itself in reorganization but which is leased, operated, or controlled by a railroad in reorganization; and

(B) whether the transfers or conveyances are more fair and equitable than is required as a constitutional minimum.

(2) If the special court finds that the terms of one or more exchanges for securities and other benefits are not fair and equitable to an estate of a railroad in reorganization, or to a railroad leased, operated, or controlled by a railroad in reorganization, which has transferred rail properties pursuant to the final system plan, it shall—

(A) enter a judgment reallocating the securities of the Corporation in a fair and equitable manner if it has not been fairly allocated among the railroads transferring rail properties to the Corporation; and

(B) if the lack of fairness and equity cannot be completely cured by a reallocation of the Corporation's securities, order the Corporation to provide for the trans-

fer to the railroad of other securities of the Corporation or obligations of the Association as designated in the final system plan in such nature and amount as would make the exchange or exchanges fair and equitable; and

(C) if the lack of fairness and equity cannot be completely cured by reallocation of the Corporation's securities or by providing for the transfer of other securities of the Corporation or obligations of the Association as designated in the final system plan, enter a judgment against the Corporation.

(3) If the special court finds that the terms of one or more conveyances of rail properties to a profitable railroad operating in the region in accordance with the final system plan are not fair and equitable, it shall enter a judgment against such profitable railroad. If the special court finds that the terms of one or more conveyances or exchanges for securities or other benefits are fairer and more equitable than is required as a constitutional minimum, then it shall order the return of any excess securities, obligations, or compensation to the Corporation or a profitable railroad so as not to exceed the constitutional minimum standard of fairness and equity.

(4) Upon making the findings referred to in this subsection, the special court shall order distribution of the securities, obligations, and compensation deposited with it under subsection (b) of this section to the trustee or trustees of each railroad in reorganization in the region who conveyed right, title, and interest in rail

properties to the Corporation and the respective profitable railroads under such subsection.

(d) A finding or determination entered pursuant to subsection (c) of this section may be appealed directly to the Supreme Court of the United States in the same manner that an injunction order may be appealed under section 1253 of title 28, United States Code: *Provided*, That such appeal is exclusive and shall be filed in the Supreme Court not more than 5 days after such finding or determination is entered by the special court. The Supreme Court shall dismiss any such appeal within 7 days after the entry of such an appeal if it determines that such an appeal would not be in the interest of an expeditious conclusion of the proceedings and shall grant the highest priority to the determination of any such appeals which it determines not to dismiss.

The Tucker Act, 28 U.S.C. 1491, provides in pertinent part:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. * * *

STATEMENT

The facts are set forth at pages 6–13 of the United States' brief as appellant in *United States of America,*

et al. v. *Connecticut General Insurance Corp., et al.*, No. 74–168.[5]

SUMMARY OF ARGUMENT

I

Appellant's claim that the Rail Act will effect a taking of his trust property without just compensation is not ripe for adjudication. The harm with which appellant claims he is threatened under the Rail Act is remote and speculative, and uncertainties attending the operation of the Act make it impossible to evaluate his claim of future injury. Mandatory conveyance of Penn Central's rail properties under the Rail Act rests upon three major contingencies—reversal of the reorganization court's order making the Penn Central's rail properties unavailable for inclusion in the final system plan, formulation of a final system plan including those properties, and congressional approval of such a plan. Furthermore, there is at present no factual basis for evaluating appellant's contention. The following critical facts are not yet knowable: (1) the rail properties to be transferred under the final system plan; (2) the value of those properties; (3) the value of the consideration to be received in return; (4) whether the claims of secured creditors will be paid in full; (5) the form of the consideration to be paid to secured creditors.

[5] The government's appeal in No. 74–168 is from a judgment of the United States District Court for the Eastern District of Pennsylvania in three consolidated civil actions (Nos. 74–189, 74–1107 and 74–1149). Appellant Smith was the plaintiff in No. 74–1107 in the district court and is before this Court as an appellee in No. 74–168.

Appellant will have a later and better opportunity to litigate his claim that the Rail Act effects an uncompensated taking of his trust property. That issue may be litigated under the Tucker Act in the Court of Claims after completion of the proceedings under the Rail Act. But if this Court determines to the contrary that the Tucker Act remedy will not be available, appellant would in any event be able to raise his claims in the special court following congressional approval of the plan.

II

Neither the creditors of the debtor railroads nor the railroads themselves are constitutionally entitled to receive cash under the Rail Act. The Act provides for the integrated reorganization of an entire regional railroad system through an effective merger of bankrupt railroads into the Consolidated Rail Corporation; as such it operates as a reorganization statute under which creditors have no constitutional right to payment of their claims in cash.

Although the federal government may temporarily participate in the management of the Corporation, that participation will not transform the Corporation into a governmental enterprise. Thus the transfer of rail properties to the Corporation clearly effects only a merger, not a taking by a federal instrumentality.

Nor does the mandatory nature of the merger take the Rail Act out of the constitutional ambit of reorganization legislation. It is well established that a plan of reorganization providing for a continuation of rail services may be imposed upon a bankrupt railroad

without securing the consent of its owners and creditors.

But even if the Rail Act operates as a condemnation statute, as appellant contends, the Corporation is not constitutionally required to pay cash in exchange for the debtor railroads' rail properties. Money is not the only constitutionally permissible form of compensation for Fifth Amendment takings. Under the Rail Act the debtor railroads simply contribute rail properties to the Corporation in exchange for indirect ownership of and claims against those same properties, and that continued interest in the rail properties themselves is the full and perfect equivalent for the property taken.

III

After the completion of the proceedings under the Rail Act, the estates of the debtor railroads will be entitled to recover any constitutional deficiency under the Tucker Act in the Court of Claims. Due process therefore does not require a preconveyance judicial determination of the fairness and equity of the consideration to be paid for the rail properties. If such a determination is required, however, it may be secured from the special court.

IV

The Rail Act is not invalid as a geographically nonuniform law on the subject of bankruptcies. The Act applies uniformly to all reorganizations of operating railroads, and the fact that those reorganizations happen to be located in the northeastern section of

the nation does not violate the requirement of geographical uniformity. Moreover, that requirement bars only geographical discrimination against creditors, and the Rail Act contains no such discrimination. The Act may in any event be sustained as a proper exercise of commerce power.

ARGUMENT

I

APPELLANT'S CLAIM THAT THE RAIL ACT WILL EFFECT A TAKING OF HIS TRUST PROPERTY WITHOUT JUST COMPENSATION IS NOT RIPE FOR ADJUDICATION

Appellant is the trustee of the estate of the New York, New Haven and Hartford Railroad Company, which is a secured creditor of the Penn Central Transportation Company.[6] His principal argument in this litigation is that any transfer of the Penn Central's rail properties in exchange for stock and securities of the Consolidated Rail Corporation, obligations of the United States Railway Association, and other property pursuant to Section 303 of the Regional Rail Reorganization Act of 1973, Pub. L. 93–236, 87 Stat. 1005–1008, will effect a taking of his trust property for public use without just compensation. Appellant bases this argument upon two separate contentions: that the value of the consideration received by the Penn Central estate will as a factual matter prove to

[6] The New Haven estate holds secured mortgage bonds in the amount of $34,025,800 and also possesses an equitable lien which appellant asserts (Br. 24, n. 21) is equivalent to a secured claim.

be constitutionally insufficient in amount (Br. 61–83); and that payment of the consideration in stock and securities violates the New Haven estate's alleged constitutional right to have their claims satisfied in cash (Br. 52–60, 84–87). The district court concluded that these contentions were not ripe for adjudication, and we agree.

The doctrine of "ripeness" is principally a flexible rule of judicial discretion and convenience. It is of course true that litigants occasionally raise issues that are so premature and speculative that they present no actual case or controversy within the Article III jurisdiction of the federal courts. See, *e.g., Roe* v. *Wade,* 410 U.S. 113, 127–129. But more commonly prematurity is a merely discretionary nonconstitutional ground for avoiding "passing on questions of public law * * * that are not immediately pressing." *Eccles* v. *Peoples Bank,* 333 U.S. 426, 432. Ripeness is relied upon as a decisional ground perhaps most frequently in constitutional litigation, for "[t]he Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'" *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 346 (concurring opinion of Justice Brandeis). See also, *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 154–155 (concurring opinion of Justice Frankfurter). Thus this Court has often dismissed suits raising constitutional claims that could equally well be asserted at a later point without undue prejudice to the particular plaintiffs. See, *e.g., Golden* v. *Zwickler,* 394 U.S. 103; *Communist Party* v. *Sub-*

versive Activities Control Board, 367 U.S. 1; *United Public Workers* v. *Mitchell,* 330 U.S. 75.

Appellant's claim of an uncompensated taking does not appear to present even that minimal concreteness required of a case or controversy under Article III.[7] But certainly appellant has failed to meet the standard of greater concreteness required for the exercise of discretionary federal declaratory judgment jurisdiction. See, *e.g., Poe* v. *Ullman,* 367 U.S. 497. As we now show, it is presently both inappropriate and unnecessary to consider appellant's claim of an uncompensated taking in view of (1) the manifold uncertainties that still attend the future operation of the Rail Act with respect to the Penn Central and its secured creditors and (2) the availability of later and better opportunities for review of the questions appellant raises here.

1. Appellant's suit on behalf of the New Haven estate proceeds from a concern that a forced conveyance of the Penn Central's rail properties will result in injury to the Penn Central's creditors. But several contingencies and uncertainties render that concern purely speculative and make it impossible to give meaningful consideration to appellant's claims. Appellant is unable to show either that the Penn Cen-

[7] Certainly appellant's claim is presented in a more abstract manner than that of the plaintiff in *Epperson* v. *Arkansas,* 393 U.S. 97, upon which he relies. The plaintiff in *Epperson* was a schoolteacher compelled by her school district to teach the principles of biological evolution, in violation of the state statute which she challenged (393 U.S. at 100). In contrast, as we discuss further below (pp. 19–20, *infra*), it is not now known whether the conveyance provisions of the Rail Act will ever be applicable to the Penn Central.

tral's rail properties will be transferred pursuant to the Rail Act or that the terms of any such transfer would be unfair.

It has not yet been judicially determined that those rail properties will be available for inclusion in the final system plan. To the contrary, the reorganization court has determined, in the language of Section 207 (b) of the Rail Act, that the Penn Central shall not "be reorganized by means of transferring some of its rail properties to the Corporation pursuant to the provisions of this Act." *In the Matter of Penn Central Transportation Co.*, E.D. Pa., Bky. No. 70–347, Order No. 1596, decided July 1, 1974. The government disagrees with that determination and has taken an appeal to the special three-judge court established under Section 209(b) of the Act. But it was obviously appropriate for the district court below to refuse to consider appellant's constitutional challenge while he was successfully litigating elsewhere to remove the Penn Central in its entirety from the operation of the Act.

Moreover, even if the special court on review holds that the Penn Central's rail properties will be available for inclusion in the final system plan, it will not be known whether those rail properties will be subject to mandatory conveyance until such a plan is formulated pursuant to Section 206 of this Act.[8] The parties have stipulated only that inclusion of some Penn Central rail properties in the final system plan is "likely". J. App. 318–319.

[8] A bill (S. 4003) has been introduced to extend by 120 days the deadline for submitting the final system plan to Congress. See 120 Cong. Rec. S16619 (daily ed., September 16, 1974).

Furthermore, once the final system plan is formulated it must be submitted for review by Congress pursuant to Section 208 of the Act, and under the terms of that provision either house may by majority vote reject the plan so submitted and require the formulation of a new plan.[9] Thus mandatory conveyance of Penn Central's rail properties under the Rail Act rests upon three major contingencies—reversal of the reorganization court's order making the rail properties unavailable for inclusion in the final system plan, formulation of a plan including those properties, and congressional approval of that plan.

But even assuming that some of Penn Central's rail properties are transferred to the Corporation under an effective final system plan, there is no factual basis for evaluating appellant's contention that such a transfer would result in an uncompensated taking of his trust property. Indeed, there is at present no basis for assuming even that the Penn Central estate itself, let alone its secured creditors, would be injured by such a transfer. The parties have stipulated (J. App. 319):

> It will not be possible to ascertain until completion of the planning and approval process required by the Act
>
> (i) which rail properties of Penn Central will be designated for transfer or conveyance * * *;

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[9] Whether such a one-house veto is constitutional is not wholly free of doubt. See our supplemental brief in *Train* v. *City of New York*, No. 73–1377, and *Train* v. *Campaign Clean Water, Inc.*, No. 73–1378.

> (ii) the liquidation value of properties designated in the final system plan for transfer * * *; * * * or
>
> (iv) the value of the consideration which will be exchanged for properties designated in the final system plan for transfer * * *.

Moreover, appellant makes his claim only on behalf of a secured creditor of the Penn Central estate. See note 6, supra. A constitutional inadequacy in the consideration paid to Penn Central might not affect creditors at all. As we indicated in our opening brief in No. 74–168 (pp. 30–31, 70–72), it appears that the Penn Central estate will be sufficient to cover all valid claims of creditors. Certainly there is no basis for assuming that priority claimants, such as the New Haven estate, will receive less than full satisfaction.

Until at least some of these uncertainties are resolved, no court will be able to pass intelligently on appellant's claim that the Rail Act will effect an uncompensated taking of his property. Nor is there any reason to consider at this time appellant's contention that secured creditors of the Penn Central estate are entitled to payment of their claims in cash. Although Penn Central will not receive cash in exchange for the rail properties it transfers to the Corporation, secured creditors of the Penn Central may receive cash or its equivalent. Cash in substantial amounts may be available, because the Rail Act contemplates that some of the debtor railroads' rail properties may be sold to profitable railroads or state and local governments, or may be abandoned and sold for scrap. See Sections 206(c)(1)(B), 303(c)(1)(A)(ii), 304(a), (b), and

(c)(2)(C), and 403(a). Consideration for the rail properties to be transferred to the Corporation will be payable in part in federally guaranteed debt instruments of the Association (see Sections 206(d), 210(b), and 303(c)(2)(B)) and possibly also of the Corporation (see Section 206(i)). Accordingly, it is possible that priority claimants would be awarded payment in cash and readily salable debt instruments essentially equivalent to cash.

In short, the harm with which appellant claims he is threatened under the Rail Act is remote and speculative, and the uncertainties attending the operation of that Act make it impossible to evaluate his claim of future injury. Appellant does not seriously dispute this. Instead, he rests his plea for immediate judicial attention on the contention that "a later opportunity for judicial intervention to prevent an unconstitutional taking will never effectively exist" (Br. 25). We now turn to a discussion of that contention.

2. Appellant will have a later and better opportunity to litigate his claim that the Rail Act effects an uncompensated taking of his trust property. That issue, as we have already shown in our opening brief in No. 74–168 (pp. 39–48), may be litigated in the Court of Claims after completion of the proceedings under the Rail Act. But if this Court determines to the contrary that the Tucker Act remedy will not be available, appellant would be able to raise his constitutional claims in the special court established under Section 209(b) of the Act following congressional approval of the plan.

Appellant contends that such relief is barred by Section 303(b)(2) of the Rail Act, which provides that the conveyance of rail properties pursuant to the final system plan "shall not be restrained or enjoined by any court."[10] But as the court below evidently recognized (J. App. 53, 82), that provision does not by its terms bar an injunction against the certification of a final system plan pursuant to Section 209(c) of the Act. Nor would it appear to bar an injunction prohibiting the corporation from depositing its securities with the special court pursuant to Section 303(a). Thus the special court, if necessary, would have adequate power to protect prospectively against an uncompensated taking.

Many of the uncertainties that make it infeasible to review appellant's constitutional contentions in the instant litigation will be resolved by the time the Association submits the final system plan to Congress for its review. Since it will at that time be known which of Penn Central's rail properties will be transferred to the Corporation and for what consideration, it may then be possible, as it is not now, to make a reasonably accurate determination of whether an uncompensated taking will occur and, if so, whether

[10] Appellant also suggests (Br. 26) that a future decision by the special court on the question whether the process under the Rail Act satisfies the statutory standard of fairness and equity may be *res judicata* on the constitutional question he seeks to raise here. But it is clear that although the judgment of the special court may collaterally estop the parties from relitigating factual issues, it would not bar the future litigation of different legal issues. See A.L.I., *Restatement of the Law of Judgments*, §§ 68, 70 (1942).

the New Haven estate will on that account receive less than the face value of its claims.

3. If this Court concludes that the Tucker Act will not afford an adequate remedy for uncompensated takings under the Rail Act, and also determines that the question of the quantitative sufficiency of the consideration to be paid to the Penn Central estate is ripe for adjudication, the Court should remand to the district court for the taking of evidence. That question cannot be decided on the present record, which is, for the reasons discussed above (pp. 20–22, *supra*), necessarily silent as to many pertinent facts.[11]

On the other hand, appellant's contention that Penn Central's secured creditors are constitutionally entitled to receive payment of their claims in cash rather than securities and other property poses a purely legal question which, if ripe, this Court would be able to decide without requiring the district court to take any further evidence. We therefore now turn to a discussion of the merits of that contention.

II

NEITHER THE CREDITORS OF THE DEBTOR RAILROADS NOR THE RAILROADS THEMSELVES ARE CONSTITUTIONALLY ENTITLED TO RECEIVE CASH UNDER THE RAIL ACT

Appellant contends (Br. 52–60, 84–87) that Section 303 of the Rail Act, which provides for payment of

[11] Appellant's related argument that the Penn Central will be entitled to the "highest and best use" value of its rail properties (Br. 77–83) is purely abstract and does not furnish a reason for invalidating the Rail Act. Decision on that question should therefore also be reserved at least until the rail properties to be transferred under the Rail Act have been identified.

stock, securities, and other property in exchange for the rail properties of the debtor railroads, violates the constitutional right of the New Haven estate, as a creditor of one of the debtor railroads, to receive payment of its claim in cash. The short answer to that contention is that the form of the payment made to a debtor railroad does not interfere with any alleged right of its creditors to receive payment of their claims in cash; if the creditors are, as appellant contends, entitled to payment in cash, the reorganization courts can sell the stock, securities, and other property received by the debtor railroads and distribute the cash proceeds. Appellant should address his claim for cash to the reorganization court after the proceedings under the Rail Act have terminated; that claim is not a basis for enjoining enforcement of the Act.

Appellant in fact is attempting to assert on behalf of the debtor railroads an alleged right to receive cash in exchange for their rail properties—a right which the estates of those railroads do not here claim. For the reason stated in the preceding paragraph, we believe appellant lacks standing to advance that claim. But we now show both that the Rail Act operates as a reorganization statute under which creditors are not constitutionally entitled to payment of their claims in cash and that the debtor railroads would not be entitled to receive cash for their rail properties even under a condemnation statute.

A. THE RAIL ACT OPERATES AS A REORGANIZATION STATUTE UNDER WHICH CREDITORS HAVE NO CONSTITUTIONAL RIGHT TO PAYMENT OF THEIR CLAIMS IN CASH

It has long been understood that the secured creditors of a railroad in reorganization are not entitled to payment of their claims in cash. See *Continental Bank* v. *Rock Island Ry.*, 294 U.S. 648 (prohibiting secured creditors of the debtor from foreclosing on their collateral). Cf. *Wright* v. *Union Central Life Insurance Co.*, 311 U.S. 273. Indeed, far from being entitled to payment in cash, secured creditors of a debtor railroad may be required to accept junior securities or even common stock of the newly reorganized railroad. See, *e.g.*, *Reconstruction Finance Corporation* v. *Denver & Rio Grande W. R. Co.*, 328 U.S. 495 (affirming a plan requiring junior creditors of the debtor to accept common stock); *Group of Investors* v. *Milwaukee R. Co.*, 318 U.S. 523 (affirming a plan requiring senior creditors of the debtor to accept junior securities or securities paying a lower interest rate); *Ecker* v. *Western Pacific R. Corp.*, 318 U.S. 448 (affirming a plan requiring senior creditors of the debtor to accept preferred and common stock); *Consolidated Rock Co.* v. *DuBois*, 312 U.S. 510 (affirming a plan requiring senior creditors of the debtor to accept junior securities).

Appellant does not contend otherwise. He argues instead that the Rail Act has converted the Penn Central reorganization proceeding into a condemnation

and liquidation proceeding, to which, he claims, different constitutional principles apply.[12] We disagree.

The Rail Act was enacted as a railroad reorganization statute intended to complement the operation of Section 77 of the Bankruptcy Act, 11 U.S.C. 205. That congressional intent is made manifest by the language of Section 207(b), which provides that "each United States district court or other court having jurisdiction over a railroad in reorganization * * * shall order that the reorganization be proceeded with pursuant to this Act unless it * * * has found that the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act * * * and that the public interest would be better served by such a reorganization than by a reorganization under this Act * * *."

In a successful Section 77 reorganization, the reorganization plan generally calls for the creation of a new capital structure in which the value of the new securities is determined primarily on the basis of the railroad's projected future earnings. See 5 Collier, *Bankruptcy*, ¶77.18 (14th ed.). The new securities

[12] Appellant's argument is that the rail properties in their entirety are being condemned. We concede, of course, that any "shortfall"—*i.e.*, any difference between the constitutional minimum value of those properties and the value of the consideration received in return—could amount to a taking that would be compensable in the Court of Claims. See pp. 39–48 of our opening brief in No. 74–168. Appellant, however, demands cash payment of the entire constitutional minimum value of the rail properties, not merely of the shortfall. It is that demand we oppose here.

are distributed to the claimants against the debtor railroad on the basis of their seniority. See generally *Ecker* v. *Western Pacific R. Corp., supra.*

The method of reorganization prescribed by the Rail Act is essentially the same. But whereas Section 77 of the Bankruptcy Act basically provides a mechanism only for the separate reorganization of individual railroads, the Rail Act provides a means for an integrated reorganization of an entire regional railroad system. See Section 101(b)(2) of the Act. This system-wide reorganization is to be accomplished by an effective merger of bankrupt railroads into the Consolidated Rail Corporation pursuant to a "plan of reorganization for the restructure, rehabilitation, and modernization of railroads in reorganization." Section 102(6) of the Act. The estates of the debtor railroads will receive stock and securities in the Corporation in exchange for some or all of their rail properties; the stock and securities received from the Corporation and the other assets remaining in the estates, or the proceeds from their sale, will then be distributed among the claimants against the estates on the same seniority basis, according to the same standard of fairness and equity, as under Section 77.

It is of course clear that a railroad reorganization is not converted into a condemnation proceeding merely by virtue of the fact that it is accomplished through the merger of two or more railroads. Indeed, such mergers, although difficult to achieve, are at least theoretically possible under Section 77. See, *e.g., New Haven Inclusion Cases,* 399 U.S. 392. But appellant complains (Br. 69–76) that the merger to be effected under the Rail Act will in fact constitute

a condemnation of the rail properties of the bankrupt railroads, because (1) the federal government will share, at least temporarily, in the management of the railroad enterprise which will survive the merger, and (2) a bankrupt railroad's participation in the merger will not be conditioned upon the consent of its owners and creditors. Those features of the Rail Act do not affect its basic character as a reorganization statute. To the contrary, as we now show, they merely illustrate the "capacity of the bankruptcy clause to meet new conditions." *Continental Bank* v. *Rock Island Ry., supra,* 294 U.S. at 671.

1. The railroad enterprise which will survive the merger effected by the Rail Act will not be a federal instrumentality

The Consolidated Rail Corporation, to which the rail properties of the bankrupt railroads will be transferred pursuant to the final system plan, will be "a for-profit corporation established under the laws of a State and shall not be an agency or instrumentality of the Federal Government." Section 301(b) of the Rail Act. The common stock of the Corporation will be held privately. However, a large share of the Corporation's funding will be provided by the federal government in the form of loans from the United States Railway Association in an amount of up to one billion dollars. See Sections 210(b) and 211(c). In effect, the Association, and through it the United States, will be a major participant in the merger. In order to protect the federal government's substantial creditor interest in the Corporation, Section 301(d) of the Rail Act provides that as long as

at least 50 percent of the outstanding indebtedness of the Corporation consists of federal obligations, the Corporation's fifteen-member board of directors shall include the Secretary of Transportation, the Chairman of the Interstate Commerce Commission, the President of the Association, and five additional members to be appointed by the President with the advice and consent of Congress.[13]

Appellant concludes from this provision that "[t]he common stock of Conrail has been stripped of all the normal attributes of ownership of stock in a private enterprise" (Br. 72). Apparently implicit in this conclusion is the suggestion that the provision for federal participation in the management of the Corporation transforms the Corporation into a federal instrumentality that "takes" appellant's trust property by eminent domain. But that provision clearly has no such effect. Federal representation on the board of directors is merely a reasonable interim measure to protect the government's substantial interest as an investor. Full voting control of the Corporation will shift to the shareholders when federal obligations fall below 50 percent of the Corporation's indebtedness. Indeed, the shareholders will exercise such control from the outset of the Corporation's operations if the federal government is not at that point the majority creditor. In any event, since the

[13] The Rail Act also provides for federal audits of the Corporation and requires that the Corporation engage only in transportation-related activities so long as a majority of its indebtedness consists of federal obligations. Sections 301(f) and 302. The Corporation is also required to make annual reports to Congress. Section 301(g).

purpose of federal representation on the board of directors is merely to protect the government's financial interests, the obligation of the federally appointed directors will be no different from that of the directors chosen by the shareholders—to ensure that the corporation operates at a profit. Accordingly, notwithstanding any temporary federal participation in its management, the Corporation will be a private, not a governmental, enterprise.

It will be, moreover, a private enterprise owned by the previous owners of the rail properties transferred to it. Thus that transfer involves no "taking," by eminent domain or otherwise; the exchange of rail properties for stock and securities in the Corporation and other property effects merely a change in the form of ownership, just like any other merger or corporate reorganization. Cf. Section 368(a)(1) of the Internal Revenue Code of 1954, 26 U.S.C. 368(a)(1).

2. A reorganization plan may be imposed on a bankrupt railroad without securing the consent of its owners and creditors

Appellant contends (Br. 69–71, 84–87) that the claimants against a failing railroad have a constitutional right to terminate its rail services and liquidate its assets, and accordingly that any plan providing for a continuation of some or all of those services against the wishes of the owners and creditors, through a merger or otherwise, is a plan of condemnation rather than of reorganization. We have already shown, in our opening brief in No. 74–168 (pp. 16–37), that

the owners and creditors of a railroad may constitutionally be compelled to bear the burden of continuing its operations in the public interest for as long as there are reasonable prospects for reorganization on an income basis, and that the Rail Act holds out such prospects for the railroads in reorganization. Thus railroad investors do not possess the unqualified right of termination and liquidation that appellant asserts here.[14] And, as we now discuss, it is well established that a plan of reorganization providing for a continuation of rail services may be imposed upon a bankrupt railroad without securing the consent of its owners and creditors.

Section 77 of the Bankruptcy Act requires the reorganization court to submit the plan of reorganization to each class of claimants for approval. The Rail Act, by contrast, does not give investors an opportunity to vote on the conveyance of rail properties to the Corporation.[15] The basic reason for this difference is obvious: the economic viability of a system-wide reorganization depends upon centralization of the planning function; it would be virtually impossible to create a workable regional rail system if the investors of each debtor railroad were entitled to determine which rail properties it would transfer to the Corporation and which it would sell or retain. Moreover,

[14] Nor do other investors. Creditors have no constitutional right to foreclosure and sale; they are entitled only to the "value of the property." *Wright* v. *Union Central Life Insurance Co.*, *supra*, 311 U.S. at 278.

[15] Section 77 will, however, afford the investors an opportunity to vote on the final distribution of the assets of the estate after the merger. The Rail Act merely adds to and does not replace the basic reorganization scheme under Section 77.

such investor determinations could not in any event be made intelligently; the investors could not evaluate the stock and securities to be received in exchange without knowing the final asset structure of the Corporation, but that structure would itself depend upon the outcome of the votes. There were thus valid reasons for not providing investors with an opportunity to vote on the merger. But the denial of a vote does not entail so great a departure from prior reorganization practice as appellant suggests. Under Section 77, the reorganization plan, if approved by two-thirds of each class, may be imposed on the dissenting minority. More significantly, however, Section 77(e) authorizes the court to confirm the plan despite the disapproval of any class of claimants, if the court finds the plan to be fair and equitable. This "cramdown" provision, which allows the court to substitute its judgment for that of the investors, has been expressly upheld as constitutional by this Court. *Reconstruction Finance Corporation* v. *Denver & Rio Grande W. R. Co., supra,* 328 U.S. at 533. Thus it is clear that a railroad's investors have no constitutional right, either as individuals or as a class, to reject a fair and equitable plan of reorganization. Such a reorganization plan may be imposed on them without their consent.

This rule antedates Section 77. In equity receivership it was an accepted practice for the court to impose a reorganization plan upon objecting creditors. Section 77(e) served "merely to confer upon the District Court in its bankruptcy part a power theretofore existing in its equity part." *In re New York, N.H. & H. R. Co.,* 16 F. Supp. 504, 512 (D. Conn.). Thus Section 77(e)'s "cramdown" provision simply carries out

a long standing "public policy that the operation of railroads as sound, economic units should be achieved for the benefit of the public, regardless of the interests of creditors and stockholders." 5 Collier, *Bankruptcy*, ¶ 77.02 (14th ed.).

It is therefore clear that the mandatory nature of the merger to be effected under the Rail Act does not take that Act out of the constitutional ambit of reorganization legislation. The fact that the "cramdown" provision of Section 77(e) operates only after the investors have had an opportunity to express their views by balloting, whereas the Rail Act affords no such opportunity, is of course constitutionally insignificant. The degree of compulsion is the same whether the plan of reorganization is imposed over the objections of the investors, as under Section 77(e), or merely without seeking their approval, as under the Rail Act. That degree of compulsion, as *Denver & Rio Grande* demonstrates, does not transform a reorganization proceeding into a taking by eminent domain. Accordingly, reorganization, not condemnation, principles apply to the transfers under the Rail Act.

B. THE DEBTOR RAILROADS WOULD NOT BE ENTITLED TO RECEIVE CASH FOR THEIR RAIL PROPERTIES EVEN UNDER A CONDEMNATION STATUTE

As we have just shown, the Rail Act operates as a reorganization statute under which the creditors of the debtor railroads are not constitutionally entitled to payment of their claims in cash. But even if, as appellant contends, the mandatory conveyance provi-

sions of the Rail Act operate as a condemnation statute, and thereby cause a taking of the debtor railroads' rail properties by eminent domain, the corporation is not constitutionally required to pay cash in exchange for those rail properties.

Money is not the only constitutionally permissible form of compensation for Fifth Amendment takings. Congress may in the exercise of its eminent domain power require an exchange of property for nonmonetary compensation. For example, as this Court held in *Bauman* v. *Ross,* 167 U.S. 548, the federal government may take land in exchange, at least in part, for the benefits which the government's use of that land confers on the landowner's adjacent property (167 U.S. at 584):

> The Constitution of the United States contains no express prohibition against considering benefits in estimating the just compensation to be paid for private property taken for the public use; and * * * no such prohibition can be implied * * *.

See also *United States* v. *1,000 Acres,* 162 F. Supp. 219 (E.D. La.).

This Court's observations in other cases that a property owner is entitled to the "full monetary equivalent of the amount taken" (*Almota Farmers Elevator & Warehouse Co.* v. *United States,* 409 U.S. 470, 473; see also *United States* v. *Miller,* 317 U.S. 369, 373, and *Monongahela Navigation Co.* v. *United States,* 148 U.S. 312, 326) do not signify that the

compensation must be paid in cash.[16] Those cases concerned only the amount of compensation required to be paid, not the form in which the property owners were entitled to receive it. The phrase "monetary equivalent" in that context was merely a shorthand method of expressing the principle that a condemnee is entitled to property equivalent in value to that which was taken. That principle is fully consistent with the *Bauman* rule that the compensation may be paid, wholly or in part, in nonmonetary form.

As this Court recognized in *Bauman,* application of the just compensation clause is simply a matter of assessing, on a case by case basis, the respective values of the property taken and the compensation offered; there is no constitutional requirement that the compensation be converted into cash in all cases. Moreover, a requirement that compensation be paid in cash would be particularly inappropriate in the circumstances of this case. Under the Rail Act the debtor railroads simply contribute rail properties to the Corporation in return for indirect ownership of and claims against those same rail properties; each debtor railroad gives up an undivided interest in a part in exchange for a divided interest in the whole. This continued, although indirect, interest in the rail properties themselves is the "full and perfect equivalent of the property taken." *Monongahela Navigation Co.* v. *United States, supra,* 148 U.S. at 326.

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[16] Appellant also relies upon *Vanhorne's Lessee* v. *Dorrance,* 2 Dall. 304. The decision in that case, however, was based upon state law. See *Satterlee* v. *Matthewson,* 2 Pet. 380, 414.

III

THE ABSENCE OF ANY PROVISION FOR A PRIOR JUDICIAL DETERMINATION OF THE FAIRNESS AND EQUITY OF THE CONSIDERATION TO BE PAID FOR THE DEBTOR RAILROADS' RAIL PROPERTIES DOES NOT RENDER THE RAIL ACT INVALID

Appellant contends (Br. 93–98) that even if the mandatory conveyance provision of the Rail Act is otherwise valid, it nevertheless denies the investors procedural due process because, unlike Section 77(e) of the Bankruptcy Act, it omits any provision for a prior judicial determination of the fairness and equity of the consideration to be paid for the debtor railroads' rail properties. That omission does not render the Rail Act invalid.

1. The Rail Act provides an expedited process for implementation of the final system plan. The plan is to be certified to the special court within 90 days after its approval by Congress; the Corporation is to deposit its stock and securities in the special court within 10 days thereafter; following which the special court is to order conveyance of the debtor railroads' rail properties within an additional ten days. Sections 209(c) and 303(a) and (b). After the conveyance of the rail properties, the special court is to determine whether the consideration payable for the rail properties under the final system plan is "fair and equitable to the estate of each railroad in reorganization in accordance with the standard of fairness and equity ap-

plicable to the approval of a plan of reorganization or a step in such a plan under section 77 of the Bankruptcy Act * * *." Section 303(c)(1)(A). If the special court determines that the terms of one or more exchanges is not fair and equitable, it may under Section 303(c)(2) reallocate the securities among the debtor railroads, order the transfer of additional securities and obligations, and, if necessary, enter a judgment against the Corporation. The determination of the special court would be reviewable by this Court. Section 303(d).

Appellant is concerned that the inevitably protracted evaluation proceedings under Section 303 may not, in the end, result in the payment of constitutionally sufficient consideration to the estates of the debtor railroads, and that those estates would then be without a remedy.[17] He therefore claims the right to a preconveyance judicial determination of the fairness and equity of the consideration to be paid for the rail properties.

Appellant errs in his basic premise. The estates of the debtor railroads will not be without a remedy in the event the consideration payable under the Rail Act proves to be constitutionally insufficient. To the contrary, they will be entitled to recover any constitutional deficiency in an action under the Tucker Act in the Court of Claims (see pp. 39–48 of our opening brief in No. 74–168).

A preconveyance judicial determination of fairness and equity is therefore not necessary for the protec-

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[17] Appellant assumes, as do we, that reconveyance of all the rail properties would not be feasible.

tion of the estates' substantial rights. Due process, accordingly, does not require such a determination: "[d]ue process of law guarantees 'no particular form of procedure; it protects substantial rights.'" *Mitchell* v. *W. T. Grant Co.*, No. 72–6160, decided May 13, 1974 (slip op. 10). Thus due process requires, at most, that prior to the conveyance the debtor railroads' estates be granted judicial assurance that they will ultimately receive no less than the constitutional minimum value of their rail properties. This Court, by upholding the availability of the Tucker Act remedy, will provide that assurance and thereby afford appellant the only preconveyance judicial determination that due process requires.

2. We concede that in the absence of a Tucker Act remedy the bankrupt estates would as a group be constitutionally entitled to a preconveyance judicial determination of the fairness and equity of the total amount of consideration payable under the final system plan. We have shown above (pp. 22–23, *supra*), however, that those estates will, if necessary, be able to secure such a determination from the special court. There is therefore no basis for declaring the Rail Act "facially defective" (Appellant's Br. 98) on due process grounds.[18]

[18] Preconveyance litigation over the fairness and equity of the proposed consideration would, however, appear to require incidental invalidation of the provisions of the Rail Act that set forth an expedited schedule for implementation of the final system plan. Such litigation could be expected to be time-consuming and the court might be required, in order to preserve its jurisdiction

IV

THE RAIL ACT IS NOT INVALID AS A GEOGRAPHICALLY NONUNIFORM LAW ON THE SUBJECT OF BANKRUPTCIES

Appellant contends (Br. 99–107) that the Rail Act is void for want of geographical uniformity. The district court below rejected that contention except with respect to the provision of Section 207(b) that requires the dismissal of certain reorganization proceedings. In our opening brief in No. 74–168 (pp. 49–54), we showed that neither Section 207(b) nor any other provision of the Rail Act is invalid under the uniformity requirement of the bankruptcy clause. We merely summarize the relevant points of that argument here: (1) the Rail Act applies uniformly to all reorganizations of operating railroads and the fact that those reorganizations happen to be located in the northeastern section of the nation does not violate the requirement of geographical uniformity; (2) the uniformity requirement bars only geographical discrimination against creditors, and the Rail Act contains no such discrimination; (3) the Rail Act may in any event be sustained as a proper exercise of commerce power.

(see 28 U.S.C. 1651(a)), to enjoin the Association from certifying the final system plan, or the Corporation from depositing its stock and securities, within the 90-day and 10-day periods respectively prescribed by Sections 209(c) and 303(a).

CONCLUSION

The judgment of the district court should be affirmed insofar as it denied appellant's request for declaratory and injunctive relief.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
CARLA A. HILLS,
Assistant Attorney General.
KEITH A. JONES,
Assistant to the Solicitor General.
JAMES F. DAUSCH,
Attorney.

RODNEY E. EYSTER,
General Counsel,
JEROME E. SHARFMAN,
Attorney,
Department of Transportation.

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In the
Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-165; 74-166; 74-167; 74-168

REGIONAL RAIL REORGANIZATION CASES

UNITED STATES OF AMERICA, *et al.*, Appellants

v.

CONNECTICUT GENERAL INS. CORP., *et al.*, Appellees
(No. 74-168)

UNITED STATES RAILWAY ASSOCIATION, Appellant

v.

CONNECTICUT GENERAL INS. CORP., *et al.*, Appellees
(No. 74-167)

ROBERT W. BLANCHETTE, *et al.*, Trustees of
Penn Central Transportation Company, Debtor, Appellants

v.

CONNECTICUT GENERAL INS. CORP., *et al.*, Appellees
(No. 74-165)

RICHARD JOYCE SMITH, Trustee, Cross-Appellant

v.

UNITED STATES OF AMERICA, *et al.*, Cross-Appellees
(No. 74-166)

ON APPEALS AND CROSS-APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OBJECTION OF NEW HAVEN TRUSTEE AND PENN CENTRAL COMPANY TO MOTION OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Each of the undersigned is a party in one or more

of the four related cases set forth above,[1] and in such capacity, each objects to the motion of the National Industrial Traffic League for leave to file a brief *amicus curiae.* The Court is urged to deny the motion for the following reasons:

1. Notwithstanding its public interest assertions, the National Industrial Traffic League's interest must be deemed, in the context of these cases, to be essentially private. Since the League did not seek intervention in the court below where its position could have been met on a party-to-party basis, it should not be allowed now to further its private interest in these cases without having the responsibilities of a party.

2. Even if, *arguendo,* the League's interest were deemed to be more public than private, the public interest is already protected in these cases by the parties. In addition, the undersigned have not opposed the motion of certain Members of Congress to file a brief as *amici curiae.*

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[1]Richard Joyce Smith, as Trustee of The New York, New Haven and Hartford Railroad Company, Debtor, is the cross-appellant in No. 74-166 and an appellee in Nos. 74-165, 74-167 and 74-168; Penn Central Company is an appellee in Nos. 74-165, 74-167 and 74-168.

CONCLUSION

The motion of National Industrial Traffic League to file a brief *amicus curiae* should be denied.

October 1, 1974

Respectfully submitted,

JOSEPH AUERBACH
225 Franklin Street
Boston, Massachusetts
02110

JAMES WM. MOORE
54 Meadow Street
New Haven, Connecticut
06506

Attorneys for
Richard Joyce Smith, Trustee

DAVID BERGER
1622 Locust Street
Philadelphia, Pennsylvania
19103

Attorney for Penn Central Company

TABLE OF CONTENTS

Page

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE COURT SHOULD NOW DECIDE WHETHER A COURT OF CLAIMS REMEDY IS AVAILABLE TO THE PENN CENTRAL ESTATE 5

II. APPELLEES' ARGUMENTS AGAINST A COURT OF CLAIMS REMEDY ARE UNFOUNDED 13

III. THE COURT BELOW CORRECTLY HELD ONE CLAUSE OF SECTION 207(b) UNCONSTITUTIONAL 26

APPENDIX: EROSION, VALUATION AND CLAIMS A-1

I. THE RECORD DEMONSTRATES THAT SUBSTANTIAL EROSION HAS OCCURRED AND WILL CONTINUE TO OCCUR A-1

A. The Erosion Which Has Occurred A-3

1. Postbankruptcy Claims Have Grown to $745 Million A-3

2. The Value of the Rail Assets Has Decreased A-6

B. Future Erosion A-17

II. THE RECORD DOES NOT SHOW THAT THE VALUE OF THE ESTATES IS ADEQUATE TO PAY ALL CLAIMS A-22

III. CONTINUED EROSION OF THE ESTATES IS NOT A BETTER ALTERNATIVE TO OTHER SOLUTIONS A-24

TABLE OF CITATIONS

Page

Cases:

Amalgamated Meat Cutters and Butcher Workmen v. Connally, 337 F. Supp. 737 (D.D.C. 1971) 14

Angilly v. United States, 199 F.2d 642 (2d Cir. 1952) 15

Aris Gloves, Inc., v. United States, 420 F.2d 1386 (Ct. Cl. 1970) 16

Armstrong v. United States, 364 U.S. 40 (1960) 16, 17

Bartley v. Finch, 311 F. Supp. 876 (E.D. Ky. 1970), *aff'd*, 404 U.S. 980 (1971) 14

Case v. Los Angeles Lumber Co., 308 U.S. 106 (1939) 12

Cherokee Nation v. Southern Kansas Ry., 135 U.S. 641 (1890) 8

Clark v. Uebersee Finanz-Korporation, 332 U.S. 480 (1947) 19

Continental Bank v. Rock Island Ry., 294 U.S. 648 (1935) 27

Corcoran v. Royal Development Co., 121 F.2d 957 (2d Cir.), *cert. denied*, 314 U.S. 691 (1941) 14

Cotton Land Co. v. United States, 75 F. Supp. 232 (Ct. Cl. 1948) 18

Dugan v. Rank, 372 U.S. 609 (1936) 23, 24

Eastport S.S. Corp. v. United States, 372 F.2d 1002 (Ct. Cl. 1967) 17

Edgar v. United States.
145 Ct. Cl. 9 (1959) 16

Eyherabide v. United States.
345 F.2d 565 (Ct. Cl. 1965) 11

Feres v. United States.
340 U.S. 135 (1950) 24, 25

Fort Berthold Reservation v. United States.
390 F.2d 686 (Ct. Cl. 1968) 20

Goltra v. Weeks.
271 U.S. 536 (1926) 23

Hanover National Bank v. Moyses.
186 U.S. 181 (1902) 26

Hooe v. United States.
218 U.S. 322 (1910) 22

Hurley v. Kincaid.
285 U.S. 95 (1932) 15, 17, 18, 22

In re New York, N.H. & H. R.R.,
278 F. Supp. 592 (D. Conn. 1967),
aff'd, 405 F.2d 50 (2d Cir. 1968) A-12

In re Penn Central Transportation Co.,
494 F.2d 270 (1974) 9

In re Penn Central Transportation Co.,
355 F. Supp. 1343 (E.D. Pa. 1973) 9

In re Port Authority Trans-Hudson Corp.,
20 N.Y.2d 24, *cert. denied sub nom. Port Authority Trans-Hudson v. Hudson Rapid Tubes Corp.*,
390 U.S. 1002 (1968) A-8

Jacobs v. United States.
290 U.S. 13 (1933) 16

Johnson v. United States Shipping Board Emergency Fleet Corp., 280 U.S. 320 (1930) 24

Joslin Mfg. Co. v. City of Providence.
262 U.S. 668 (1923) 8

Land v. Dollar.
330 U.S. 731 (1947) 21, 22, 23

Larson v. Domestic & Foreign Commerce Corp..
337 U.S. 682 (1949) 15, 22, 23

Malone v. Bowdin.
369 U.S. 643 (1962) 23, 24

Marbury v. Madison.
5 U.S. (1 Cranch) 137 (1803) 14

Mitchell v. United States.
267 U.S. 341 (1925) 21

Myers v. United States.
323 F.2d 580 (9th Cir. 1963) 15

Nehf v. United States.
278 F. Supp. 444 (N.D. Ill. 1967) 15

New Haven Inclusion Cases.
399 U.S. 392 (1970) 27

Ogden River Water Users' Assn. v. Weber Basin Water Conservancy. 238 F.2d 936 (10th Cir. 1956) 15

Ove Gustavsson Contracting Co. v. Floete.
278 F.2d 912 (2d Cir.), *cert. denied.*
364 U.S. 894 (1960) 15

Parrish v. Seamens.
343 F. Supp. 1087 (D.S.C. 1972),
aff'd. 485 F.2d 571 (4th Cir. 1973) 15

Philadelphia Co. v. Stimson.
223 U.S. 605 (1912) 22

Portsmouth Harbor Land & Hotel Co. v. United States.
260 U.S. 327 (1922) 17-18

Putnam Mills Corp. v. United States.
432 F.2d 553 (2d Cir. 1970) 15

Richard v. United States.
282 F.2d 901 (Ct. Cl. 1960) 18

Silesian-American Corp. v. Clark.
332 U.S. 469 (1967) 18, 19

Silesian-American Corp. v. Markham.
156 F.2d 793 (2d Cir. 1946) 19

Sioux Tribe of Indians v. United States.
315 F.2d 378 (Ct. Cl. 1963) 18

Smithers v. United States.
150 Ct. Cl. 649 (1960) 16

Spevak v. Strauss.
257 F.2d 208 (D.C. Cir. 1958), *remanded on other grounds.* 359 U.S. 115 (1959) 15

State Road Dept. v. United States.
166 F.2d 843 (5th Cir. 1948) 15

Stringer v. United States.
471 F.2d 381 (5th Cir.), *cert. denied.* 412 U.S. 943 (1973) 8, 15

United States v. Causby.
328 U.S. 256 (1946) 16

United States v. Dickinson.
331 U.S. 745 (1947) 16

United States v. Lee.
106 U.S. 196 (1882) 20, 21, 22

United States Shipping Board Emergency Fleet Corp. v. Rosenberg Brothers & Co..
276 U.S. 202 (1928) 24

Yearsley v. W.A. Ross Construction Co..
309 U.S. 18 (1940) 15, 17, 18, 19, 20

Youngstown Sheet & Tube Co. v. Sawyer.
343 U.S. 579 (1952) 24

Yuhasz v. United States.
109 F.2d 467 (7th Cir. 1940) 15

Constitution and Statutes:

Act of January 21, 1927, 44 Stat. 1010, 1013 20

Bankruptcy Act, Section 77 . . . . . 5, 26, 27, A-5

Constitution, Article I, Section 8,
Clause 4 26

Constitution, Fifth Amendment 5, 16, 17, 18, 19, 20, 21, 22

Federal Tort Claims Act 25

Indian Claims Commission Act, 28 U.S.C. § 2501 20

Regional Rail Reorganization Act of 1973, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10,
Pub. L. 93-236, 87 Stat. 985 . . . 11, 12, 13, 14, 15, 16, 24, 26, A-8, A-26

Sec. 207(b) 4, 6, 26, 27
211 (e) (3) 7
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215 . . . . . A-18, A-19
303 (c) 8
303 (c) (2) (C) 7
304 (f) 10, 11

Suits in Admiralty Act 24, 25

Trading with the Enemy Act, § 9(a) 19

Tucker Act, 28 U.S.C. § 1491 . . . . . 2, 4, 5, 6, 10, 11, 13, 15, 17
18, 19, 20, 21, 23, 24, 25, 26, 27

28 U.S.C. §§ 2282 and 2284 14

Legislative Materials:

H.R. 9142, Sec. 502(d) 10

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Miscellaneous:

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47 Harv. L. Rev. 18 (1933) 27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-165, 74-166, 74-167 and 74-168

ROBERT W. BLANCHETTE, RICHARD C. BOND AND JOHN H. McARTHUR, AS TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR, *Appellants*,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, *ET AL.*, *Appellees*.

RICHARD JOYCE SMITH, AS TRUSTEE OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILWAY COMPANY, DEBTOR, *Appellant*,

v.

UNITED STATES OF AMERICA, *ET AL.*, *Appellees*.

UNITED STATES RAILWAY ASSOCIATION, *Appellant*,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, *ET AL.*, *Appellees*.

UNITED STATES OF AMERICA, *ET AL.*, *Appellants*,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, *ET AL.*, *Appellees*.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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REPLY BRIEF FOR APPELLANTS ROBERT W. BLANCHETTE, RICHARD C. BOND and JOHN H. McARTHUR, TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR

The Penn Central Trustees believe that this Court should conclude that the Regional Rail Reorganization Act of 1973 (the "Act") is, with one minor exception, a valid exercise of the powers of Congress. However, the Trustees are not in full agreement with the Government appellants — the

United States and the United States Railway Association ("USRA") — on several of the issues raised by these appeals; thus a reply to the Government briefs, as well as to the briefs of the creditor appellees, is necessary.

The Trustees also wish to underscore the urgent need for a resolution of the issues before this Court. Because of the legal uncertainties attending the Act, the public interest in adequate and continued essential rail services is being seriously imperiled.

From the public's standpoint, the status quo is intolerable. Thousands of miles of track are operated under slow orders and thousands of pieces of equipment are out of service, all for want of repair. Unless substantial maintenance and rehabilitation programs are launched, the situation will continue to deteriorate and whatever prospect now exists for an economically viable Northeast rail system will be put hopelessly out of reach.

Until this Court rules, these needs must go essentially unsatisfied. So long as the Act is under constitutional doubt, the $150 million provided by Congress for improvement programs will, as a practical matter, be unavailable to maximum and timely advantage. Similarly, the Trustees are unable to assess what allocation they can make of their own cash resources in aid of improved rail service. For example, the court below and the Special Court have found that continued loss operations are, or will be, constitutionally impermissible without a Tucker Act remedy. But these courts disagree on the availability of that relief. At present, the Trustees are confronted with a cash flow inadequate to pay all claims of administration, such as taxes, and to maintain the system above a bare-bones level. Thus far, taxes have been deferred. If the Tucker Act affords the estate the prospect of compensation for interim

erosion, maintenance programs can be set at the highest levels which cash flow permits. But if compensation cannot be assured, prudence would require that payment of all administration claims be resumed. The consequence — a lowering of the level of maintenance — is inevitable even though, from all points of view, unacceptable.

Without the guidance of this Court, day-to-day decisions with critical import for the future can only be made on a basis unsatisfactory to all interests.

SUMMARY OF ARGUMENT

I.

A decision by this Court on the availability of a Court of Claims remedy, both for any deficiency in the ultimate compensation the Penn Central estate will receive and for any erosion beyond constitutional limits, is in no sense premature. Such a decision is essential to avoid grave harm to the public interest in continued rail service. The Special Court's decision has made it clear that only the assurance of an adequate Court of Claims remedy can make the process of the Act fair and equitable to the Penn Central estate. Only this Court can give that assurance. If the Court should find the issue premature, Penn Central would be excluded from reorganization pursuant to the Act. Such exclusion is wholly unnecessary if a Court of Claims remedy is available.

Unless the availability of a Court of Claims remedy is now affirmed, the Act must be held unconstitutional. Once Penn Central is included in the process of the Act, mandatory conveyance of its properties follows inexorably; thus the assurance that compensation will be adequate must now be available if the Act is to be sustained. Similarly with respect to the erosion issue, there is no basis other than the

availability of Court of Claims relief to avoid now holding the Act unconstitutional, since the Act plainly requires continued Penn Central rail operations and all parties admit the possibility that such operations have passed or will pass constitutional limits if for the account of the estate.

II.

The Court plainly has jurisdiction to decide the Court of Claims issue. Such a decision would in no sense be a "declaratory judgment" against the United States, but is rather the only basis for denying the injunctive relief sought by appellees. Such a denial, on the ground that appellees have an adequate remedy at law, is conventional and proper, and poses no doubtful question of jurisdiction.

As to the question of availability of a Court of Claims remedy, the New Haven Trustee admits that the Court of Claims would have jurisdiction but argues that it would be compelled to deny relief for want of a substantive cause of action, on the theory that in enacting the Act Congress did not intend to create such a cause of action. The argument is wholly untenable. Case law in this Court is uniform that, when private property is taken by the Government pursuant to Congressional authorization, the Constitution itself creates a cause of action, and the Tucker Act provides the remedy. Whether Congress intended to exercise the eminent-domain power, or intended to deny or to limit compensation for a taking, is irrelevant. So long as Congress has authorized — as it clearly has here — the acts which in law constitute a taking, both the right to compensation and the remedy therefor are fully available.

III.

The Court below correctly held unconstitutional the provision of Section 207(b) of the Act which requires

dismissal of the Section 77 reorganization proceeding with respect to any Northeastern railroad excluded from the process of the Act. That provision is void as a geographically non-uniform rule of bankruptcy, and probably as a violation of the due-process and equal-protection clauses as well. The provision irrationally denies Northeastern railroads excluded from the Act the substantial advantages of reorganization under Section 77, and relegates them to the quite different fate of an equity receivership. The defective provision is unnecessary to the general structure of the Act and can readily be severed.

ARGUMENT

I.

THE COURT SHOULD NOW DECIDE WHETHER A COURT OF CLAIMS REMEDY IS AVAILABLE TO THE PENN CENTRAL ESTATE.

The Act can and should be found to assure the Penn Central estate of all the rights guaranteed to it by the Fifth Amendment, because — as the Special Court held on September 30 — a suit in the Court of Claims under the Tucker Act is available to remedy any deficiency in compensation which may occur under the process of the Act itself. On the other hand, unless there is a full and unqualified right to recover from the United States in the Court of Claims any amount which is necessary to meet the requirements of the Fifth Amendment, the Act cannot be sustained.

In the interests of both public and private concerns, this paramount issue — whether such a remedy in the Court of Claims is available — must be resolved promptly. If that remedy exists, the Trustees can safely await the resolution of the presently unknown — and indeed unknowable —

questions which inhere in the future implementation of the Act. If the remedy does not exist, the Penn Central estate should be freed immediately from the strictures which the Act imposes.

Unfortunately, the Government appellants sought to have the Court postpone its decision on that issue. However, the recent decision of the Special Court has demolished the Government's prematurity arguments.

Since the earlier briefs were filed, the Special Court has held that absent a Tucker Act remedy the process of the Act is not fair and equitable to the Penn Central estate. That holding is unreviewable under the Act (Section 207(b)). However, the Special Court was concerned whether, if this Court does not reach the Tucker Act issue, its own view that the remedy is available would have the "preclusive effect" necessary to make the remedy adequate (Opinion, pp. 111-16).

Those doubts are well founded. If this Court finds the issue premature, the Special Court will have to conclude that Penn Central must be excluded from the Act. Only a present decision by this Court conclusively establishing Tucker Act availability, both as to compensation and as to interim erosion, will support the Special Court's conclusion that the Act is fair and equitable and will permit the process of the Act to be implemented.

1. **Compensation.** The first aspect of the Act which makes a potential Court of Claims remedy vital to its constitutionality is the manner in which it provides consideration for the rail properties of the Penn Central estate which will have to be conveyed to Conrail. Absent a Court of Claims remedy, the Act does not provide the assurance to which the estate is constitutionally entitled that it will

receive constitutionally adequate payment.[1] The reasons advanced by the majority of the court below for holding this matter premature are inadequate (Trustees' Brief, pp. 48-54). Since USRA (in its "appellee" brief, pp. 17-22) advances different reasons, additional comment is warranted.

USRA recites a variety of matters which are presently unknown — the proper measure of the value of the rail properties of Penn Central which it will be forced to convey to Conrail, what those properties will be, and what consideration will be tendered in return. These are indeed unknown; USRA's extended discussion of the various valuation methods (pp. 56-70) underscores the uncertainties in this area. But it is precisely because they are unknown that the Act, by itself, cannot provide *assurance* that the Penn Central estate will be adequately compensated. What is indisputable is that Penn Central will be

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[1] Trustees' Brief, pp. 54-62. One additional comment on that issue is appropriate.

At page 60 of the Trustees' Brief, it was pointed out that the deficiency judgment against Conrail available as a last resort under Section 303(c)(2)(C) was, as Judge Fullam noted (J.A. 137), "relatively pointless," since it would only decrease whatever value the Conrail common stock might have. USRA now agrees. It says: "It may be that such a judgment would be ineffective in correcting any substantial shortfall in the consideration received by the Penn Central estate, since that estate will probably be the largest single holder of Conrail securities" (appellee brief, p. 28, n. 24). Presumably USRA agrees that the assertion by the United States (p. 45, n. 25) that a judgment would have priority over claims of the Association against Conrail is in error. Under Section 211(e)(3) of the Act the Association can make loans to Conrail only on adequate security; it is doubtful that USRA would accept a subordination to a future possible deficiency judgment. In addition, if the deficiency judgment can prime Conrail's debts, the ability of the new corporation to seek private sector financing in the meantime would be most doubtful.

required to convey very substantial rail properties. *Perhaps* the process of the Act will provide it with constitutionally adequate consideration, but neither the United States nor USRA asserts as a *certainty* that it will. The United States asserts (p. 39) that "the Rail Act *appears* to provide considerable promise of success." (Italics supplied.) USRA says (appellee brief, p. 28) that the remedies available to the Special Court under Section 303(c) "*may* fully correct any deficiencies in the terms of the transfer." (Italics supplied.) Plainly, when property is being taken, the constitutional guarantee of just compensation is not accorded by a possibility, or even a probability, that it will be paid. *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 676 (1923); *Cherokee Nation v. Southern Kansas Ry.*, 135 U.S. 641, 659 (1890); *Stringer v. United States*, 471 F.2d 381 (5th Cir. 1973). The *assurance* of payment requires that a Court of Claims remedy be available if it is needed. And its availability *vel non* is as ripe for decision now as it will ever be.

Indeed, USRA is itself not consistent on this prematurity issue. In its "appellant" brief, it urges that the Court deny injunctive relief on the "taking" issue because a remedy in the Court of Claims is available and adequate (pp. 40-60). Even in its "appellee" brief it several times asserts (pp. 29, 33 n. 29, 48) that a remedy is available in the Court of Claims for any inadequacy in the consideration provided under the process of the Act iself. Whether that is so is precisely the issue which we believe the Court should now address and decide.

2. **Interim erosion.** The second aspect of the Act which makes necessary a possible Court of Claims remedy if the Act is to be sustained is its failure specifically to provide relief for interim erosion. The court below found this issue

ripe for decision and, concluding that no Court of Claims remedy exists, enjoined the operation of several sections of the Act. The Government appellants now urge that the Court need not decide whether a Court of Claims remedy exists. Here again, their arguments are nullified by the Special Court's decision.

For the Court to reach this issue it is not necessary to decide whether, in fact, erosion of the Penn Central estate since June 1970 has reached the point where the estate could not be constitutionally required to bear further operating losses. The court below looked rather to the likelihood that such a point had been reached, or would be reached before the final system plan could be implemented. Its conclusion that the likelihood was great is supported by the opinion of other courts which have been intimately involved in the Penn Central proceedings — the Penn Central Reorganization Court, both in early 1973 (*In re Penn Central Transportation Co.*, 355 F. Supp. 1343, 1344, 1346) and in its 180-day decision under the Act (J.A. pp. 124-51), and the Court of Appeals for the Third Circuit (*In re Penn Central Transportation Co.*, 494 F.2d 270, 283 (1974)). The likelihood which was envisioned by the court below has now been increased by the recent admission [2] that USRA cannot meet the time schedule in the Act, and that a four-month extension of the planning process is necessary.

As the court below found, Penn Central has been suffering huge losses, and loss operations are continuing. The details need not be of concern to the Court. However, because of the remarkable contention of the United States

[2]Letter, Arthur Lewis, Chairman, USRA, to Hon. Harley Staggers, dated September 4, 1974. A bill to grant the requested extension was favorably reported in the Senate on September 30, 1974. S. Rep. No. 93-1192, p. 70 (Sec. 208(a)).

that the Penn Central estate is really better off now than it was when it filed for reorganization (Brief, pp. 63-65), there is appended a statement of the evidence in the record dealing with the nature and extent of the financial and asset erosion which has already occurred, and which may be anticipated to occur in the future.

Both USRA's appellant brief and that of the other Government appellants asked this Court to decide that a Court of Claims remedy exists, and suggested that other means of saving the constitutionality of the Act should be explored *only if* the Court rejected their Tucker Act argument. However, in its brief as appellee USRA seems to suggest that, even if further loss operations for the account of the estate reach the point of unconstitutionality, a Court of Claims remedy is unnecessary and hence that its availability *vel non* need not be decided. USRA asserts that compensation for any unconstitutional taking can be provided by the Special Court (USRA appellee brief, pp. 27-28). The Trustees have fully responded to that contention in their main brief (pp. 41-42).[3] USRA also asserts that, in any event, the Penn Central estate can avoid an unconstitutional loss operation by terminating its operations. (The Trustees had believed, on the basis of both Government appellants' briefs, that the Government wished the Court to reach that issue only if it first held that no Court of Claims remedy is available.) While this argument is also addressed in the Trustees' brief, further comment is warranted.

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[3]The criticism by USRA ("appellee" brief, p. 28, n. 28) of the legislative history cited in the Trustees' brief at p. 41, note 14, is misplaced. The committee report was not inaccurate, since it was essentially quoting the language of Section 502(d) of H.R. 9142. (In the prior footnote on p. 41 of the Trustees' brief (note 13) Section 304(f) is incorrectly referred to as Section 305(f).)

The briefs for the Government parties appear to argue that if and when the point of unconstitutional erosion is reached — and they do not deny that it may be reached prior to the time the estate is relieved of operating responsibility [4] — USRA will authorize a termination of all Penn Central operations. That any such authority in USRA was within the contemplation of Congress does violence to the entire statutory scheme. It cannot seriously be proposed that this Court rule the Act valid even without a Court of Claims remedy because Congress intended that all Penn Central service could stop when erosion became an unconstitutional burden. The Special Court squarely rejected the Government's argument (Opinion, pp. 45-47), cogently remarking that "this is standing [Section 304(f)] on its head" (p. 46).

Since only a present decision in favor of a Tucker Act remedy, with respect to erosion as well as to ultimate compensation, will suffice to make the process of the Act fair and equitable to Penn Central, acceptance of the Government's argument would almost certainly result in Penn Central's exclusion from the Act. The Special Court has strongly so intimated (Opinion, pp. 111-16). If this Court were to accept the Government's prematurity argument, and the Special Court were to persuade itself — as we think it would not — that its own view as to Tucker Act availability furnished sufficient assurances of fairness and equity, the result would be further delay which could well be fatal to the enormous public interest in continued Penn Central rail operations. A new round of time-consuming

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[4] The USRA appellant brief, in discussing the injunction issued by the court below with regard to Section 304(f), states that the court "deals with a situation which has not arisen and *may not* arise" (p. 71; italics supplied).

litigation would be required as to whether the point of unconstitutionality of operations has been reached. Meanwhile, Penn Central would remain in its present limbo. Improvements essential to stem continued deterioration of the railroad, such as those contemplated by the Act, may not be justified so long as the ultimate solution is wholly in doubt. Penn Central operations are essential to the national economy, and become even more essential with energy shortages, the risk of massive unemployment and other developments. Cessation of service as a result of another round of litigation — the only alternative the Government offers to deciding the Court of Claims issue — is unthinkable. Failure by the Court to decide the issue now is not only legally unwarranted but would have the gravest possible consequences in fact.

The Government also now suggests (U.S. Brief, p. 31) that continuing erosion of the estate can be ignored because the erosion would be even greater if the estate were to be liquidated. There are several answers. Even were the Government's assertion correct in fact, which it is not, it would not warrant depriving the creditors of the estate from exercising their rights. In *Case v. Los Angeles Lumber Co.*, 308 U.S. 106 (1939), the Court was asked to approve a reorganization plan, which was otherwise not fair and equitable, on this ground. Its answer was categorical (p. 123):

> "The fact that bondholders might fare worse as a result of a foreclosure and liquidation than they would by taking a debtor's plan under § 77B can have no relevant bearing on whether a proposed plan is 'fair and equitable' under that section. Submission to coercion is not the application of 'fair and equitable' standards."

But in any event. the Government is wrong on the facts. Its argument assumes (U.S. Brief, p. 73) that liquidation is the only alternative to continued deficit operations. The enactment of the Act now before the Court reveals that assumption to be untrue. Congress has made it clear that the national interest will not permit a cessation of Penn Central services. A determination by this Court that continued erosion beyond constitutional limits cannot, absent a Tucker Act remedy, be constitutionally compelled will not lead to a scrapping of Penn Central. More likely, the public need for rail services and the private rights of property owners will be more appropriately reconciled.

Moreover, on its own premises, the Government assertion is in error. Under the Trustees' plan of July 1973, erosion from the deficit-ridden rail operations of Penn Central would have ended in 1975, and the reorganization proceeding would have been far advanced. The details are set out in the Appendix, *infra*, pp. A-24-26. Under the Act, erosion will continue at least into 1976 — since the Congress will have no choice but to allow USRA the additional time it has requested — and it may continue far beyond that, if Congress disapproves the USRA plan.

II.

APPELLEES' ARGUMENTS AGAINST A COURT OF CLAIMS REMEDY ARE UNFOUNDED.

The New Haven Trustee argues (brief as appellee, pp. 33-37) that the District Court was without jurisdiction to determine whether just compensation can be obtained in an action in the Court of Claims for any taking of property effected by the Act. The New Haven Trustee apparently contends that this Court as well is without jurisdiction to determine that issue. This position is untenable.

The District Court was lawfully convened pursuant to 28 U.S.C. §§ 2282 and 2284 to consider the constitutionality of the Act and the propriety of declaratory and injunctive relief with respect thereto. That it was within the jurisdiction of the District Court to determine the constitutionality of the Act cannot be questioned. See, *e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803); *Amalgamated Meat Cutters and Butcher Workmen v. Connally*, 337 F. Supp. 737, 744 (D.D.C. 1971); *Bartley v. Finch*, 311 F. Supp. 876, 878 (E.D. Ky. 1970), *aff'd*, 404 U.S. 380 (1971). Obviously, neither the District Court nor this Court can perform this process of constitutional adjudication and, at the same time, ignore a substantial argument tending to sustain the constitutionality of the statute at issue. To adopt the New Haven Trustee's truncated process of constitutional adjudication could yield the truly bizarre result that what is in fact a constitutional statute would be held unconstitutional and enjoined from operation because of a less than full consideration of the possible bases for sustaining its constitutionality.

The New Haven Trustee suggests (pp. 33, 35-36) that Penn Central seek a declaratory judgment which even the Court of Claims is without jurisdiction to grant. But, as Judge Learned Hand once observed:

> "[I]t is absurd to speak of a judgment as 'declaratory' in so far as it 'declares' no more than is necessary to sustain the immediate relief prayed, for in that sense every action is for a 'declaratory judgment.' A court cannot grant any relief whatever except as it finds, and by finding 'declares,' that the plaintiff has those rights on which the remedy must be based." *Corcoran v. Royal Development Co.*, 121 F.2d 957, 959 (2d Cir.), *cert. denied*, 314 U.S. 691 (1941).

Federal courts have in fact regularly ruled upon the extent of the jurisdiction of other federal courts — including the jurisdiction of the Court of Claims under the Tucker Act — as necessary to dispose of cases before them. [5] In precisely the same fashion, it is both proper and necessary for this Court now to analyze the effect of the Act upon the jurisdiction of the Court of Claims, thereby avoiding the serious questions which have been raised as to the constitutionality of the Act.

The New Haven Trustee disclaims any suggestion that the jurisdiction of the Court of Claims under the Tucker Act was in any way impaired by the Act; he "has not asserted at any time that the jurisdiction of the Court of Claims under 28 U.S.C. § 1491 was impliedly repealed by the RRRA" (p. 41; see also p. 63 n. 52). The concession is dispositive. The New Haven Trustee does argue that, notwithstanding the fact that the jurisdiction of the Court of Claims is unimpaired by the Act, no substantive cause of action would exist. But that argument is made wholly untenable by the uniform case law in this Court.

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[5] See, *e.g.*, Yearsley v. W.A. Ross Construction Co., 309 U.S. 18 (1940); Hurley v. Kincaid, 285 U.S. 95 (1932); Stringer v. United States, 471 F.2d 381, 383-84 (5th Cir.), *cert. denied*, 412 U.S. 943 (1973); Putnam Mills Corp. v. United States, 432 F.2d 553 (2d Cir. 1970); Myers v. United States, 323 F.2d 580, 583 (9th Cir. 1963); Ove Gustavsson Contracting Co. v. Floete, 278 F.2d 912, 914 (2d Cir.), *cert. denied*, 364 U.S. 894 (1960); Spevak v. Strauss, 257 F.2d 208 (D.C. Cir. 1958), *remanded on other grounds*, 359 U.S. 115 (1959); Ogden River Water Users' Assn. v. Weber Basin Water Conservancy, 238 F. 2d 936, 942 (10th Cir. 1956); Angilly v. United States, 199 F.2d 642 (2d Cir. 1952); State Road Dept. v. United States, 166 F.2d 843 (5th Cir. 1948); Yuhasz v. United States, 109 F.2d 467 (7th Cir. 1940); Parrish v. Seamens, 343 F. Supp. 1087, 1092-94 (D.S.C. 1972), *aff'd*, 485 F.2d 571 (4th Cir. 1973); Nehf v. United States, 278 F. Supp. 444 (N.D. Ill. 1967). *Cf.* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 697 n. 13, 703 & n. 27 (1949).

The New Haven Trustee claims that an action for just compensation as a result of the taking of property by the United States is available only if "Congress in fact *intended* to authorize the exercise of the sovereign's eminent domain power" (p. 62). (Italics supplied.)* But the substantive right to receive just compensation is derived directly from the Fifth Amendment itself and requires nothing more. "If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine." *United States v. Causby*, 328 U.S. 256, 267 (1946). *Accord, Armstrong v. United States*, 364 U.S. 40, 48-49 (1960); *United States v. Dickinson*, 331 U.S. 745, 748 (1947); *Jacobs v. United States*, 290 U.S. 13 (1933); *Aris Gloves, Inc., v. United States*, 420 F.2d 1386, 1391 (Ct. Cl. 1970); *Eyherabide v. United States*, 345 F.2d 565 (Ct. Cl. 1965). The Special Court so held, noting that the irrelevance of Congressional intent to the existence *vel non* of a substantive claim is demonstrated by "cases too numerous to require citation" (Opinion, p. 85).

It is not necessary that the Government intend to take the property; so long as the acts which in law constitute a

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*The New Haven Trustee also contends that Congress could not have intended to allow claimants to the estate of a railroad to litigate their claims first in the Special Court under the provisions of the Act and then, "if not satisfied with its judgment, [to] commence a second round of litigation in the Court of Claims" (p. 42). This argument distorts the situation with respect to the remedies available for any taking effected by the Act. Exercise of the right to recover just compensation in the Court of Claims would not involve duplication of or conflict with the processes for which provision is made in the Act. Matters adjudicated in the Special Court would be governed by doctrines of res judicata and collateral estoppel in a subsequent action for just compensation in the Court of Claims. See, *e.g.*, Edgar v. United States, 145 Ct. Cl. 9 (1959); Smithers v. United States, 150 Ct. Cl. 649 (1960). There is no prospect that it would be necessary in the Court of Claims to retrace the steps of the Special Court.

taking occur, and they were duly authorized, the Fifth Amendment, without more, confers a substantive right to receive just compensation and under the Tucker Act the Court of Claims has jurisdiction to enforce that right.[7] In *Armstrong v. United States*, 364 U.S. 40 (1960), this principle was applied in holding that the possessors of materialmen liens on certain partially completed boats which had been taken by the United States, thereby rendering the liens unenforceable, were entitled to just compensation in the amount of the liens effectively destroyed. This Court said: "Since this acquisition was for a public use, however accomplished, *whether with an intent and purpose of extinguishing the liens or not, the Government's action did destroy them* and in the circumstances of this case did thereby take the property value of those liens within the meaning of the Fifth Amendment. . . . A fair interpretation of [the] constitutional protection [of the Fifth Amendment] entitles these lienholders to just compensation . . . ." 364 U.S. at 48-49. (Italics supplied.) *Accord, Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18, 21 (1940); *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260

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[7]The New Haven Trustee asserts (pp. 38-41) that the decision in Eastport S.S. Corp. v. United States, 372 F.2d 1002 (Ct. Cl. 1967), supports the view that a substantive cause of action for just compensation arises under the Fifth Amendment only where Congress evidences an intent to exercise its eminent-domain power. *Eastport* in fact makes plain that the substantive right to recover just compensation is not dependent upon the intent of Congress. "Under Section 1491 what one must always ask is whether the constitutional clause *or* the legislation which the claimant cites can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." 372 F.2d at 1009. (Italics supplied.) The Court of Claims obviously spoke in the disjunctive: legislation may, to be sure, mandate the payment of compensation but so, too, do certain provisions of the Constitution. The Fifth Amendment is, of course, the classic instance of a constitutional provision which mandates the payment of compensation.

U.S. 327 (1922); *Sioux Tribe of Indians v. United States*, 315 F.2d 378, 379 (Ct. Cl. 1963); *Richard v. United States*, 282 F.2d 901, 904 (Ct. Cl. 1960); *Cotton Land Co. v. United States*, 75 F. Supp. 232, 235 (Ct. Cl. 1948).

Since the substantive right to recover just compensation under the Fifth Amendment is in no way dependent upon the intent with which Congress or any other governmental authority acts in taking property, it is without relevance here that evidence of a Congressional intent to subject the United States to suit may or may not be found in decisions such as *Hurley v. Kincaid*, 285 U.S. 95 (1932), *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), and *Silesian-American Corp. v. Clark*, 332 U.S. 469 (1947) — decisions which unequivocally establish that the availability of an action for just compensation under the Fifth Amendment will render lawful action on behalf of the United States which results in the taking of property. Still, it should be observed that, contrary to the New Haven Trustee's assertion (pp. 44-45), these decisions did involve situations in which Congress had not clearly evidenced an intent that the injured party was to be paid. While the attempts of the New Haven Trustee to impose his theory on *Hurley* and *Silesian-American Corp.* are not persuasive,[8] the decision in *Yearsley* is most plainly inconsistent with his theory.

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[8]The New Haven Trustee seeks to reconcile *Hurley* with his theory on the basis that Congress had expressly provided for the exercise of eminent-domain powers in the context of the project which was to result in the taking of the plaintiff's land (pp. 44-46). But in deciding *Hurley* this Court placed no emphasis whatever on the eminent-domain powers provided by Congress; on the contrary, the case was decided by this Court on the assumption that the federal officials were acting in disregard of those powers. See 285 U.S. at 104. It was nothing more than the Fifth Amendment — combined with the waiver of immunity effected by the Tucker Act — that ensured the plaintiff in *Hurley* an adequate remedy at law. (continued)

In *Yearsley*, riparian landowners sought to recover damages from a government contractor for erosion of their lands as a result of work performed by the contractor pursuant to a contract with the United States to improve navigation in the Missouri River. This Court found it unnecessary to determine whether the landowners were entitled to recover compensation from the contractor because, if a taking of their property had occurred as a result of the acts of the Government's agent, "there must be just compensation under the Fifth Amendment" and "the Government . . . has afforded a remedy for its recovery by a suit in the Court of Claims." 309 U.S. at 21. The Court did not find that Congress had intended or even anticipated that

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*(continued)

As for *Silesian-American Corp.*, this Court made no reference to the statutory compensation provision, § 9 (a), upon which the New Haven Trustee relies (pp. 48-53), in upholding the constitutionality of the Trading with the Enemy Act on the ground that under the Constitution just compensation would be available to any friendly aliens whose property was taken under that Act. See 332 U.S. at 477-78. Moreover, while at the time of this Court's decision in *Silesian-American Corp.* it was established that the statutory remedy of § 9(a) was available to a friendly alien whose property had been taken, see Clark v. Uebersee Finanz-Korporation, 332 U.S. 480 (1947), such was not the case at the time of the decision of the Court of Appeals. On the contrary, before the Court of Appeals both parties to the action took "the position that a friendly alien may not sue under § 9(a)." Silesian-American Corp. v. Markham, 156 F.2d 793, 797 (2d Cir. 1946). Acknowledging the substantiality of that position, the Court of Appeals said: "However that may be, it is settled by many decisions of which we need only to cite the last — *Yearsley v. W.A. Ross* . . . — that when the United States seizes the property of an individual, not an enemy, . . . it impliedly promises to pay just compensation, and that that promise is just compensation under the Fifth Amendment." 156 F.2d at 797. Plainly, the Court of Appeals' decision was based exclusively upon the right of just compensation under the Fifth Amendment, and necessarily implicit in the court's reference to that right was reliance upon the jurisdiction created by the Tucker Act which permitted the right to be enforced.

compensable takings of property would occur in the course of the navigation project;[9] rather, it held merely that the navigation project itself had been validly authorized by Congress, thereby making the project the responsibility of the United States.[10]

The New Haven Trustee reviews (pp. 43-63) an array of cases which purportedly support the view that the taking of property by the United States will be enjoined where Congress has failed to evidence its intent to exercise its eminent domain powers and to subject the United States to liability for just compensation. These cases bear no such construction.

First, there is the famous case of *United States v. Lee*, 106 U.S. 196 (1882), in which this Court allowed an action in

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[9]The Act of January 21, 1927, 44 Stat. 1010, 1013, pursuant to which the project was conducted, see 309 U.S. at 20, was wholly silent with respect to any payment of just compensation for any taking of property which might result from the project.

[10]Nor is the New Haven Trustees's theory of Congressional intent of any avail in disposing of Fort Berthold Reservation v. United States, 390 F.2d 686 (Ct. Cl. 1968), where it was held that the taking of certain Indian reservation lands by the United States for inadequate consideration gave rise to a substantive right under the Fifth Amendment to receive just compensation for the property taken. The New Haven Trustee wrongly asserts (pp. 53-54) that the Indians in *Fort Berthold* would have been "without any substantive remedy" for the taking of their property for inadequate compensation but for the passage of the Indian Claims Commission Act. For purposes of the Fifth Amendment claim at issue in *Fort Berthold*, the Indian Claims Commission Act served a single essential function: it effectively removed the six-year statute of limitations which Congress attached to the general waiver of sovereign immunity effected by the Tucker Act. See 28 U.S.C. § 2501. From the date of the taking of their reservation lands in 1910, the Indians in *Fort Berthold* had had a substantive right to just compensation, but the statute of limitations for prosecuting a claim based on that right in the Court of Claims had run in 1916 without the Indians' acting.

ejectment to be maintained against a federal officer who seized property to which it was established the United States did not have title. At the time *Lee* was decided, the Tucker Act had not yet been enacted; thus the sovereign immunity of the United States stood as a bar to any attempt by the plaintiff to recover just compensation under the Fifth Amendment. Only ejectment of the federal officer and restoration of the property to the plaintiff could secure the Fifth Amendment right at stake in *Lee*. Since the Government had made no provision for compensation, the officer's entry was itself unconstitutional. Today, however, the United States is subject to suit for claims for just compensation as a result of the Tucker Act; hence *Lee* provides no authority for the award of equitable relief in this action.

Land v. Dollar, 330 U.S. 731 (1947), is equally unhelpful to the New Haven Trustee. *Land* was brought by corporate stockholders who sought equitable relief to compel the Federal Maritime Commission to return shares of stock which had been delivered to the Commission in return for financial assistance to the corporation. The Commission refused to return the shares on the ground that it possessed full title to them. The District Court dismissed the action, holding it was a suit against the United States. This Court reversed. While recognizing that affirmative relief was not available against the United States, it observed that "public officials may become tort-feasors by exceeding the limits of their authority," thus justifying the issuance of equitable relief against their individual wrongful acts. 330 U.S. at 738. Thus in *Land* the Court was really applying the rule that "[i]n the absence of authority, even an intentional taking cannot support an action for compensation under the Tucker Act," *Mitchell v. United States*, 267 U.S. 341, 345 (1925). Action taken by federal officials in excess of their lawful authority does not constitute action of the United States and cannot, as a consequence, impose any

liability on the United States under the Fifth Amendment.[11] Here, by contrast, there is no dispute that Congress has fully and expressly authorized the acts which in law constitute a taking.

The limits of the decisions in *Lee* and *Land* are fully illuminated in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). *Larson* was an equitable action brought, in essence, to compel specific performance of a contract under which the Administrator of the War Assets Administration had allegedly sold certain coal to plaintiff, but then had refused to deliver it to plaintiff and proposed to sell it to another. In denying equitable relief, this Court first disposed of the plaintiff's reliance on *Lee*, which was decided at a time when "there clearly was no remedy available by which he could have obtained compensation for the taking of his land." 337 U.S. at 697 n. 17. But a remedy in the Court of Claims was available to the plaintiff in *Larson*. "Where the action against which specific relief is sought is a taking or holding of the plaintiff's property, the availability of a suit for compensation against the sovereign will defeat a contention that the action is unconstitutional as a violation of the Fifth Amendment. Compare *Hurley v. Kincaid*, 285 U.S. 95 (1932)." 337 U.S. at 697 n. 18.

As for *Land*, it was deemed to fall into the class of cases which are outside the general prohibition on specific relief

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[11] Similarly, in Hooe v. United States, 218 U.S. 322 (1910), this Court, in holding that the unauthorized use of certain property by the Civil Service Commission did not give rise to a claim for just compensation from the United States under the Fifth Amendment, said: "The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the Government." 218 U.S. at 336. *Cf. also* Philadelphia Co. v. Stimson, 223 U.S. 605, 622-23 (1912).

against government action because the action taken was "not within the officer's statutory powers." 337 U.S. at 701-02. In *Land*, it was pointed out, the complaint "alleged that the members of the Commission 'acted in excess of their authority as public officers.' "[12] 337 U.S. at 702 n. 26. By contrast, the Administrator in *Larson* was found to be acting "within his authority," which justified the denial of equitable relief since compensation would be available to the plaintiff in the Court of Claims. 337 U.S. at 703 & n. 27.

Larson obviously has dual significance for the present action. In the first place, it constitutes yet another instance in which this Court has refused to afford equitable relief against governmental action in view of the availability of an adequate remedy at law in the Court of Claims under the Tucker Act. Moreover, it makes plain that decisions such as *Land* which have, since the enactment of the Tucker Act, granted equitable relief to prevent the taking of property by federal officials have turned simply upon whether the officials were acting within the scope of their official authority, thereby rendering the United States liable for the effect of their acts. These decisions did not turn on any distinction as to whether Congress did or did not intend to subject the United States to liability for just compensation.[13]

[12]The *Larson* court expressly rejected (337 U.S. at 699-702) the continuing validity of the decision in Goltra v. Weeks, 271 U.S. 536 (1926), a decision in which the New Haven Trustee apparently purports to find some support for his position (pp. 61-62).

[13]No support for the New Haven Trustee's theory is found in Malone v. Bowdin, 369 U.S. 643 (1962), and Dugan v. Rank, 372 U.S. 609 (1963). Both decisions expressly followed *Larson* and therefore denied the specific relief requested to prevent the taking of property by federal officials upon determining that the officials were not acting beyond the limits of their lawful authority. See 369 U.S. at 647-48 and 372 U.S. at 621-23. Thus, in dismissing the suit in *Malone*, this Court observed:

> "Unlike the situation in the *Lee* case, there has been at all relevant times a tribunal where respondents (contd)

The decision in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), is, without question, merely a further example of official action in excess of statutory and constitutional authority, requiring the award of equitable relief to prevent the taking of property for which this Court doubted that the Government could ultimately be held liable in an action for just compensation.

In contradistinction to the theory of the New Haven Trustee, the Penn Central Company (pp. 72-75) argues that the specific remedies provided in the Act evidence a legislative intent to preclude resort to a Tucker Act remedy. Support for this theory is sought in *Johnson v. United States Shipping Board Emergency Fleet Corp.*, 280 U.S. 320 (1930), and *Feres v. United States*, 340 U.S. 135 (1950). In fact neither *Johnson* nor *Feres* supports such a conclusion.

In *Johnson*, this Court's determination that claims within the Suits in Admiralty Act could not be alternatively brought under the jurisdiction created by the Tucker Act was explicitly based on the fact that the Suits in Admiralty Act not only provided for the adjudication of all maritime claims resulting from the operation of merchant vessels by the United States but also provided expressly for the repeal of "the inconsistent provisions of all other Acts." 280 U.S. at 326; see *United States Shipping Board Emergency Fleet Corp. v. Rosenberg Brothers & Co.*, 276 U.S. 202, 212-14 (1928). In view of the comprehensive, express repeal provision plus the fact that the same form of relief was available under the Suits in Admiralty Act as under the

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[1](continued)

could seek just compensation for the taking of their land by the United States. That tribunal is the Court of Claims." 369 U.S. at 647 n. 8.

The availability of just compensation for the property taken was likewise emphasized in *Dugan*. See 372 U.S. at 625-26.

Tucker Act, it is understandable that the Suits in Admiralty Act was deemed to preclude resort to the jurisdiction created by the Tucker Act. Here there is no such provision repealing all inconsistent statutes, much less any identity in the forms of relief available under the Act and under the Tucker Act.

The decision in *Feres* is of even less relevance to the present action. *Feres* held that in enacting the Federal Tort Claims Act Congress had never intended to subject the United States to liability for the death or injury of military personnel as a result of negligence which occurred incident to service. The crux of the rationale underlying the decision was that the Tort Claims Act, by its terms, "recognizes and assimilates into federal law the rules of substantive law of the several states, among which divergencies are notorious," 340 U.S. at 142, while "the relationship of military personnel to the Government has been governed exclusively by federal law." 340 U.S. at 146. This Court simply did "not think that Congress, in drafting [the Tort Claims] Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence." 340 U.S. at 146. Reference to pre-existing legislation providing compensation for service-connected injuries merely confirmed that the relationship between military personnel and the Government was peculiarly federal in character, 340 U.S. at 144, and was thus outside the express scope of a statute which focused exclusively upon liability under local law. Here, there is no doubt that a cause of action to recover just compensation under the Fifth Amendment for any taking of property effected by the Act is within the express terms of the Tucker Act. The only question is whether the Act repealed the Tucker Act by implication. We believe it did not, for the reasons fully set forth in our first brief (pp. 18-25), the governmental briefs and, most recently, the Special Court's opinion.

III.

THE COURT BELOW CORRECTLY HELD ONE CLAUSE OF SECTION 207(b) UNCONSTITUTIONAL.

The court below correctly rejected appellees' contention that the Act is invalid because it violates the geographical "uniformity" requirement of Article I, Section 8, Clause 4 of the Constitution. *Hanover National Bank v. Moyses*, 186 U.S. 181, 188 (1902). However, the court properly found invalid that portion of Section 207(b) which requires a reorganization court, upon a finding that the process of the Act is not fair and equitable to the estate of the railroad over which it has jurisdiction, to dismiss the Section 77 proceeding. Trustees' Brief, pp. 68-69. The extended argument to the contrary in the brief for the United States (pp. 49-54) warrants a more detailed answer.[14]

Most of the Act can obviously be sustained as an exercise of the powers of Congress under the Commerce Clause. The dismissal requirement of Section 207(b), however, cannot rest on any Commerce Clause exercise. It clearly amends the Bankruptcy Act to deny a particular category of railroad debtors, those in reorganization in the Northeast region, the benefits of that Act if they are not made subject to the mandatory conveyance procedures of the Rail Act. This contingent denial of continuing relief under the bankruptcy law to railroads in reorganization in one part of

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[14]USRA did not appeal from this portion of the order below, "[s]ince the court's ruling does not materially affect the administration of the Rail Act." Brief, p. 14. In light of the Special Court's decision, of course, the issue is moot unless this Court holds that the Tucker Act issue is premature or disagrees with the Special Court on that issue. In either of these events, the procedure to be followed after Penn Central is excluded from the process of the Act will again become critical.

the United States is a clear, but impermissible, attempt to exercise the bankruptcy power.

It is significant that the United States advances no reason why this provision was included in the Act, and that USRA, which is charged with the Act's administration, did not appeal this portion of the decision below. The Trustees suggested (Brief, p. 70) that the provisions may have been intended to have an *in terrorem* effect — to dissuade attacks on the "process" of the Act lest the result would be a denial of the benefits of Section 77.[15] It is also possible that the Congress believed that it was not in fact amending Section 77 because it was only commanding what it anticipated the reorganization court would be required to do in any event — to dismiss the proceeding if an income-based reorganization was found to be impossible. That this assumption was erroneous is reflected in *New Haven Inclusion Cases*, 399 U.S. 392 (1970), which dealt with a permissible plan of reorganization under Section 77 which was not based on railroad earnings. The legislative history is silent. But whichever the reason, the provision has no relation whatever to the power of Congress over interstate commerce.

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[15]The United States suggests that it makes no real difference whether the railroad continues in Section 77. If this be the case, the dismissal provision is completely devoid of sense. In actuality, by eliminating the Interstate Commerce Commission as the architect of the reorganization plan, an equity receivership would probably facilitate the re-arrangement of Penn Central's non-railroad assets. See Trustees' April 3, 1974 Report on Reorganization Planning, p. 8. However, as to the railroad assets, the presence of the Commission as a key element of the reorganization process was deemed essential to avoid the abuses of equity receivership practice. See, *e.g.*, Continental Bank v. Rock Island Ry., 294 U.S. 648, 672 (1935); Lowenthal, "The Railroad Reorganization Act," 47 Harv. L. Rev. 18 (1933).

The opinion of Judge Fullam suggests (J.A. 65) that this provision of Section 207(b) is probably invalid on other grounds as well. Absent a rational basis for a distinction, which has not even been suggested, it would seem to be a violation of the due-process and equal-protection clauses to deny the benefits of a federal reorganization statute to railroads which happen to be in reorganization in one part of the United States, while leaving it fully available to railroads elsewhere. The provision is plainly invalid as a non-uniform provision of the bankruptcy laws.

Respectfully submitted,

CHARLES A. HORSKY
BRICE M. CLAGETT
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

PAUL R. DUKE
JOHN F. DePODESTA
Penn Central Transportation Company
Six Penn Center Plaza
Philadelphia, Pa. 19107

Attorneys for Appellants
Penn Central Trustees

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APPENDIX

EROSION, VALUATION AND CLAIMS

This Appendix responds to the appendix of the governmental appellants (U.S. Brief, pp. 59-73) on the same subjects.

I. THE RECORD DEMONSTRATES THAT SUBSTANTIAL EROSION HAS OCCURRED AND WILL CONTINUE TO OCCUR.

The purpose of calculating erosion is to provide a measure of the extent to which the estates are burdened by being required to continue their deficit rail operations during the reorganization process. Erosion has two major elements. The first element, fiscal or financial erosion, arises from the continuing accrual of postbankruptcy claims which are entitled to priority over and must be paid ahead of prebankruptcy claims. Examples of postbankruptcy claims which contribute to erosion are accrual of unpaid taxes, rents or use-and-occupancy payments for leased rail lines, loans which constitute expenses of administration and increases in net current liabilities. Postbankruptcy claims also arise from the accrual of postbankruptcy interest on secured prebankruptcy claims such as mortgage bond issues and property taxes. The second element of erosion, asset or physical erosion, is the physical deterioration caused by rail operations and the resulting decline in the value of the assets of the estates from which both postbankruptcy and prebankruptcy claims must be satisfied. Such declines usually occur in assets employed in rail operations and result from obsolescence, from inadequate maintenance or replacement of physical properties, and from losses in earning capacity or going-concern value.

The facts used by the parties in advancing different theories of erosion are not themselves in serious dispute. The primary record sources for the data are the following:

1. The annual reports of Penn Central to the ICC for the years 1970, 1971, 1972 (known in those years as the "Form A") (Joint Documentary Submission[1] (J.D.S.) 34, 35, and 36) and for 1973 (redesignated commencing with this year as the Form R-1) (J.D.S. 37). These reports contain the basic income-statement and balance-sheet data.

2. The statement of Clarence E. Jackman (J.D.S. 39), Exhibit 18 in the ICC proceeding (hereinafter "Jackman Statement"), as updated by his affidavit (J.D.S. 18) before the Reorganization Court for the hearing of March 25, 1974 (hereinafter "Jackman Affidavit"). Mr. Jackman's statements contain the best evidence as to the inadequate maintenance being performed on Penn Central's rail plant both before and during the bankruptcy, the continuing decline of the physical condition of the rail plant and the impact which that decline is having on the capability of the rail plant to support adequate service, and show that postbankruptcy maintenance has been inadequate and that the amount of maintenance deferrals has *increased* postbankruptcy. Jackman Statement, pp. 12-16; Jackman Affidavit, pp. 3-5; J.D.S. 48 at Tr. 1087-88. This is the only evidence of record on this point.

3. The income-statement and cash-flow projections contained in the affidavit of Ernest R. Varalli (J.D.S. 19) submitted at the March 25, 1974 hearing before the Reorganization Court. These affidavits forecast income-state-

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[1]By agreement among all parties, ten copies of the Joint Documentary Submission, which supplements the Joint Appendix, have been lodged with the Clerk.

ment and cash-flow results for future years and thus provide data used in estimating future erosion.

4. The statement of John S. Guest (J.D.S. 41), Exhibit 22[2] in the ICC proceeding (hereinafter "Guest Statement"), as updated by his affidavit (J.D.S. 20) to the Reorganization Court for the hearing on March 25, 1974 (hereinafter "Guest Affidavit"). Mr. Guest's Statement and Affidavit set forth the Trustees' definition of erosion and marshal the facts pursuant to that definition to estimate the erosion which has occurred and which will occur in the future.[3]

A. THE EROSION WHICH HAS OCCURRED

1. POSTBANKRUPTCY CLAIMS HAVE GROWN TO $745 MILLION.

As of December 31, 1973, postbankruptcy claims against the estates have been created in the amount of at least $540

[2]The ICC record also contains Exhibits 23 (J.D.S. 42) and 24 (J.D.S. 43), which the Government describes as working papers of Mr. Guest. Actually Exhibit 23 was a memorandum prepared by Mr. Guest for counsel to show what his testimony might cover, while Exhibit 24 was a summary of his possible testimony. Both were prepared by Mr. Guest for purposes of discussion with counsel and thus did not reflect comments from counsel on the definition of erosion (ICC Tr. 1821, 1836-38, 1843-45). It is, therefore, not surprising that the testimony of Mr. Guest presented to the Commission contained a different definition of erosion, reflecting the legal advice provided by counsel. It simply does not follow, however, as the Government suggests, that for Mr. Guest to include in his statement a definition of erosion consistent with the legal advice provided by counsel in any way undermines his credibility or impairs the accuracy of the facts which the remainder of his statement presents.

[3]The Government centers much of its attack on the estimates of erosion in an assault on Mr. Guest's credibility. Not only is the assault

(continued)

million and more likely as much as $745 million. These claims arise from the following sources:

Trustees' Certificates	$ 100 million
State and Local Taxes	241 "
Rentals or Use and Occupancy Payments	up to 101 "
Storm Agnes Loan	15.7 "
Increase in Net Current Liabilities	183.2 "
Increase on Prebankruptcy Secured Debt	up to 104 "
Total	$ 745 million

State and local taxes are estimated at $241 million. J.D.S. 59, Stip. ¶ 12. Some portion of that amount represents taxes which might legally be characterized as prebankruptcy, depending on what the proper cut-off date might be—the lien date, the billing date, or the payment date. Based on lien date, $44 million to $48 million of that amount would be prebankruptcy *(ibid.)*. Nonetheless, the $241 million estimate still would be reasonable since it is exclusive of interest accruing since the deferral of payment. Guest Statement, pp. 6-7. However these taxes are labeled, they constitute claims prior to creditor claims under local lien law, and in a normal operation are paid out of earnings and not through an invasion of capital or assets.

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[3](continued)
not persuasive; it is aimed at the wrong target. In questioning Mr. Guest's credibility the Government does not seek to discredit the facts to which he testified — with those it is in substantial agreement — but rather the definition of erosion on which he relied. But the definition of erosion involves questions of law, and it was never the Trustees' purpose in offering Mr. Guest to have him support the legal validity of their definition with his expertise. The purpose of offering Mr. Guest was to provide the facts to quantify erosion once it had been defined.

Rentals or use-and-occupancy payments for leased lines can reasonably be estimated to contribute up to $101 million in erosion based on the amounts presently being accrued as lease rentals, due and owing but not paid. Guest Affidavit, p. 9. If the leases ultimately are affirmed, then the lease rentals presently being deferred by court order would all become obligations of the Trustees. In the event the leases should be disaffirmed, the obligations of the lessor and lessee cannot presently be estimated. The lessor would have a claim for breach of lease and for reasonable use-and-occupancy payments for its property. The lessee, on the other hand, would probably be compelled for a time to continue operating the lessor's railway for the lessor's account, which may give rise to a claim by the lessee for operating losses. See Section 77(c)(6) of the Bankruptcy Act, 11 U.S.C. § 205(c)(6). What the results of such accounting might be cannot be estimated at the present time. Guest Statement, p. 7. Moreover, a large portion of most leased line rents represents interest due on secured debt obligations of the lessors which would be claims under any analysis. Many issues of lessor bonds are guaranteed by the lessee.

Postbankruptcy interest accruing on prebankruptcy secured debt would be $104 million on the Debtor's mortgage and collateral trust bonds on the assumption that all are fully secured. Guest Affidavit, p. 9. The Government objects to treating any of this accrual as erosion, on the basis that if the debt is not fully secured interest does not accrue, and that if interest does accrue the claimants are not injured. U.S. Brief, p. 65. It is only if major issues of secured debt are not fully secured that inclusion of postbankruptcy interest on all secured debt overstates erosion. The accrual of interest on fully secured claims diminishes the amount of excess security available to pay unsecured claimants or stockholders, thereby eroding their claims.

2. THE VALUE OF THE RAIL ASSETS HAS DECREASED.

The second aspect of erosion—that is, permanent changes in the value of rail assets brought about by continued rail operations—is more difficult to assess. However, the record supports the conclusion that the value of these assets is being impaired.

The book value of the rail plant other than equipment had declined by $68 million by the end of 1972. Guest Statement, p. 8. That decline, of course, gives effect to additions and betterments, retirements and depreciation. While the Government quarrels with the use of book value, it suggests no alternative. U.S. Brief, p. 62.

Book value is not the best measure of the erosion which has occurred in the value of the rail plant, since it understates the actual erosion in the value of the rail plant. Guest Statement, p. 8; ICC Tr. 2037-39. A more direct measurement of the actual decline in the value of the rail plant is contained in Mr. Jackman's testimony,[4] which shows that annual installations of material since bankruptcy have been inadequate to prevent continuing deterioration of the rail plant by at least the following amounts:[5]

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[4]Jackman's Statement to the Commission measured the amount of deferred maintenance which had accrued on the tracks included within the two core systems as of the end of 1972, while the appendices to his Affidavit updated those figures to reflect conditions as of the end of 1973. By comparing the two it is therefore possible to make an estimate of the amount of deferred maintenance accruing annually on Penn Central at present maintenance levels.

[5]These figures are calculated by subtracting the amounts shown on Appendix C to the Jackman Statement from similar amounts shown on Exhibit T-35 to the Jackman Affidavit, and therefore include maintenance deferrals only for the tracks included in the 15,000-mile core system.

Cross ties	520,000
Switch ties	81,000
Ballast	560,000 tons
New rail	140 miles
Repair rail	210 miles
Depreciable property	$11,450,000

Based on current prices[6] the erosion in the value of the entire rail plant has been at least $190 million, and probably considerably more.

Other evidence of record also strongly suggests that the value of the rail plant has declined since bankruptcy. The Jackman evidence as to the continuing deterioration of the rail plant after bankruptcy and its increasing adverse impact on the quality of service Penn Central can offer and therefore on the revenues it can generate clearly shows that the Penn Central rail plant is worth less as an operating rail facility today than it was at the time of the bankruptcy. Jackman Statement, pp. 12-16; see also Guest Statement, pp. 8-10. The same conclusion follows from the standpoint of liquidation value. While the price of scrap has risen, so, too, has the cost of removal. The continuing inadequacy of

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[6]Using unit prices set forth in the Jackman Affidavit, Ex. T-35, the shortfall on the 15,000-mile system would be $40 million annually, or $160 million since bankruptcy. The proposed 15,000-mile system contains 14,072 route miles and 33,234 track miles, while Penn Central is presently maintaining on its entire system 18,817 route miles and 39,338 track miles (Jackman Statement, p. 5). Thus the amount of actual deferred maintenance on the entire Penn Central system is at least 20 percent larger than on the 15,000-mile core system, or approximately $190 million; the actual amount is undoubtedly larger than $190 million, since financial constraints have forced the Trustees to concentrate their maintenance on main lines included in the core systems.

maintenance suggests that less of the rail materials would be satisfactory for re-use and thus more would have to be sold for the lesser scrap value. Enactment of the Regional Rail Reorganization Act of 1973 manifests a strong Government policy to continue Penn Central's essential rail system in the national interest. Consequently, the standards of valuation may have to reflect its intrinsic railroad value, and not its worth as a soon-to-be-dismantled anachronism.[7] In such event, there can be no doubt as to the substantial impairment wrought by the inability to maintain the plant since bankruptcy.

Mr. Guest estimated that Penn Central's equity in its owned freight equipment had increased by $150 million. Guest Statement, pp. 8-10. This he reduced to $100 million on account of a decline in Penn Central's equity in owned passenger equipment. The increase in the value of Penn Central's equity in freight equipment was caused both by the retirement of debt at a rate faster than depreciation accrual and by an increase in the value of the equipment itself brought about by inflation. The estimate treats all of the equipment as being in good repair, an assumption which is not valid in light of the very high percentage of cars in bad order status for heavy repairs, a percentage which has increased since bankruptcy *(ibid.;* see J.D.S. 9). Nor does the estimate contain any discount on account of obsolescence or the mix of equipment in the Penn Central fleet. Guest Statement, p. 9.

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[7] See In re Port Authority Trans-Hudson Corp., 20 N.Y.2d 24, *cert. denied sub nom.* Port Authority Trans-Hudson v. Hudson Rapid Tubes Corp., 390 U.S. 1002 (1968).

The record, therefore, with respect to changes in value of rail assets may be summarized as follows:

Rail property	at least -$ 190 million
Equipment	100 " (including inflation)
Other assets[8]	50 "
Total	-$ 40 million

Putting the growth in postbankruptcy claims together with the decline in rail assets produces the following result:

Increase in postbankruptcy claims	$ 745 million
Decline in rail assets	40 "
Total	$ 785 million

Overall, therefore, the estates have been eroded by at least $785 million by being forced to bear the burden of deficit rail operations since reorganization.

The primary area in which the Government takes issue with this conclusion relates not to any changes in asset values brought about by continued rail operations but to changes in values of assets not used in rail operations caused by wholly extraneous factors. The value of Penn Central's investment in its nonrail assets has changed since bankruptcy, is changing now, and will undoubtedly change again. The value of Penn Central's numerous investments in other enterprises is constantly being altered by changing interest rate and stock market conditions. Penn Central's Park Avenue properties are primarily fixed rental leases,

[8]Mr. Guest testified to an increase in other assets, primarily escrow funds, which should be included in this analysis. Guest Statement, pp. 5, 16-17.

the value of which declines as interest rates rise. Penn Central's other nonrail real estate has not shared fully in the general inflationary increases in value. Guest Statement, pp. 10-12.

Exhibits 1 and 2 of the Palmieri Report (J.D.S. 44) show the uneven extent to which the various owning companies and first mortgages share in the ownership of the estate's nonoperating properties. In some cases these amounts represent a substantial portion of the company's assets or of the claims secured by the mortgage, but in others they are a very small part indeed. So, too, with the alleged increase in value of the Pennsylvania Company, the stock of which is pledged[9] to a group of banks to secure a lien of $300 million on a revolving credit agreement. According to the Government the value of the Debtor's investment in Pennsylvania Company has increased from $150 million at the time of bankrupty to $203 to $250 million at the present time. U.S. Brief, p. 69. Assuming the validity of the pledge, the sole effect of any such increase would be to satisfy a larger portion of a claim which on these facts is not fully secured. Even if the value of Pennco were to increase by another $100 million, no other creditor group would benefit from that increase, since as soon as the value of the stock exceeded $300 million, the claim would commence accruing postbankruptcy interest which, as of the end of 1973, amounted to $74 million.

Much of the Government's Appendix is directed to an elaborate criticism of the income-statement method of computing erosion, a method which the Government erroneously asserts was employed by the Trustees. U.S. Brief,

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[9]The validity of the pledge is the subject of litigation pending in the Reorganization Court.

p. 63. The Trustees agree that income deficits are not the best measure of erosion. They did not use this method in computing their estimate of erosion, but calculated erosion from the growth in postbankruptcy claims together with any change in value of rail assets. However, analysis of income deficits is an alternative means of calculating erosion and one which, in the context of the Penn Central proceeding, produces a very similar estimate of the amount of erosion which has accrued.

The existence of substantial deficits is not disputed; the parties have stipulated that Penn Central's ordinary net losses approximate $851 million for the period from June 21, 1970 through December 31, 1973. J.D.S. 59, Stip. ¶ 10. Moreover, rail operations have continued to produce heavy losses in 1972, and it is conceded by all that such losses will continue in the future.

The Government, however, suggests that five adjustments should be made to the income statements. U.S. Brief, pp. 63-65. These five items, which total $1,027 million, represent, the Government suggests, the amount by which the use of income losses potentially overstates erosion. Since the amount of the adjustments proposed exceeds the income losses by $176 million, the Government's analysis comes close to suggesting the conclusion that the estates have benefited from being forced to assume the rail losses, a conclusion so wholly at odds with common sense as plainly to demonstrate that something is fundamentally wrong with the Government's analysis.

The Government first proposes to eliminate income-statement depreciation from the income losses, asserting that depreciation represents an arbitrary charge which does not reflect actual changes in value, and from this inferring that necessarily the changes in value were far less than the

amount of depreciation taken.[10] The only evidence in the record, however, is that income-statement depreciation understates the actual decline in the values of the properties, particularly of the road properties. ICC Tr. 2037-39. Depreciation is a noncash item, a large portion of which is represented by depreciation on owned equipment. Not included in the income statement (but relied on by the Government to show an increase in the value of the Debtor's rail assets) is the retirement of debt on owned equipment accomplished by the Debtor out of cash flow. The Government overlooks the fact that such retirements, in the absence of earnings, are of no net benefit to secured claimants.[11]

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[10]Similar efforts to conjure away depreciation have been rejected. "Depreciation, however, does not create additions to assets or accessions to assets already held, but is a reflection of the very real economic fact that the assets are being consumed or wasted away in the process of keeping the railroad running and is actually a measure of the contribution of physical properties made by the mortgagees for this purpose." In re New York, N.H. & H. R.R., 278 F. Supp. 592, 604 (D. Conn. 1967), *aff'd.* 405 F.2d 50 (2d Cir. 1968).

[11]The basis for this is spelled out in an opinion by Judge Anderson in In re New York, N.H. & H. R.R., 278 F. Supp. 592, 604 n. 21:

> "For example assume an acquisition of $3,000,000 in equipment under either equipment trust of conditional sale. The equipment obligation is for 15 years, providing for interest at 4.87%, payable semi-annually. It is assumed that the equipment has a useful life of 20 years, at the end of which there will be a 2% net salvage value.
>
> "In each year, the principal of the obligation will be reduced by $200,000; annual depreciation charges will be $147,000 and annual interest payments will average $84,282. The balance sheet accounting entries will be as follows: Upon acquisition, an asset of

(continued)

The second adjustment proposed by the Government is to eliminate the costs charged in the income statement for track replacement. The Government contends that these replacements enhance the value of the estate and therefore cannot properly be regarded as erosion. Since track is not

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[11](continued)

> $3,000,000 is added, and a liability in equal amount is also created. As payments are made on principal, the balance sheet liability is reduced by $200,000 annually. Correspondingly, cash is also reduced by $200,000, plus the amount of interest paid. Each year the net book value of the asset is reduced by $147,000, reflecting the depreciation. On the income account, annual depreciation of $147,000 is taken as a charge against revenues. The interest payment is reflected as a fixed charge; it is deducted only *after* arriving at the figure designated 'Income Available for Fixed Charges.'
>
> "At the end of 15 years, principal payments will total $3,000,000, and interest payments will aggregate $1,264,234. The total cash outlay will thus be $4,264,234. At the end of 15 years, the equipment will be carried on the balance sheet as $795,000 with nothing owed thereon. Depreciation charges would have aggregated $2,205,000.
>
> "Under normal circumstances, the owner's equity would have benefited by $795,000, the difference between the amount of the principal payments and the depreciation (reflecting the decrease in value with use) over 15 years. However, cash outlays for interest of $1,264,234 were required to reach this result. Normally, since there is income available for fixed charges, the owner of the enterprise does not suffer an impairment of his equity.
>
> "On the other hand, if there is a deficit in income available for fixed charges, the cash which must be

(continued)

depreciable property, however, track replacement can enhance the value of the plant only if replacements exceed the amount of track which wears out. Mr. Jackman's testimony, the only evidence in the record on this point, shows conclusively that track replacements were not adequate to prevent continued deterioration of the rail plant and that the rail plant has continued to deteriorate since bankruptcy at an accelerating rate. Thus, despite the fact that $358 million has been spent on track replacement, the rail plant has less value now than it did prior to bankruptcy. Moreover, in singling out track replacement, the Government is trying to isolate but a single element of the balance sheet. While spending available cash for track replacement may well tend to lessen the erosion in the rail plant, given the cash stringency under which the estates have operated, devoting the cash to track replacement has prevented its being used elsewhere, a fact reflected in other areas of the balance sheet such as the growth of net current liabilities since bankruptcy.

"(continued)

paid as interest impairs the owner's equity. A deficit in this account means that after other expenses and charges for depreciation, revenues are insufficient to meet interest payments. In the above illustration cash of $4,264,234 was required to discharge the obligation. A non-cash charge to income was depreciation in the amount of $2,205,000. Accordingly, if there is a deficit in income available for fixed charges throughout the 15-year period, corpus will be impaired by the difference between $4,264,234 and $2,205,000, or $2,059, 234. Assuming that the asset is worth its net book value of $795,000 after 15 years, the owner has suffered a net loss in equity of $1,264,234."

The next two adjustments the Government proposes are that deferred leased line rentals and postbankruptcy interest on secured debt should not be treated as erosion because they cannot be quantified with absolute assurance. The comments we have previously made on these two items, see p. A-5, *supra*, apply here as well.

Finally, the Government suggests that the income-statement deficit may overstate erosion to the extent that it includes accrual of interest on unsecured prebankruptcy debt. We agree, except we note that the Government includes in such debt the Pennco debt, which may be secured.

Thus the only adjustment proposed by the Government which should be made to the income statement is to eliminate the $72.5 million in interest accrued on concededly unsecured prebankruptcy debt.[12] Making this adjustment to the income deficit of $851 million produces an estimate of erosion of $778.5 million—an estimate very close to the $785 million in erosion calculated by the Trustees pursuant to their method.

Coupled with its attacks on income-statement erosion is an argument by the Government that the estates have not been hurt by being subordinated to the lien of the Trustees' Certificates or by being forced to use cash generated by their nonrail assets to support rail operations. U.S. Brief, pp. 66-67. The estates have since bankruptcy used $310 million in nonrail income and nonrecurring cash infusions because the rail operations have produced not only net losses but also substantially negative cash flows. The Government suggests that these expenditures have not reduced

[12]Consisting of $35.2 million in interest on short-term notes in default and $37.3 million in interest on miscellaneous obligations other than the Pennco notes.

the value of the estates since additions and betterments and reductions in debt on owned equipment exceed that amount.[13] This suggestion is, at the least, misleading. Normally, additions and betterments and retirements of debt are expected to be covered by revenues, with funds made available by the noncash charge to depreciation. It is because of the inadequacy of revenues and of depreciation to generate these funds that sources external to the rail operation had to be tapped for operations to be sustained. Moreover, "additions and betterments" is a misleading term, since it suggests that the total expenditure represents an improvement, which is not the case here, since much of its limited capaital has been spent on safety projects which are necessary to permit the railroad to operate but which do not generally represent an improvement in the sense of adding value or generating efficiency.

A more fundamental objection to the Government's suggestion that the estates have not been harmed by use of external cash sources and income from nonrail operations to sustain rail operations is that, once again, it represents a plain instance of unfairness among creditors. The Trustees' Certificates represent a lien on all of the estate's assets; but the additions and betterments which the Government suggests were funded by the proceeds benefit, if they provide any benefit at all, only those claimants on whose properties they were made. Similarly, the Storm Agnes loan was used to restore the condition of the plant to what existed before a natural disaster occurred. At most, it served to prevent those claimants whose properties were damaged from having their security weakened. But it also created new claims

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[13] The Government does not claim these funds were actually spent for these purposes. The Trustees' estimated erosion includes the effect of these expenditures on both assets and claims.

prior to the interest of prebankruptcy unsecured claimants and stockholders. So, too, with the use of income from nonrail properties to sustain rail operations. That income could have been sequestered for the benefit of the claimants owning the properties generating the income. Instead, it was expended in rail operations or, even accepting the Government's view, for making additions and betterments on properties other than those properties which produced the income. Even in the fortuitous circumstance where cash generated from the income of a property subject to a given lien was expended on additions and betterments subject to the same lien, still it is plain that the estates have been injured. Assuming that the rail system continues to operate, those improvements become worth less with each passing day as they wear out and depreciate. If the railroad is to be liquidated, then surely cash in hand is worth far more than a rail improvement anchored to the ground requiring removal before it can be converted to cash by being sold for re-use or scrap. If the nonrecurring cash infusions and the nonrail income had not been used for rail operations, those amounts would have had to be borrowed for rail operations to continue, thereby creating a postbankruptcy claim ranking ahead of all prebankruptcy claims.

B. FUTURE EROSION

Projecting future erosion is a more difficult task than measuring past erosion, because the same tools are not available. The growth in claims and the changes in asset values must be projected, which in turn requires a projection of the financial results of performing the rail operations. Thus the basic ingredients in an estimate of future erosion are a projection of income or loss, a projection of growth of claims, and a projection of change in asset values.

The Trustees' estimate of future erosion commencing with January 1974 is set forth in the Affidavit of Mr. Guest submitted at the March 25, 1974 hearing. Guest Affidavit, pp. 9-10. That estimate shows that for the years 1974 through 1978 there will be a further growth in postbankruptcy claims of $588 million offset by an increase in Penn Central's equity in owned freight equipment represented by the reduction of equipment debt of $200 million, for a net increase in claims of $388 million. This estimate does not include any estimate for the increase in net current liabilities from the end of 1973 to 1978. Nor does the estimate give any effect to the possible further lowering of the value of the rail plant brought about by continuing maintenance at the present inadequate level, thereby resulting in further maintenance deferrals.

Much of the Government's attack on this estimate of erosion is based on its mistaken belief that Mr. Guest had used the so-called income-statement method. U.S. Brief, p. 63. But, as a reading of Mr. Guest's Affidavit makes clear, that simply is not the case. The only estimate of future erosion made in the affidavit is contained in paragraphs 12 and 13, and those paragraphs plainly deal with the accumulation of administration claims and changes in the value of rail plant and equipment. Mr. Guest does point to the projections of substantial future income deficits as supporting his conclusion that erosion will occur. Indeed, the likelihood that continued substantial net deficits will lead to further erosion seems self-evident.

The suggestion of the Government, see U.S. Brief, pp. 31-32, 72-73, that future erosion will be substantially abated by the availability of funds under Sections 213 and 215 of the RRRA and the recent ten percent freight rate increase is incorrect, since funds from these sources may not be available or adequate to reduce the primary sources of

erosion—namely, the continuing accrual of unpaid taxes, leased line rentals and postbankruptcy interest on secured claims.

Funds under Section 213 are limited to a total of $85 million, not all of which has been appropriated, and are restricted in use. The Government has taken the position that such funds may not be used for the purpose of combating erosion but only to supply the cash necessary to meet payrolls or other expenses, the current payment of which is essential to continued operation. Annex A to Trustees' Brief.

There are similar problems with the loans provided for in Section 215. Those loans may only be used for the purpose of rehabilitating or purchasing needed additions to plant or equipment. Apart from the considerable practical impediment to the immediate availability of such loans arising from the requirement that § 215 loans be spent only on properties that will be included in the final system plan, the loans may not be used directly to reduce any elements of erosion, such as, for example, the current payment of taxes. Moreover, both the Act itself and the public statements of USRA indicate that the loans will not enhance the value of the creditors' security since the amount of the improvement made will be deducted from the consideration paid by Conrail for the assets to avoid any double payment. Thus, loans under Section 215 cannot be used to abate financial erosion and will not cure physical erosion because any gains in value attributable to those expenditures are retained by the Government and do not pass to the creditors.

Finally, the Government suggests that the recent ten percent freight rate increase will reduce the projected erosion. The ten percent freight rate increase was not included in the income projection submitted to the Reorganization Court at the hearing on March 25, 1974. However, Mr.

Varalli subsequently testified to the impact of that increase on his projection during the hearing before the Reorganization Court on June 10, 1974. That testimony shows his earlier projections did not include an inflation rate as high as that being experienced now and likely to be experienced in the future, with the result that the net cash benefit of the increase will be far less than the amount of additional revenues. Moreover, Mr. Varalli's projections assumed that additional rate increases would be granted adequate to offset without lag any wage increases, an assumption which Mr. Varalli conceded was not realistic.[14]

Nor is it fair to assume that the impact of inflation can be wholly avoided through freight rate increases. As is shown in the statement of Mr. Charles C. Shannon, Exhibit 19 in the Interstate Commerce Commission proceedings, neither the freight rate increases requested nor the rate increases granted have been adequate in the past to recover the full amount of inflationary cost increases. Moreover, the freight rate increases which it is now apparent would be required to offset current inflation greatly exceed the increases assumed by Temple, Barker & Sloane in making its forecast of future traffic, thus calling into question the conclusion of that study that the rate increases assumed will not lead to diversion of traffic.

The critical assumption of all of these forecasts of future erosion is that the freight traffic projected will in fact be achieved by the Penn Central. Attaining this goal, however, requires that the continuing deterioration of Penn Central's

[14]Subsequent testimony in the Reorganization Court at a hearing on Sept. 19, 1974, shows that each one percent increase in wage levels and materials prices not offset by rate increases will add $15 million annually to Penn Central's cash drain. The unions involved are seeking wage increases totaling 35% over the next two years.

plant and equipment promptly be halted, a task which will consume all of the additional funds which the Government has suggested can be used to reduce erosion, including any net cash accruing from the 10 percent rate increase. Moreover, wholly apart from the question of the quality of service Penn Central can provide in light of its plant condition, substantial doubt is cast on the traffic forecasts by the enormous rate increases required to offset all of the unanticipated inflationary cost increases now being realized. Without such offset the forecasts understate future deficits. With such offset it is doubtful that the traffic results can be achieved given the diversion of traffic to other modes resulting from rate increases far above the level assumed in constructing the forecasts.

For all of these reasons, the estimate of future erosion presented to the Penn Central Reorganization Court on March 25, 1974, remains reasonable. That estimate, it should be noted, was based on a projection of income and of cash flow which was inadequate to permit the current payment of state and local taxes, of leased line rentals, or of postbankruptcy interest on mortgage debt. The sources of additional funds which the Government claims may lessen future erosion either cannot be used for that purpose or will be inadequate in amount to significantly lessen the projection. Moreover, $50 million in Trustees' Certificates become due in January, 1976, and would have to be refunded, presumably through another Government guarantee and probably at higher interest costs. And some external source of funds must be found to make up the $60 million cash-flow deficit forecast by Mr. Varalli for 1975 and 1976.

II. THE RECORD DOES NOT SHOW THAT THE VALUE OF THE ESTATES IS ADEQUATE TO PAY ALL CLAIMS.

While there is substantial valuation evidence in the record, it is not adequate to permit a definitive valuation to be made of the assets of the estates. In part, this is because the available studies are dated or were performed for specialized purposes. For example, the Day & Zimmerman liquidation study (J.D.S. 40) has a valuation date of December 31, 1970, and therefore does not reflect any of the changes which have occurred since that date. Similarly, the valuation of Pennco was a valuation made of only some of its assets and then on the assumption of a sale of those assets to third parties at a point in time long since past. Moreover, there are substantial disagreements between the parties as to appropriate valuation standards, and even within a given valuation standard there are disputes as to how particular kinds of assets should be valued.

Similar comments can be made concerning the estimates with respect to claims. Major claims categories have not yet been brought into the proofs-of-claim program for tabulation, verification, and, ultimately, liquidation. Thus, for example, late claims and claims reflecting potential liabilities not immediately recognized by the Trustees are just now being processed; and until the Trustees have affirmed or disaffirmed the Debtor's executory contracts, the proofs-of-claim program cannot include estimates of the very substantial potential claims arising from those leases which are

disaffirmed. For these and other reasons, the claims estimate used by the Government is surely too low.[15]

Not only is the record not adequate to permit a finding as to the total value of all assets and the total amount of all claims, but, more critically, the record is practically devoid of evidence showing the value of individual assets or of the amount of claims which may be charged against individual assets or individual debtors. Even were the total pool of assets adequate to cover the total amount of claims, that does not mean that every claim will be fully recognized and compensated. There are undoubtedly secured claims which are not fully secured and thus not only have lost their right to postbankruptcy interest but have already suffered erosion of their principal. And while in gross the amount of assets might seem adequate to permit recognition of stockholder interests, the Penn Central reorganization does not involve one debtor but rather sixteen, and it most certainly cannot

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[15]The Government purports to base its figures on the Trustees' Report on Proofs of Claim, Attachment No. 5 to the Trustees' Plan for Reorganization of April 1, 1972. However, the $1,583 million figure for all prebankruptcy claims used by the Government does not include any portion of the New Haven Trustee's claim other than the portion represented by the Divisional Mortgage. The estimate in the Report of unsecured claims, as the Report states, is an April 1, 1972 figure only, and, moreover, is based on amounts reflected in the Debtor's books. The sum actually claimed as of April 1, 1972 was considerably higher — $3,349 million; so presumably the ultimate liability as of April 1, 1972, as to just the claims discussed in the Report will lie somewhere between $1,583 and $3,349 million. The April 1, 1972, Report does not purport to deal with claims corresponding to the several categories of claimants exempted as of April 1, 1972, from the requirement of filing proofs of claim. Also, the Report does not include any estimate of claims which may be filed by or against leased lines or on account of guarantees.

be said that the assets of each debtor are more than sufficient to cover the claims against each debtor even though the totals may suggest that conclusion.[16]

III. CONTINUED EROSION OF THE ESTATES IS NOT A BETTER ALTERNATIVE TO OTHER SOLUTIONS.

Contrary to the contentions of the United States (Brief, pp. 31, 73), Penn Central would be better off if it were to embark upon a course of action such as that proposed by the Trustees in their Plan of Reorganization filed in July 1973 than if it is forced to continue assuming the burden of rail losses through 1975.

The United States rests its argument on the cash forecast prepared for the Trustees' Plan and submitted to the ICC as Exhibit 7 to Mr. Varalli's Statement (ICC Exhibit 16). That forecast was prepared to demonstrate the ability of the estates to carry out the Trustees' Plan under the least favorable assumptions. The forecast assumed that no payments on account of real estate taxes, leased line

[16]The uncertainty of claims and values in the case of the principal debtor — Penn Central Transportation Company — is particularly acute. Assuming a reorganization based on sale or other disposition of rail lines with most leases disaffirmed, an important element of value would be PCTC's interests in the leased lines, an interest which on this hypothesis would be represented by its ownership of their stock. Similarly, disaffirmance would create claims by PCTC against the lessors and by the lessors against PCTC, none of which can presently be quantified. All of these matters would have to be resolved in each of the 16 reorganizations before a reasonable appraisal for the prospects of value in PCTC's equity could be made. For the Government to assert in the face of such complexities that all shareholder interests will participate in the reorganizations is the most far-fetched sort of speculation.

rentals, postbankruptcy interest or the Debtor's equipment obligations would be made. The forecast also assumed, however, no income from the sale or disposition of real property, railroad equipment, or rail assets. These assumptions plainly do not reflect the conditions which would actually prevail if the Trustees' Plan were implemented. In 1971 and 1972 the Trustees sold properties for amounts totaling $80 million (J.D.S. 44, p. 11). Under the program set forth in the Palmieri Report (J.D.S. 44), such sales will substantially increase, as will income from nonrail properties. Moreover, given the acute shortage of railroad equipment and the substantial equity of Penn Central in such equipment, it is most unlikely that the Trustees would simply cease paying all equipment obligations and thereby permit the equipment to be repossessed. Instead, the equipment could be sold or rented, on a short- or long-term basis, to other railroads, thereby generating additional cash for the Trustees. Even if the equipment were repossessed and sold, it does not follow that all of the Debtor's equity would be lost or that the estates would not realize cash.

Thus the cash forecast submitted to the ICC substantially understates the cash receipts the estates would enjoy. With proceeds from the sale of real property and with income from the disposition or rental of equipment, the estates would have a greater cash flow, some of which could be applied to the current payment of state and local taxes and to the reduction of other high-priority administration claims. And, as real property was sold, the tax liens against such property would be satisfied and no further taxes would accrue. Consequently, contrary to what the United States suggests, if the Trustees could implement their plan of July 1973 it is likely that the estates could commence paying currently at least some of

the claims which would necessarily continue to accrue as erosion if continued rail operations are required.

More fundamental than the factual shortcomings of the Government's contention is its mischaracterization of the claims which would accrue as erosion at all. Under the Plan which the Trustees proposed to the Commission, the process leading to the final reorganization of the estates would be set in motion. Thus the costs which the Government characterizes as further erosion are not erosion but simply the expenses the estates will incur as part of disposing of their assets and effectuating major steps of the Plan of Reorganization. The key factor is that by the end of 1975, under the Trustees' Plan, all erosion from the continuation of the deficit-ridden rail function would have ended and the reorganization process would have been far advanced. On the other hand, if rail operations must be continued, then by the end of 1975 additional erosion would accrue and the estates might not be any closer to final reorganization than they are today. The Act does not put any time limit on erosion; it would permit the Congress indefinitely to reject successive proposed final system plans. (Moreover, under the Government's theory — a theory we think wholly wrong — the Special Court would be free to refuse to order conveyance pursuant to a final system plan if it found the plan unfair and inequitable. If that happened, early 1976 would find the estates burdened with additional accumulations of erosion and faced with the necessity then for adopting a Plan looking toward disposition of their rail and other assets.)

CERTIFICATE OF SERVICE

I hereby certify that I have this 10th day of October, 1974, caused three (3) copies of the foregoing Brief to be mailed first-class, postage prepaid to:

The Honorable Robert H. Bork
Solicitor General
Department of Justice
Washington, D.C. 20530

Lloyd N. Cutler, Esquire
Wilmer, Cutler & Pickering
1666 K Street, N.W.
Washington, D.C. 20006

Louis A. Craco, Esquire
Willkie, Farr & Gallagher
1 Chase Manhattan Plaza
New York, N.Y. 10005

Joseph Auerbach, Esquire
Sullivan & Worcester
225 Franklin Street
Boston, Mass. 02110

David Berger, Esquire
1622 Locust Street
Philadelphia, Pa. 10103

Brice M. Clagett

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

REPLY BRIEF OF APPELLANT UNITED STATES RAILWAY ASSOCIATION

[redacted]

Louis A. Cox
William E. Fenner
Louis E. Cox

Attorneys for the United States Railway Association

Of Counsel:

Robert B. Carter
Paul G. Hudson
William T. Lake
Wilmer, Cutler & Pickering
1666 K Street, N.W.
Washington, D.C. 20006

Joseph Jay Simeran
Senior Legal Consultant
United States Railway Association
2100 Second Street, S.W.
Washington, D.C. 20590

October 15, 1974

INDEX

	Page
TABLE OF AUTHORITIES	II
I. THE DECISION OF THE SPECIAL COURT	1
II. RESTATEMENT OF THE ISSUES	2
III. PLAINTIFFS' ARGUMENTS CONCERNING THE TUCKER ACT ARE WITHOUT MERIT	7
IV. PLAINTIFFS HAVE PROVIDED NO BASIS FOR AN INJUNCTION TO PREVENT EROSION BEYOND CONSTITUTIONAL LIMITS	17
A. Plaintiffs Offer No Justification for Assuming that Conrail Will Fail	17
B. Plaintiffs Have Not Shown that They Are Suffering any Erosion Injury	22
C. It Has Not Been Shown that Erosion Will Exceed Constitutional Limits	25
CONCLUSION	30

TABLE OF AUTHORITIES

CASES:

	Page
American President Lines v. *Federal Maritime Board*, 133 F. Supp. 100 (D.D.C. 1955), *aff'd*, 235 F.2d 18 (D.C. Cir. 1956)	11
Brooks-Scanlon Co. v. *Railroad Commission*, 251 U.S. 396 (1920)	17, 18
Continental Bank v. *Chicago, Rock Island & P. Ry.*, 294 U.S. 648 (1935)	18, 27
Eastport Steamship Corp. v. *United States*, 372 F.2d 1002 (Ct. Cl. 1967)	9, 10
Ecker v. *Western P.R.R.*, 318 U.S. 448 (1943)	28
Eisen v. *Eastman*, 421 F.2d 560 (2d Cir. 1969)	19
General Telephone Co. v. *United States*, 449 F.2d 846 (5th Cir. 1971)	19
Glidden Co. v. *Zdanok*, 370 U.S. 530 (1962)	16
Hooe v. *United States*, 218 U.S. 322 (1910)	10
Hurley v. *Kincaid*, 285 U.S. 95 (1932)	10, 11, 12, 16
In re Boston & Maine Corp., 484 F.2d 369 (1st Cir. 1973)	19, 24
re Chicago, Rock Island & P. Ry., 168 F.2d 587 (7th Cir. 1948)	28
In re New York, N.H. & H.R.R., 304 F. Supp. 1121 (D. Conn. 1969)	27
Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949)	11
Lynch v. *United States*, 292 U.S. 571 (1934)	12
Malone v. *Bowdoin*, 369 U.S. 643 (1962)	11
Mitchell v. *United States*, 267 U.S. 341 (1925)	12, 13
New Haven Inclusion Cases, 399 U.S. 392 (1970)	19, 25, 26
Oklahoma v. *Guy F. Atkinson Co.*, 313 U.S. 508 (1941)	19
Phelps v. *United States*, 274 U.S. 341 (1927)	14
Phillips v. *Commissioner*, 283 U.S. 589 (1931)	14
Reconstruction Finance Corp. v. *Denver & Rio Grande W.R.R.*, 328 U.S. 495 (1946)	25, 26, 28
Richfield Oil Corp. v. *United States*, 207 F.2d 864 (9th Cir. 1953)	11
Tempel v. *United States*, 248 U.S. 121 (1918)	10

TABLE OF AUTHORITIES—Continued

	Page
United States v. *Causby*, 328 U.S. 256 (1946)	10
United States v. *Thayer-West Point Hotel Co.*, 329 U.S. 585 (1947)	14
Vanston Bondholders Protective Committee v. *Green*, 329 U.S. 156 (1946)	12
Western v. *McGehee*, 202 F. Supp. 287 (D. Md. 1962)	11
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952)	10, 14

CONSTITUTIONAL PROVISIONS AND STATUTES:

U.S. Constitution:

Article I	10
Amendment I	10
Amendment V	9, 10, 14

Bankruptcy Act:

Section 77, 11 U.S.C. § 205	5, 28

Regional Rail Reorganization Act of 1973:

Pub. L. 93-236, 87 Stat. 985	1, *passim*

Tucker Act:

28 U.S.C. § 1491	4, *passim*

MISCELLANEOUS:

5 Collier on Bankruptcy ¶ 77 (14th ed. rev. J. Moore 1974)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-167

UNITED STATES RAILWAY ASSOCIATION,
Appellant,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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REPLY BRIEF OF APPELLANT UNITED STATES RAILWAY ASSOCIATION

I. THE DECISION OF THE SPECIAL COURT

On September 30, 1974, the Special Court handed down its opinion on the appeals from the "180-day decisions" of the Reorganization Courts. It held that the Rail Act does provide a fair and equitable process for the reorganization of each debtor railroad. In reaching this conclusion, the Special Court considered and rejected the constitutional challenges presented in these cases.

We shall not here restate the many directly relevant conclusions of that distinguished panel. We emphasize, however, that there are two important differences between the Special Court proceedings and these cases. First, these cases, which involve challenges to the facial constitutionality of the Act, were decided below on motions for summary judgment based on a limited set of stipulations. The "180-day decisions" resulted from plenary proceedings, including live presentation of a great deal of evidence not of record in these cases. The Special Court itself emphasized that it had before it a more adequate record than the court below in these cases [1] and that the issues could not be resolved "without regard to the facts." [2] Second, while the question before the Special Court—whether the Act provides a fair and equitable process—included the constitutional issues presented in these cases, the Special Court made it clear that in its view the statutory "fairness and equity" standard is higher at critical points than the standard of bare constitutionality.[3]

II. RESTATEMENT OF THE ISSUES

Plaintiffs have challenged the constitutionality of the Rail Act on a number of grounds. One, relating to the alleged lack of an assured remedy for excessive erosion, was adopted by the court below, and another, relating to the statute's alleged lack of uniformity, was adopted in

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[1] *In the Matter of Penn Central Transportation Company, Debtor, et al.* (Nos. 74-6 through 74-12), Special Court, Regional Rail Reorganization Act of 1973 (Slip Opinion, September 30, 1974) ("*Special Court 180-Day Appeals*") at 33.

[2] *Id.* at 38.

[3] *Id.* at 39. We do not necessarily agree that in the circumstances of these cases the term "fair and equitable" imposes a higher standard than do the constitutional provisions invoked by Plaintiffs. The important point is that the Special Court held that the higher standard was satisfied.

minor part. The other grounds of attack were rejected as premature but have been renewed before this Court in further support of the decision under appeal.

All of these challenges, including those held premature below, have now been decisively rejected by the Special Court. We submit that this Court also should reject them and should reverse the decision below.

The question underlying all of these challenges is the future of the Penn Central. The Plaintiff investors contend that Penn Central is their railroad and Congress must choose between letting them dismantle it and directing a Government agency to buy the railroad for cash (at a price they say must be substantially higher than net liquidation value). The Special Court answered that contention decisively: "Congress did not have to choose between the Scylla of outright condemnation and subsequent nationalization and the Charybdis of a collapse of rail transportation in the most heavily industralized section of the country." [4] If a self-sustaining Conrail can be created out of portions of the railroads now in reorganization, the Penn Central estate can be required to await Conrail's creation and to accept Conrail securities as part of the consideration for the rail properties it transfers pursuant to the Act, as long as it is assured of receiving the "constitutional minimum" as determined by a federal court.

Plaintiffs advance four main arguments for striking down the Rail Act and forcing Congress, instead, to condemn and nationalize the Penn Central system. Each of these contentions is without merit.

A. First, Plaintiffs contend that Conrail will not in fact be a "self-sustaining rail service system" as re-

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[4] *Id.* at 59.

quired by the Rail Act, so the whole enterprise is futile. Having chosen to proceed by way of motion for summary judgment without any supporting financial analysis of Conrail's prospects, Plaintiffs rest this key contention on the naked assertion that, on the face of the Act, Conrail can be no more than a warmed-over Penn Central.[5]

This invitation to reject the Final System Plan as unworkable before it has been written should be declined. Congress has determined that with new legal and regulatory tools which create the capacity to redesign and reduce the system, together with the more than $2 billion in financial resources provided in the Rail Act, USRA can create a self-sustaining private rail system. The Penn Central Trustees have agreed that the basic concept of the Rail Act is "sound".[6] And, in the most careful judicial examination yet made of the prospects of Conrail's viability, based on a factual record not before this Court, the Special Court found "a sufficient possibility of the viability of Conrail that it is not unfair and inequitable to require [the investors] to await the processes of the Rail Reorganization Act if a remedy under the Tucker Act [for any shortfall of the consideration below the "constitutional minimum"] is ultimately available."[7] While the merits of that factual conclusion are not before this Court, the finding leaves no room whatsoever for Plaintiffs' contention that, as a matter of law, Conrail can be found non-viable now on the face of the statute alone.

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[5] Brief of Appellees Connecticut General Insurance Corp., *et al.*, in Nos. 74-165, 74-167, 74-168 ("Brief of Appellees Conn. Gen.") at 53-54. At the same time, Plaintiffs make the different and incompatible argument that Conrail is a new and untested concept in railroading. *Id.* at 55-56.

[6] Penn Central Trustees' April 1974 Report, J. Doc. 10 at 4.

[7] *Special Court 180-Day Appeals* at 83.

B. Plaintiffs next contend that reorganization of a railroad must be a "voluntary" process, and that the Rail Act is unconstitutional because they have chosen not to accept it. They argue that even if Conrail is viable, and even if the Rail Act assures the Penn Central estate that it will receive value equal to the "constitutional minimum" in Conrail securities, Government-guaranteed securities, and other consideration, they do not have to accept that consideration if they would prefer to do something else with the railroad—either dismantle it or force its nationalization. These contentions are refuted by the entire history of Section 77, which

> "reflects a public policy that the operation of railroads as sound, economic units should be achieved for the benefit of the public, regardless of the interests of creditors and stockholders." [8]

As the Special Court concluded, many decisions of this Court leave

> "no doubt that a bankruptcy court can constitutionally be vested with power to resort to its informed judgment in determining what constitutes satisfaction of the claims of creditors." [9]

C. Plaintiffs next contend that even if the end result, reorganization into Conrail, were constitutional, Congress cannot "get there from here." On the one hand, they claim that too much erosion of pre-bankruptcy claims will occur even during the very short period of time Congress has provided for a Final System Plan to be adopted and for Conrail to begin operations. On the other hand, they claim that this period must be substantially lengthened to allow judicial review of the valuation of the rail properties and the consideration *before*, rather

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[8] 5 Collier on Bankruptcy ¶ 77.02, at 469 (14th ed. rev. J. Moore 1974).

[9] *Special Court 180-Day Appeals* at 106.

than after, the properties are transferred and Conrail starts to function. The court below apparently accepted some part of these contentions, even though it did not define or quantify any such erosion or determine whether it exceeded constitutional limits. That court's ruling cannot be squared with the well-established principle, also apparently accepted by the court below, that a reasonable burden may be imposed on creditors and shareholders through interim erosion in order to provide an opportunity to reorganize.

On the basis of "more ample factual records" than the court below had,[10] the Special Court conducted a complete and penetrating analysis of the likelihood of erosion of the Penn Central estate. As that analysis cogently demonstrated, "the erosion likely during the interim period has been considerably exaggerated." [11] Even if the Act had not been passed, the chances that Penn Central would have been able to accomplish large-scale abandonments during the period the Act provides for development of a Final System Plan [12] "would have been exceedingly poor." [13]

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[10] *Special Court 180-Day Appeals* at 33.

[11] *Id.* at 56. See also *id.* at 107-08 n. 112.

[12] On the assumption that Congress does not disapprove the Final System Plan first submitted and that all other steps under the Act take the maximum time allowed, 620 days would pass between enactment of the Rail Act and transfer of rail properties to Conrail in mid-August 1975. As noted in Brief of Appellee and Cross-Appellee United States Railway Association in Nos. 74-165 and 74-166 ("Brief of Appellee USRA") at 3-4 n. 1, USRA has asked Congress to enact a 120-day extension of the statutory deadlines relating to the Final System Plan, and that request is now pending. The Special Court suggested that erosion might become a more serious question if there were substantial doubts that USRA will be able to meet its prescribed schedule or that Congress will accept the first Final System Plan, but it also ruled that the Tucker Act remedy would save the Act's constitutionality in that event. *Special Court 180-Day Appeals* at 56-57.

[13] *Special Court 180-Day Appeals* at 49.

D. Finally, Plaintiffs contend that *if* the resources explicitly provided by the Rail Act are not sufficient to provide the statutorily required "constitutional minimum" consideration for Penn Central's properties and for any constitutionally compensable erosion, the Rail Act impliedly bars a further remedy under the Tucker Act and the result will be a taking of Penn Central's property for public use for less than just compensation. But, as the Special Court found, the Act cannot fairly be read to deny a Tucker Act remedy in such circumstances. Accordingly, Plaintiffs' proper remedy is not a summary injunction in advance to protect against the admittedly hypothetical possibility of such a taking, but a Tucker Act suit for just compensation in the Court of Claims if and when facts are established that entitle them to maintain such a suit.[14]

III. PLAINTIFFS' ARGUMENTS CONCERNING THE TUCKER ACT ARE WITHOUT MERIT

Plaintiffs argue that the Rail Act, on its face, will or may cause a taking of their property for public use without just compensation. The Government parties urge, first, that Plaintiffs have not established and cannot establish now that such a taking will occur and, second, that in any event the Tucker Act, 28 U.S.C. § 1491, provides an adequate remedy at law whose availability precludes advance injunctive relief. Plaintiffs' responses have now been rejected by the Special Court and are without merit.

The Special Court has rejected the argument that Congress intended in the Rail Act to repeal or limit the Tucker Act so as to deny a remedy to rail estates for actions taken pursuant to the Rail Act. The Special Court found

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[14] See *id.* at 83-108.

> "no evidence in the text or scheme of the Act that if Congress had recognized possible constitutional inadequacy of compensation, it would have preferred that the Act be struck down, with consequent serious disarray, rather than that additional monies be expended to rectify the inadequacy." [15]

The New Haven Trustee has explicitly conceded that "[t]he RRRA is silent as to any intent of Congress partially to repeal 28 U.S.C. § 1491 in cases arising under the RRRA." [16] The *amici* Congressmen agree explicitly that the Rail Act neither repealed the Tucker Act nor "engrafted" it onto the Rail Act.[17]

The New Haven Trustee's basic objection to the Tucker Act remedy is that the "Penn Central Trustees have *no* substantive cause of action, under the Tucker Act, for a taking for which they can invoke the jurisdiction of the Court of Claims . . . ." [18] We find this argument hard to understand. The New Haven Trustee has argued here and below that the Rail Act will necessarily and unavoidably cause a taking of Penn Central's property for public use without just compensation. We believe that contention to be wrong, but it certainly states a cause of action for compensation from the United States under the Fifth Amendment.

What the New Haven Trustee appears to mean is that, even though the Tucker Act by its terms gives the Court

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[15] *Special Court 180-Day Appeals* at 88.

[16] Brief of New Haven Trustee, Appellee, in Nos. 74-165, 74-167, 74-168 ("Brief of Appellee New Haven Trustee") at 26. He says, further, "The New Haven Trustee has not asserted at any time that the jurisdiction of the Court of Claims under 28 U.S.C. § 1491 was impliedly repealed by the RRRA." *Id.* at 41.

[17] Brief Amicus Curiae of Certain United States Representatives at 17-22.

[18] Brief of Appellee New Haven Trustee at 41 (emphasis in original).

of Claims jurisdiction over "any claim against the United States founded . . . upon the Constitution," [19] that jurisdiction may in fact be invoked only if Congress intended a compensated taking. He argues that no Tucker Act remedy is available here because "the RRRA was not intended as an eminent domain statute." [20] The Special Court rejected this argument,[21] which is belied by the very case the New Haven Trustee cites, as well as by established legal principles and common sense. The real point of the long passage quoted by the New Haven Trustee from *Eastport Steamship* [22] is contained in the second-to-last sentence he quotes: [23]

> "Under Section 1491 what one must always ask is whether the *constitutional clause* or the legislation which the claimant cites can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." 372 F.2d at 1009 (emphasis added).

The Fifth Amendment certainly "mandates" compensation by the Federal Government for a taking of private property for public use.[24] It is well established and logical

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[19] 28 U.S.C. § 1491.

[20] Brief of Appellee New Haven Trustee at 40.

[21] *Special Court 180-Day Appeals* at 85.

[22] *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002 (Ct. Cl. 1967).

[23] Brief of Appellee New Haven Trustee at 40.

[24] Of course, as the *amici* Congressmen suggest, the Tucker Act does not "insure the constitutionality of [all] potential unconstitutional laws." Brief at 18, quoted *passim* by Plaintiffs. For example, abridgements of First Amendment rights will rarely, if ever, be compensable in money. Similarly, the Tucker Act is not an answer to Plaintiffs' "uniformity" argument, which is adequately disposed of on other grounds. The Tucker Act does, however, insulate otherwise authorized federal action from being *enjoined* on the ground that the action will or may cause a taking without just compensation. In that event, the proper remedy is a suit for compensation under the Tucker Act, as *Hurley* v. *Kincaid*, 285 U.S. 95 (1932), makes clear.

that a person may sue in the Court of Claims on the governmental promise contained in the Fifth Amendment itself, even where it is clear that Congress intended neither to take nor to pay. *United States* v. *Causby*, 328 U.S. 256 (1946). The Court of Claims therefore specifically considered and rejected on its merits the argument that a taking was involved in *Eastport Steamship*.[25]

Plaintiffs also invoke *Hooe* v. *United States*, 218 U.S. 322 (1910) and *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), but the Special Court held that the argument based on these cases "is without force." *Special Court 180-Day Appeals* at 102 n. 106. *Hooe* involved the occupation of a building by a federal officer who had no authority to rent the building. The holding was simply that the wholly unauthorized actions of that officer did not render the United States liable for rent. In *Youngstown*, this Court expressed doubt, on the basis of *Hooe*, that a Tucker Act remedy would be available for the President's seizure of steel mills because the issue on the merits in that case was whether the President's actions had been authorized by Congress.[26]

Plaintiffs next suggest that no court other than the Court of Claims has jurisdiction to make an initial determination of the jurisdiction of the Court of Claims.[27] Defendants placed in issue below the assertion that Plaintiffs are not entitled to equitable relief because, among other reasons, a suit in the Court of Claims is an adequate remedy at law. Once the court below reached the merits of that contention, it had to decide it,

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[25] 372 F.2d at 1011. The Court of Claims ruled on the merits that a federal agency's alleged abuse of regulatory authority by refusing permission to sell a ship did not constitute a taking of property. *Id.*

[26] *Tempel* v. *United States*, 248 U.S. 121 (1918) also lacks relevance here. The holding in that case was that a mere trespass ("sounding in tort") was not a compensable taking of property.

[27] Brief of Appellee New Haven Trustee at 33-37.

as the Supreme Court ruled that the district court should have decided the adequate-legal-remedy defense in *Hurley* v. *Kincaid*, 285 U.S. 95 (1932).[28] The decision of the court below rejecting that defense is now before this Court. As the Special Court observed, a decision by this Court on the merits of the Tucker Act issue would resolve one of the essential issues squarely framed by the pleadings in these cases. "[T]he Court of Claims will abide by [this Court's] ruling, and it is immaterial whether such observance would be a matter of collateral estoppel or respect for a binding precedent."[29]

The New Haven Trustee's attempt to distinguish *Hurley* on the ground that it "did not arise in a context where Congress had specifically provided for *another court* to render judgment as to the value of the property being taken and the value of the consideration provided under the law as compensation therefor"[30] is without merit. *Hurley* arose because the government officials declined to proceed by condemnation in the district court—certainly "another court"—as required by the flood-control statute involved in that case. This Court reversed an injunction that would have required the officials either to follow the statutory condemnation procedure or to cease work, and held that the landowner should have been left to his remedy at law in the Court of Claims even though that remedy was not contemplated by the flood-control statute.

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[28] See also *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697 n. 18 (1949); *Malone* v. *Bowdoin*, 369 U.S. 643, 647 n. 8 (1962); *Richfield Oil Corp.* v. *United States*, 207 F.2d 864, 871 (9th Cir. 1953); *American President Lines* v. *Federal Maritime Board*, 133 F. Supp. 100 (D.D.C. 1955), aff'd, 235 F.2d 18 (D.C. Cir. 1956); *Western* v. *McGehee*, 202 F. Supp. 287 (D. Md. 1962).

[29] *Special Court 180-Day Appeals* at 115.

[30] Brief of Appellee New Haven Trustee at 26 (emphasis in original).

Plaintiffs' contention that the Rail Act bars a Tucker Act remedy ultimately rests, as did the decision of the court below, on the erroneous legal premise that the Rail Act itself must show a Congressional intent to renew or revalidate the century-old jurisdiction of the Court of Claims. But, as the Special Court said on this very point, "[p]utting the wrong questions is not likely to beget right answers even in law." [31] As the Special Court went on to state, "the true issue is whether there is sufficient proof that Congress intended [in the Rail Act] to *prevent* such recourse," [32] a question that the Special Court throughly and persuasively answered in the negative. The Special Court found no such intention in the words of the statute, and it noted that no case had been cited "in which a court has resorted to statements on the floor of Congress in order to consign an [act] to futility or destruction." And the Special Court found authoritative precedent against inferring that Congress would have meant to bar an adequate remedy for any taking that Congress itself directed. *Lynch* v. *United States*, 292 U.S. 571, 586 (1934).

balance needed to provide just compensation. Plaintiff Mitchell initially accepted the full presidential award but later sued in the Court of Claims for additional compensation. This Court held that the later suit was *not* barred by his earlier acceptance of the award and failure to follow the statutory procedure.

On the merits, Mitchell claimed that he was entitled to compensation not only for the value of his land but also for the loss of his corn-growing business. This Court held that although the "special value of land due to its adaptability for use in a particular business is an element which the owner of land is entitled, under the Fifth Amendment, to have considered in determining the amount to be paid as just compensation . . .." *id.* at 344-[illegible] the Fifth Amendment does not [illegible] require compensation for purely "consequential" harm through loss of business when only the land is taken. On the assumption that there was no Fifth Amendment right to recover for the loss of the business as such, the Court considered and rejected, in the para-[illegible] quoted by the New Haven Trustee, the

recognized the difficulties inherent in any judicial valuation, but it held that valuation is a function traditionally assigned to courts and that it is not unfair or inequitable to vest this responsibility in the Special Court and, if necessary, in the Court of Claims.[35] While it is obvious that the valuation process will be long,[36] the "adequacy" of a legal remedy depends on the alternatives. The only alternatives Plaintiffs have suggested to proceeding under the Rail Act are (1) to leave the creditors alone to dismantle the Penn Central, with highly uncertain results to themselves and highly certain [illegible] (2) to have the United States purchase the entire railroad (or the part it wants to keep in operation) at values apparently to be determined in judicial proceedings. The practical valu[illegible]

of Claims judgment.[37] Plaintiffs seek to engender fears on that score by suggesting that the judgment might be "astronomical." [38] With respect to the Penn Central, however, the Special Court concluded that the investors' erosion claims were "considerably exaggerated." [39] It found that the chances of abandoning substantial amounts of rail lines within the planning period established by the Act would, even in the absence of the Act, "have been exceedingly poor." [40] It concluded that, "[b]arring an economic catastrophe, there is thus little likelihood [illegible] during 1975 Penn Central will experience any of [illegible] items of erosion we have recognized." [41] The Special Court also squarely ruled that Congress may compel the claimants to accept "Conrail securities, USRA obligations and other benefits up to their full value and need [illegible] on eminent domain, with concomitant cash payments only for any shortfall." [42] Consequently, in discounting the likelihood of any actual money judgment against the United States in the Court of Claims, the Special Court noted that "these amounts may be non-

impugn the good faith of Congress in sug-
Congress might "allow the processes of the

ppellee New Haven Trustee at 72-75; Brief of Ap-
n. at 98-101.

rt 180-Day Appeals at 111-12 n. 118.

See also *id.* at 107-08 n. 112.

See also *id.* at 92 n. 98.

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2 n. 98. Earlier, without actually deciding the issue, Court had suggested that the rail estates might not entitled to receive even as much as liquidation value, oncern value of Conrail (plus the USRA obligations efits) is found to be substantial although below liqui-
d. at 61-62 n. 61.

Act to go forward after a ruling that a remedy under the Tucker Act applies . . . [and] thereafter fail to respond." [44] On the contrary, "there seems to be no sound reason why the Court of Claims may not rely on the good faith of the United States." [45] Nothing in the history of the Rail Act or the post-enactment statements of its sponsors suggests that Congress intends such defiance.

Finally, this Court should not, as Plaintiffs and the Penn Central Trustees suggest, attempt to define and limit the issues that the Court of Claims might eventually have to consider. The range of the issues open to the Court of Claims will depend on what is decided by the Special Court and on appeal by this Court in the valuation proceedings under Section 303. Moreover, the Penn Central Trustees, who request this Court to narrow the issues, have no right or need to have this Court, at this time, rule out defenses that may appear to the Court of Claims (and to this Court on review of the Court of Claims) to be just. In particular, the Penn Central Trustees have no right to insist that the United States now waive diligence on their part in pursuing and preserving their claims. As *Hurley, supra,* makes clear, all the rail estates need or are entitled to at this time is assurance that there is a federal court with jurisdiction to provide an adequate remedy for any constitutional injury they can prove. When the potential injury is an inadequately compensated taking, the Tucker Act provides that assurance.

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[44] *Id.* at 111-12 n. 118.

[45] *Glidden Co.* v. *Zdanok,* 370 U.S. 530, 571 (1962), quoted in *Special Court 180-Day Appeals* at 111-12 n. 118.

IV. PLAINTIFFS HAVE PROVIDED NO BASIS FOR AN INJUNCTION TO PREVENT EROSION BEYOND CONSTITUTIONAL LIMITS

Plaintiffs argue that even if a Tucker Act remedy is available, the likelihood that the Rail Act will cause erosion beyond constitutional limits is so strong that it is unconstitutional to require them to suffer this erosion and take their chances on a Court of Claims remedy after Rail Act proceedings have run their course. Even if this were a sound legal theory for seeking an injunction, the argument fails for lack of proof of its essential premise.

If a substantial prospect of successful reorganization exists, a rail estate may be required to suffer uncompensated erosion for the period reasonably necessary to accomplish the reorganization. Congress has provided in the Rail Act a means of saving essential Penn Central rail operations, and Plaintiffs have offered no justification for disregarding the prospect that the Act will succeed in that objective. Therefore, Plaintiffs would be entitled to injunctive relief only if they could show a likelihood that erosion will occur pending the implementation of the Act *and* that it will exceed constitutional limits before the transfers occur under the Final System Plan. They have made neither showing. The remarkable thing about these cases is that the court below granted an injunction based on the *possibility* of unconstitutional erosion even though it did not find that Plaintiffs had made either of the showings necessary to support its order.

A. Plaintiffs Offer No Justification for Assuming that Conrail Will Fail.

This Court has established two constitutional principles that frame the erosion issues in this case. *Brooks-*

Scanlon[46] and related cases hold that the owners of a railroad are entitled to cease operations and liquidate if the road is unprofitable and has no prospect of being made profitable. By contrast, *Rock Island*[47] and subsequent cases under Section 77 make it clear that investors can be required to continue to devote their property to public rail use if the railroad can be restored to profitability through reorganization. In the reorganization, pre-bankruptcy claims may be postponed or eliminated to the extent necessary to achieve profitability; and the investors may be required to sustain an economic burden from interim operations for a period reasonably consumed by the reorganization process.

Plaintiffs contend that under *Brooks-Scanlon* the Penn Central estate cannot be required to continue operations. They argue that Penn Central has no prospect of successful reorganization, either in whole or in part, with or without the assistance of the Rail Act. Therefore, they contend, no additional uncompensated erosion may be required. Since Plaintiffs have sought summary judgment on a record devoid of evidence bearing on Conrail's viability, this argument requires them to show that Conrail's doom is plain on the face of the Rail Act. They have furnished no grounds for such a conclusion.

Plaintiffs suggest that the burden rested on the Government parties (even on Plaintiffs' motion for summary judgment) to prove that Conrail will be viable, and that those parties failed to carry the burden in the court below.[48] To the contrary, it is commonplace that persons

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[46] *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396 (1920).

[47] *Continental Bank* v. *Chicago, Rock Island & P. Ry.*, 294 U.S. 648 (1935).

[48] Brief of Appellees Conn. Gen. at 53; Brief for Appellee Penn Central Company in Nos. 74-165, 74-167, 74-168, at 16-17 n. 6 ("Brief for Appellee Penn Central Co."); see Brief of Appellee New Haven Trustee at 110.

challenging a congressional enactment on the ground that it violates their constitutional rights bear the burden of establishing that such a violation will or is likely to occur. In the railroad reorganization context, the courts have ruled that the burden of proving that interim operations would result in an unconstitutional taking of property rests on the opponents of continued service. *New Haven Inclusion Cases*, 399 U.S. 392, 492-93 (1970); *In re Boston & Maine Corp.*, 484 F.2d 369, 372-75 (1st Cir. 1973).

Plaintiffs' contention that Conrail cannot be viable is a direct attack on the legislature's judgment that the Rail Act offers a feasible solution to the Northeastern rail crisis. It is beyond dispute that the courts must defer to the judgment of the legislature on the appropriateness of legislation and on the likelihood that it will accomplish its purposes.[49]

Contrary to Plaintiffs' suggestion,[50] the court below did not accept Plaintiffs' invitation to second-guess the legislative judgment that a viable Conrail can be created. The majority held that all issues relating to the ultimate transfer of property were premature. Its injunction to prevent an "erosion taking" was based on the erroneous legal views that the Special Court may not consider pre-transfer erosion in determining the "constitutional minimum" consideration and that a Tucker Act remedy for such erosion is barred—views which the Special Court

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[49] See, *e.g.*, *Oklahoma* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 527, 533 (1941) (court deferred to Congress' judgment that proposed dam would relieve flooding and to Congress' choice of design); *Eisen* v. *Eastman*, 421 F.2d 560, 567 (2d Cir. 1969) (court deferred to legislative judgment that rent control law would relieve, rather than prolong, housing shortage); *General Telephone Co.* v. *United States*, 449 F.2d 846, 858-59 (5th Cir. 1971) (court deferred to FCC determination that CATV rules would enhance competition in cable TV market).

[50] See Brief of Appellees Conn. Gen. at 61; *cf. id.* at 28, 53; Brief for Appellee Penn Central Co. at 25-27, 29-30.

itself has since rejected.[51] The court below made no finding that Conrail will not or might not be viable. Judge Fullam, who concurred below and rendered the Penn Central 180-Decision since reversed by the Special Court, expressly held that "it would be both premature and inappropriate for this Court to express a judgment as to Conrail's prospects for viability."[52] Nor have the Penn Central Trustees, as some Plaintiffs assert, ever said "that the hope of reorganization afforded by the Act upon its own terms is ephemeral."[53] From the outset, the Trustees have taken the position that "[t]he basic concept of the Act is . . . sound"[54] and have agreed with the Government parties that the Act should be given a chance to work as long as a Tucker Act remedy is available.

The Special Court, in rejecting the "erosion taking" argument, did analyze Conrail's prospects for viability and concluded that those prospects are sufficiently good that, as long as a Tucker Act remedy is ultimately available, it is fair to require the investors to await Conrail's creation.[55] While we support that court's factual conclusions, we submit that this Court, lacking the factual record before the Special Court and not sitting in review of its decision, should not duplicate the Special Court's examination of Conrail's future. The Special Court acknowledged that it might be appropriate to defer to Congress' judgment that the Rail Act can succeed, "in the absence of contrary evidence."[56] It undertook a

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[51] *Special Court 180-Day Appeals* at 56, 83-102.

[52] *Penn Central* 180-Day Decision at 9, JA 124 at 133.

[53] Brief of Appellees Conn. Gen. at 80.

[54] Penn Central Trustees' April 1974 Report, J. Doc. 10 at 4.

[55] *Special Court 180-Day Appeals* at 70-83.

[56] *Id.* at 71. The Special Court said that, absent contrary evidence, the reorganization courts and the Special Court "perhaps

factual analysis of Conrail's prospects only because the opponents of reorganization had submitted affidavit evidence critical of those prospects. There is no such evidence in the record of these cases; by moving for summary judgment without any evidence at all on Conrail's viability, Plaintiffs sought a ruling on the facial constitutionality of the Rail Act. Obviously, nothing on the face of the Act indicates that USRA's planning process, aided by over $2 billion in federal assistance, will fail to produce a viable Conrail.

Plaintiffs' argument of last resort is that Conrail must have little chance of succeeding, because most of Penn Central's investors are resisting reorganization under the Rail Act.[57] That self-fulfilling prediction is irrelevant as well as misleading. As everyone involved has recognized at one time or another, wholesale liquidation of Penn Central is not a realistic option. By opposing reorganization under the Rail Act, Plaintiffs are not really seeking to be left alone to dismantle the railroad in the belief that it is worth more dead than alive. Rather, they seek to prevent reorganization under the Act in the hope that the Government will then be forced to nationalize the rail properties, at a price to the Government much greater than if a reorganization can be successfully ac-

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could rely on . . . a presumption" that Conrail will be viable. *Id.* at 71. Supporting this presumption are the great care that Congress devoted and the substantial public resources that Congress provided in designing a solution to problems revealed in the Penn Central reorganization (see Brief of Appellant United States Railway Association in No. 74-167, at 23-39), the "exceedingly heavy" practical compulsion on USRA to design a financially viable system (*Special Court 180-Day Appeals* at 71), and the fact that "[a] prime objective of the Act is to produce operating economies by eliminating unprofitable and duplicating mileage . . . ." *Id.* at 79.

[57] See Brief of Appellees Conn. Gen. at 80-81; Brief of Appellee New Haven Trustee at 87-89; *cf.* Brief for Appellee Penn Central Co. at 28.

complished.[58] Accordingly, the preferences of Penn Central's investors have little bearing on whether a viable Conrail is reasonably possible.

B. Plaintiffs Have Not Shown That They Are Suffering Any Erosion Injury.

We have contended that it is impossible to tell on the record in these cases whether any creditor or the shareholder will be worse off after the Rail Act is implemented than it would be if Penn Central took any presently available alternative course of action. Plaintiffs offer no support for a contrary conclusion.

The court below made no finding of the amount of erosion and did not say that it has or will exceed constitutional limits. Plaintiffs suggest that the lower court was inexact in its discussion of erosion, and that its findings merely lack "mathematical precision." [59] To the contrary, the court made no findings at all. After reciting the stipulated income-statement loss figures for past periods and concluding that the erosion issue is ripe, the court went on to grant injunctive relief based on the mere possibility that erosion beyond constitutional limits might ultimately be found to have occurred.[60] In contrast, on the basis of a "more ample factual record" than the court below had,[61] the Special Court concluded that for Penn Central in particular "the erosion likely during the interim period has been considerably exaggerated," [62] that there is "little

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[58] The New Haven Trustee is explicit in recommending that Conrail stock be purchased by USRA with Government-guaranteed obligations and the resulting cash be used to purchase Penn Central rail properties in eminent domain proceedings. Brief of Cross-Appellant New Haven Trustee in No. 74-166, at 89-90.

[59] See Brief of Appellee New Haven Trustee at 12-15, 78, 117. See also Brief for Appellee Penn Central Co. at 15.

[60] JA 9 at 36-40.

[61] *Special Court 180-Day Appeals* at 33.

[62] *Id.* at 56; see also *id.* at 107-08 n. 112.

likelihood" that Penn Central will suffer erosion during 1975,[63] and that even if the Rail Act had not been passed the chances that Penn Central would nevertheless have been able to accomplish large-scale abandonments by mid-August 1975 "would have been exceedingly poor."[64]

Plaintiffs fail to justify their position that appreciation in asset values should be ignored in determining whether the position of the Penn Central estate is improving or deteriorating. They suggest that increases in asset values should be disregarded because they are "caused by an inflationary economy."[65] However, the ability of the estate to satisfy claimants will be determined by matching the value of its assets, in dollars, against the dollar amounts of pre- and post-bankruptcy claims against it. That ability will inevitably be affected by the fact that Penn Central owns physical properties whose real value may be increasing substantially.[66] Plaintiffs suggest that the ruling to that effect in *In re Boston & Maine Corp.*, 484 F.2d 369, 373 n. 5 (1st Cir. 1973) is distinguishable because "[t]he point there at issue was one of standing"[67] to challenge continued operations pending reorganization. The issue in *Boston & Maine* was no more one of "standing" than the issue in these cases. In both cases, the question is whether parties who would concededly have standing if they could show any

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[63] *Id.* at 53.

[64] *Id.* at 49.

[65] Brief of Appellees Conn. Gen. at 46. Similar suggestions by the Penn Central Trustees are answered in detail in Brief of Appellee USRA at 23-24.

[66] As pointed out by the Special Court, there is some evidence that the liquidation value of Penn Central's properties (excluding the "Park Avenue" properties in New York City) may approximate $3.5 billion, of which over $2.6 billion represents land values not subject to deterioration in value through continued use. *Special Court 180-Day Appeals* at 53-54.

[67] Brief of Appellees Conn. Gen. at 46.

injury have established that continued reorganization proceedings will in fact cause them any harm.

Even if the value of the estate as a whole were declining now, that decline might be more than offset by the results of successful reorganization under the Act. Moreover, whether any class of claimants would fare better in, for example, a liquidation beginning now [68] than in a reorganization under the Act depends on the status of that class vis-a-vis other claimants and vis-a-vis the benefits provided by the Act. Plaintiffs assert that, since they include both secured and unsecured creditors and the shareholder of Penn Central, any decline in the value of the estate must be injuring at least one of them.[69] That argument ignores the fact that reorganization under the Act affords a prospect that substantial going-concern values may be produced and that other benefits may be conferred on the estate that will benefit the various claimants in different ways. For example, assuming that the shareholder's interest presently has some value, the $250 million in labor payments authorized by the Act may benefit it by relieving the estate of labor claims which would otherwise be incurred on abandonment and would prime the shareholder's claims.[70]

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[68] As the Special Court noted, immediate liquidation is not really a possibility because, absent the Rail Act, ICC abandonment authority would have to be obtained before liquidation could begin. The Special Court concluded that obtaining such authority would probably take longer than the period prescribed in the Rail Act for implementation of the Final System Plan. *Special Court 180-Day Appeals* at 41-49.

[69] Brief of Appellee New Haven Trustee at 85; Brief of Appellees Conn. Gen. at 34.

[70] The Special Court correctly recognized that such benefits may be taken into account in determining whether the consideration which claimants receive for their properties meets the constitutional minimum. *Special Court 180-Day Appeals at* 105.

C. It Has Not Been Shown That Erosion Will Exceed Constitutional Limits

Plaintiffs concede that, where there exists a reasonable prospect of reorganization, some economic burden may be imposed on claimants while the reorganization is accomplished.[71] As demonstrated in our Brief as Appellant,[72] the limit of uncompensated erosion can be determined only by balancing the economic injury to claimants from continued operations,[73] the harm to the public that would result if service were terminated, and the feasibility of possible solutions. The *New Haven* litigation demonstrates that such balancing can be done. But the record in this case contains nothing to suggest that any injury to claimants will be sufficient to outweigh the public interest in finding a way to continue Northeast rail operations under private ownership. Plaintiffs have produced no legal or factual basis for requiring reorganization efforts to be abandoned now.

The New Haven Trustee seeks to distinguish this Court's prior decisions permitting the imposition of substantial economic burdens on railroad estates pending reorganization. He suggests that *Denver & Rio Grande*[74] was a case in which there was "no erosion" because the book value of the road's assets increased during reorgani-

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[71] Brief of Appellees Conn. Gen. at 51-52; Brief of Appellee New Haven Trustee at 95-96; *cf.* Brief for Appellee Penn Central Co. at 24-29.

[72] Brief of Appellant United States Railway Association in No. 74-167, at 82-97.

[73] As the Special Court succinctly pointed out, economic injury from continued operations must "be viewed in a practical frame, namely, by comparing the prospects afforded by § 304(f) with those that would have prevailed in its absence." *Special Court 180-Day Appeals* at 47.

[74] *Reconstruction Finance Corp.* v. *Denver & Rio Grande W.R.R.*, 328 U.S. 495 (1946).

nsferee railroads. Rather than prolonging which Penn Central will be exposed to ero- il Act may well offer the fastest way to end re.

opening brief we argued that, even if the Rail ed a Tucker Act remedy, Plaintiffs were not en- an injunction because they failed to establish Rail Act would cause erosion beyond constitu- imits. We adhere to that position, but we agree United States that the Court should reach and the Tucker Act issue.

ally, the first defense to these actions for declara- d injunctive relief is that, even on their own es about the facts, Plaintiffs have an adequate at law under the Tucker Act. That issue is re squarely before the Court, and we believe the hould decide it. Only by so doing will this ques- Court of Claims jurisdiction be definitively re- ow in a way that will beyond doubt be binding ture Court of Claims proceeding.

peculiar circumstances of these cases, including rrelationship between these cases and the Special decision on the 180-day appeals, also make it ap- te for this Court now to decide this central issue. gress, USRA, the Special Court, the bankruptcy nd the trustees of the rail estates to discharge onsibilities in resolving the Northeast rail s a matter of fairness to all interests con- finitive answer to this question is plainly

CONCLUSION

The judgment of the court below should be reversed, except as to paragraphs 3 and 4c, with directions to enter an order granting Defendants' motion for summary judgment.

Respectfully submitted,

LLOYD N. CUTLER
WILLIAM R. PERLIK
LOUIS R. COHEN

Attorneys for the United States Railway Association

Of Counsel:

BARRY E. CARTER
PAUL C. HUDSON
WILLIAM T. LAKE
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

JORDAN JAY HILLMAN
Senior Legal Consultant
United States Railway Association
2100 Second Street, S.W.
Washington, D.C. 20590

October 10, 1974

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MICHAEL RODAK, JR., CLE

In The Supreme Court of the United States

OCTOBER TERM, 1974

No. 74–166

REGIONAL RAIL REORGANIZATION CASES

RICHARD JOYCE SMITH, Trustee of the Property of The New York, New Haven and Hartford Railroad Company, Debtor, Cross-Appellant

v.

UNITED STATES OF AMERICA, *et al.*, Cross-Appellees

ON CROSS-APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF OF CROSS-APPELLANT

Of Counsel:

MORRIS RAKER
CHARLES W. MORSE, JR.

SULLIVAN & WORCESTER
225 Franklin Street
Boston, Massachusetts
02110

JOSEPH AUERBACH
225 Franklin Street
Boston, Massachusetts
02110

JAMES WM. MOORE
54 Meadow Street
New Haven, Connecticut
06506

Attorneys for Appellant Richard Joyce Smith, Trustee of the Property of The New York, New Haven and Hartford Railroad Company, Debtor

TABLE OF CONTENTS

	Page
Table of Citations	iv
Introduction	1
PART ONE: ARGUMENT IN REPLY TO CROSS-APPELLEES:	
I. THE CONSTITUTIONAL ISSUES RAISED BY THE CROSS-APPEAL ARE RIPE FOR ADJUDICATION	3
A. The Alleged Existence of a Tucker Act Remedy Does Not Operate to Make Constitutional Issues Premature Because an Action for an Inadequately Compensated Taking Will Lie Only if the RRRA Is Constitutional	3
B. The New Haven Trustee Will Not Have a "Later and Better Opportunity" to Have an Adjudication of His Claim that the RRRA's Compulsory Conveyance Provisions Are Unconstitutional	4
II. THE NEW HAVEN TRUSTEE, AS A SECURED CREDITOR OF PENN CENTRAL, HAS STANDING TO ASSERT PENN CENTRAL'S RIGHTS UNDER THE FIFTH AMENDMENT, AS WELL AS HIS OWN RIGHTS, SINCE DIVESTMENT OF HIS LIENS BY §303(b)(2) OF THE RRRA IS A TAKING OF HIS PROPERTY WITHOUT JUST COMPENSATION	6
III. THE RRRA, CONSIDERED AS A REORGANIZATION STATUTE, IS INVALID AS A VIOLATION OF THE FIFTH AMENDMENT'S DUE PROCESS AND TAKINGS CLAUSES	8

Page

IV. PENN CENTRAL IS ENTITLED TO RECEIVE THE HIGHEST AND BEST USE VALUE OF ITS PROPERTIES AS A COMPLETE TRANSPORTATION SYSTEM IN MONEY OR ITS PERFECT EQUIVALENT; THE NEW HAVEN TRUSTEE IS ENTITLED TO FORECLOSURE ON HIS LIENED PROPERTY, OR THE FAIR VALUE THEREOF 10

A. The Railroad Enterprise Which Would Survive the RRRA, if It Is Not Enjoined, Will Be in Substance a Public Authority . 10

B. Since the RRRA is Invalid as Bankruptcy Legislation, the Compulsory Conveyance Provisions, Considered as an Exercise of Eminent Domain Power, Require Application of Principles of Condemnation Law to Determine Whether Payment of the "Constitutional Minimum" is Assured 12

C. Penn Central's Rail Properties Have a Condemnation Value as a Complete Transportation System Which is Greater than the "Bare Bones" Liquidation Value of its Rail Properties 13

D. The Governmental Appellees Cannot Have it Both Ways—Either the RRRA Is an Unconstitutional Attempt to Take Private Property Without Exercising Eminent Domain Powers; or the RRRA is Equivalent to Nationalization of Penn Central 20

V. THE LACK OF PRE-CONVEYANCE JUDICIAL REVIEW OF THE FAIRNESS AND EQUITY OF THE MANDATORY CONVEYANCES OFFENDS DUE PROCESS 22

Page

PART TWO: LEGAL ANALYSIS OF SPECIAL COURT'S SEPTEMBER 30, 1974 DECISION, *IN THE MATTER OF PENN CENTRAL TRANSPORTATION CO.* (No. 74-8):

I. PROCEDURAL STATUS OF SPECIAL COURT'S DECISION IN RELATION TO THE INSTANT APPEALS AND CROSS-APPEAL 26

II. ANALYSIS OF SPECIAL COURT'S OPINION 29

A. Introduction 29
B. Jurisdiction 29
C. Collateral Estoppel 32
D. The Requirement of Uniformity 34
E. Fair and Equitable Process—General Considerations 35
F. Erosion of Investors' Rights 35
G. The Compelled Conveyance and the Adequacy of the Consideration 40
H. Availability of a Remedy Under the Tucker Act 42
I. The Adequacy of the Remedy Under the Tucker Act 44

CONCLUSION 47

TABLE OF CITATIONS

CASES:	Page
Armstrong v. United States, 364 U.S. 40 (1960) .	7, 21
Battaglia v. General Motors Corp., 169 F. 2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948) .	31
Bauman v. Ross, 168 U.S. 548 (1897)	44
Brooks-Scanlon Co. v. Railroad Commission, 251 U.S. 396 (1920)	37
Bullock v. Railroad Commission of Florida, 254 U.S. 513 (1921)	37
Catlin v. United States, 324 U.S. 229 (1945) ...	23-24
Chicago & Southern Airlines v. Waterman S.S. Corp., 333 U.S. 103 (1948)	30
City of Omaha v. Omaha Water Co., 218 U.S. 180 (1910)	16
Denver v. Denver Union Water Co., 246 U.S. 178 (1918)	16
Des Moines Gas Co. v. City of Des Moines, 238 U.S. 153 (1915)	16
Eastport S.S. Corp. v. United States, 372 F. 2d 1002 (Ct. Cl. 1967)	42
Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944)	41
Group of Institutional Investors v. Chicago, M., St.P. & Pac. R.R., 318 U.S. 523 (1943)	40
Harlem Valley Transp. Ass'n v. Stafford, 360 F. Supp. 1057 (S.D.N.Y. 1973), aff'd – F. 2d – (2d Cir. 1974)	38
Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792) ...	30
Hurley v. Kincaid, 285 U.S. 95 (1932)	43
In re City of New York (Fifth Avenue Coach Lines), 18 N.Y. 2d 212, 219 N.E. 2d 410, *appeal dismissed sub. nom. Fifth Avenue Coach Lines v. City of New York*, 386 U.S. 778 (1966)	13 *et passim*
In re City of New York (Fifth Avenue Coach Lines), 22 N.Y. 2d 613, 241 N.E. 2d 717 (1968)	16

	Page
In re Litigation Under the RRRA of 1973, Docket No. 166 (J.P.M.L. March 25, 1974)	4-5, 33
In re New York, N.H. & H. R.R., 304 F. Supp. 793, 304 F. Supp. 1136 (D. Conn. 1969), *aff'd in part, rev'd in part, sub nom. New Haven Inclusion Cases*, 399 U.S. 392 (1970) ...	36
In re Penn Central Transportation Co. (Park Avenue Properties), 484 F. 2d 323 (3d Cir.), *cert. denied sub. nom. Baker v. Morgan Guaranty Trust Co. of N.Y.*, 42 U.S.L.W. 3334 (U.S., Dec. 3, 1973).	22
In re Port Authority Trans-Hudson Corp., 20 N.Y. 2d 457, 231 N.E. 2d 743, *cert. denied sub. nom. Port Authority Trans-Hudson Corp. v. Hudson Rapid Tubes Corp.*, 390 U.S. 1002 (1968)	13, 16-17, 19
In the Matter of Penn Central Transportation Co., (Special Court, Regional Rail Reorganization Act, No. 74-8, *et al.*, Sept. 30, 1974)	5 *et passim*
Kimball Laundry Co. v. United States, 338 U.S. 1 (1949)	16
Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949)	43
Lockerty v. Phillips, 319 U.S. 182 (1943)	31
Lynch v. United States, 292 U.S. 571 (1934) ...	43
Malone v. Bowdoin, 369 U.S. 643 (1962)	43
McGrath v. Kristensen, 340 U.S. 162 (1950) ...	30
Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893)	15
National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949)	29-30
New Haven Inclusion Cases, 399 U.S. 392 (1970)	19 *et passim*
New York, N.H. & H. R.R., 1st Mortgage 4% Bondholders' Committee v. United States, 305 F. Supp. 1049 (S.D.N.Y. 1969), *rev'd sub nom. New Haven Inclusion Cases*, 399 U.S. 392 (1970)	35-36
Palmer v. Massachusetts, 308 U.S. 79 (1939) ...	37

	Page
Railroad Commission v. Eastern Texas R.R., 264 U.S. 79 (1924)	37
Roberts v. City of New York, 295 U.S. 264 (1935)	18
Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957)	30
United States v. Causby, 328 U.S. 256 (1946)	43
United States v. Commodities Trading Corp., 339 U.S. 121 (1950)	16
United States v. King, 395 U.S. 1 (1969)	31, 44, 45
United States v. Klein, 80 U.S. (13 Wall.) 128 (1871)	31
United States v. Lee, 106 U.S. 196 (1882)	43
United States v. 1,000 Acres of Land, More or Less, in Plaquemines Parish, La., 162 F. Supp. 219 (E.D. La. 1958)	44
United States v. Sherwood, 312 U.S. 584 (1941)	31, 44, 45
Wright v. Union Central Life Ins. Co., 311 U.S. 273 (1940)	19
Yakus v. United States, 321 U.S. 414 (1944)	30, 31
Youngstown Sheet & Tube Co., v. Sawyer, 343 U.S. 579 (1952)	42-43
ADMINISTRATIVE DECISIONS:	
Penn Central Transportation Company Reorganization, Report on Reorganization Plans, Finance Docket No. 26241 (ICC, Sept. 28, 1973)	37
Pennsylvania R.R.—Merger—New York Central R.R., 334 I.C.C. 25 (1968)	35-36
CONSTITUTIONAL PROVISIONS AND STATUTES:	
Constitution of the United States:	
Article I, Sec. 8, Cl. 4 (Bankruptcy Clause)	8, 10, 46
Article III	29, 31, 33, 48
Amendment V (Takings and Due Process Clauses)	2 *et passim*
Amendment XIV	18

	Page
Statutes:	
Bankruptcy Act:	
Section 77, 11 U.S.C. §205	9, 29, 37
§77(g)	31, 32, 46
§77(o)	22
Judicial Code, 28 U.S.C.	
§1491 (Tucker Act)	2 *et passim*
§1651	48
§2282	28, 32, 33
§2284	4 *et passim*
National Environmental Policy Act of 1969, 42 U.S.C. §§4321 *et seq.*	38
Regional Rail Reorganization Act of 1973, Public Law 93-239, 87 Stat. 985, 45 U.S.C. §§701 *et seq.*:	
§207(b)	28 *et passim*
§208	30
§209(a)	4
§209(b)	5
§209(c)	4
§301	10
§302	40
§303(b)	6 *et passim*
§303(c)	12 *et passim*
§303(d)	24, 48
§304(f)	37
§601(c)	38
MISCELLANEOUS:	
Hart & Wechsler, The Federal Courts and the Federal System (2d Ed. 1973)	34
Press Release of USRA, Office of Public and Governmental Affairs, "Strategic Options (Alternate Industry Concepts)," August 22, 1974	12
Press Release of USRA, Office of Public and Governmental Affairs, September 30, 1974	11

In The
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OCTOBER TERM, 1974

No. 74–166

REGIONAL RAIL REORGANIZATION CASES

RICHARD JOYCE SMITH, Trustee of the Property
of
The New York, New Haven and Hartford
Railroad Company, Debtor, Cross-Appellant

v.

UNITED STATES OF AMERICA, *et al.*,
Cross-Appellees

ON CROSS-APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF OF CROSS-APPELLANT

INTRODUCTION

This reply brief is submitted on behalf of Cross-Appellant, Richard Joyce Smith, Trustee of the Property of The New York, New Haven and Hartford Railroad Company, Debtor (the "New Haven Trustee" and "New Haven," respectively). This brief will address the contentions made by the United States and the other governmental parties (herein collectively the "United States") in the brief for the Federal Appellees dated September, 1974, and the separate brief of United States Railway Association ("USRA") dated September 26, 1974.

This reply brief is in of two parts. Part One consists of an argument in reply to points made by the Cross-Appellees. Part Two is an analysis of the opinion of the Special Court dated September 30, 1974 holding that Penn Central is required to reorganize pursuant to the Regional Rail Reorganization Act of 1973 ("RRRA").

The Penn Central Trustees intervened in the action below as defendants, aligned with the United States and USRA as supporters of the constitutionality of the RRRA based on the alleged existence of a "Tucker Act remedy" under 28 U.S.C. §1491. On this cross-appeal the Penn Central Trustees, while maintaining their original position that the RRRA is allegedly constitutional because of the putative existence of a Tucker Act remedy, have parted company with the United States and USRA and have aligned themselves with the New Haven Trustee. The Penn Central Trustees take the position that the constitutional issue of whether the RRRA violates the New Haven Trustee's Fifth Amendment rights is ripe for adjudication; and the Penn Central Trustees argue that, absent a definitive judgment as to a Tucker Act remedy, the RRRA is unconstitutional insofar as it would, in an eminent domain context, fail to assure that the Penn Central estate will receive money or its perfect equivalent in an amount equal to the highest and best use value of its properties. See Penn Central Trustees' brief as Appellant in No. 74-165 (at 30-47, as to interim erosion taking; at 48-54, as to ripeness of permanent taking issue; at 54-62, as to the failure of the RRRA to assure just compensation for either interim erosion takings or the permanent taking; at 63-65, as to limits upon the defenses that may be deemed open to the United States in any Tucker Act action; and at 65-67, as to valuation of Conrail securities at actual fair market value rather than on a capitalization-of-prospective-earnings valuation).

PART ONE: ARGUMENT IN REPLY TO CROSS-APPELLEES

I

THE CONSTITUTIONAL ISSUES RAISED BY THE CROSS-APPEAL ARE RIPE FOR ADJUDICATION

The United States and USRA seek to have the Court defer consideration of the constitutional issues presented based on the dual contention that "manifold uncertainties" attend the operation of the RRRA, and that "later and better opportunities" are available for judicial determination of the New Haven Trustee's claim that the RRRA, on its face, offends his Fifth Amendment rights. United States' brief at 16-24. USRA makes a similar argument, but in addition claims that the interim erosion taking issue decided by the court below is not ripe for adjudication. USRA's brief at 15-33.

A. The Alleged Existence of a Tucker Act Remedy Does Not Operate to Make Constitutional Issues Premature Because an Action for an Inadequately Compensated Taking Will Lie Only if the RRRA Is Constitutional

A pervasive fallacy in the Federal Appellees' prematurity contention is the premise that the Tucker Act, by providing post-conveyance judicial review of the adequacy of the compensation for a taking by eminent domain, will provide an alternative form of judicial review of the same constitutional issues raised here. This premise is fallacious because, as we have previously shown (New Haven Trustee's brief as Appellee at 62-64), the Government's argument places the cart before the horse: the Tucker Act claim will be a valid cause of action only if the RRRA is a constitutionally valid exercise of the sovereign's power of eminent domain. But that is the very issue which the United States and USRA claim is premature.

B. The New Haven Trustee Will Not Have a "Later and Better Opportunity" to Have an Adjudication of His Claim that the RRRA's Compulsory Conveyance Provisions Are Unconstitutional

Aside from the Tucker Act remedy argument, the only basis upon which the United States and USRA suggest that there will be a "later and better opportunity" to adjudicate the constitutional issues now presented is that the New Haven Trustee might apply to a court convened under 28 U.S.C. §2284 on some day prior to the 60th day after submission by USRA to Congress of a final system plan, for an injunction against certification of such a plan by USRA to the Special Court pursuant to §209(c) of the RRRA.

But the RRRA itself will frustrate any attempt to secure subsequent judicial review because the injunction action which USRA claims could be brought at a later date is specifically barred by §209(a), first sentence, if not granted before the end of the 60th calendar day after submission of a final system plan to Congress:

> "Notwithstanding any other provision of law [a phrase which presumably includes all of Title 28, United States Code], the final system plan which is adopted by the Association [USRA] and which becomes effective after review by the Congress is not subject to review by any court except in accordance with this section."

It should be noted that, even while arguing that the present action is premature, the United States and USRA have carefully refrained from stipulating that they will not, in a subsequent action before a §2284 court, raise the issue of the allegedly exclusive jurisdiction of the Special Court.[1]

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[1]The issue of exclusive jurisdiction of the Special Court has already been raised once in *Smith v. United States* before the Judicial Panel on

(footnote continued on next page)

Thus, the only court with unassailable jurisdiction to enjoin certification to the Special Court of a final system plan is the Special Court itself. However, the Special Court's decision as to any application for an injunction is foreordained by its decision dated September 30, 1974 holding that Penn Central is subject to the RRRA on the basis of there being a Tucker Act remedy to rectify any failure of the RRRA to compensate Penn Central for its interim erosion and for the taking of its properties.[2]

The alleged "later and better opportunity" offered by the United States for the Court to adjudicate the constitutional issues now presented does not in fact exist for precisely the reasons set forth in the New Haven Trustee's brief as Cross-Appellant (at 24-31 and 34-35). The Government's prematurity argument, it is submitted, is not an attempt to assist this Court in de-

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(footnote continued from prior page)

Multi-District Litigation, and decided against the United States and USRA. *In re Litigation Under the Regional Rail Reorganization Act of 1973*, Docket No. 166 (J.P.M.L. March 25, 1974). The Panel's *Per Curiam* decision stated: "The Panel has carefully considered the respective contentions of the parties and finds that transfer of these actions under Section 209(b) of the Act to the Special Court must be denied." However, it can be expected that in response to any future action to enjoin implementation of the RRRA, the United States and USRA will apply to the Special Court for an injunction prohibiting suits in other courts. It is not clear that such an injunction, if granted, could be appealed to this Court.

[2] *In the Matter of Penn Central Transportation Co.* (Special Court, Regional Rail Reorganization Act, No. 74-8, *et al.*, Sept. 30, 1974). The Special Court has stayed its mandate of reversal of Judge Fullam's Order No. 1596 (JA 152) pending a decision by this Court on the instant cross-appeal and the related appeals (Nos. 74-165, 74-166, 74-167 and 74-168). If the Court does not reach the issue of the unconstitutionality of the RRRA, and of the existence of a Tucker Act remedy, the Special Court's decision will stand that the RRRA is constitutional and that a Tucker Act remedy exists under which the Penn Central Trustees and its creditors may sue the United States for money damages in the Court of Claims. See Part Two, *infra*, for an analysis of the Special Court's decision.

ciding the constitutional issue at a time when more facts about the final system plan will be known. The United States would prefer to postpone adjudication of the constitutionality of the RRRA until Conrail's take-over of Penn Central's rail properties is an accomplished fact. At that point, the New Haven Trustee and the New Haven bondholders will be remitted to the Court of Claims as their only remedy, without even a decision here that a valid cause of action exists in the Court of Claims.

II

THE NEW HAVEN TRUSTEE, AS A SECURED CREDITOR OF PENN CENTRAL, HAS STANDING TO ASSERT PENN CENTRAL'S RIGHTS UNDER THE FIFTH AMENDMENT, AS WELL AS HIS OWN RIGHTS, SINCE DIVESTMENT OF HIS LIENS BY §303(b)(2) OF THE RRRA IS A TAKING OF HIS PROPERTY WITHOUT JUST COMPENSATION

The United States' brief (at 24-25) challenges the standing of the New Haven Trustee to seek injunctive relief. USRA apparently concedes the standing issue.[3] The United States' standing argument is without substance.

First, the New Haven Trustee as a secured creditor of Penn Central, with a claim of some $124 million, plus interest, in default for over four years, has an obvious financial stake in a proposal under which a major portion of Penn Central's rail assets will be, in effect, converted into securities of uncertain market value. The New Haven Trustee claims that it is unconstitutional for Congress to require that Penn Central's

[3]See USRA's brief at 34 n.30.

rail assets be exchanged solely for securities of Conrail and USRA, without a *prior* judicial determination that the securities of Conrail and USRA have a fair market value equal to the highest and best use value of the properties conveyed. It is obvious that the New Haven Trustee has a direct financial stake in Penn Central sufficient to sustain his standing.

Second, the United States' argument ignores the challenge which the New Haven Trustee makes in his own right, *qua* secured creditor of Penn Central, that the divestment of *his* lien by §303(b)(2) of the RRRA is unconstitutional on its face.

Section 303(b)(2) provides in pertinent part:

> "(2) All rail properties conveyed to the Corporation [Conrail] and the respective profitable railroads . . . under this Section shall be conveyed free and clear of any liens or encumbrances. . . ."

The New Haven Trustee's standing as a lien creditor to challenge this portion of the RRRA is clear. *Cf. Armstrong v. United States*, 364 U.S. 40 (1960).

III

THE RRRA, CONSIDERED AS A REORGANIZATION STATUTE, IS INVALID AS A VIOLATION OF THE FIFTH AMENDMENT'S DUE PROCESS AND TAKINGS CLAUSES

The United States' brief (at 26-34) and USRA's brief (at 33-50) make an elaborate argument to the effect that, the Fifth Amendment notwithstanding, Congress has the inherent power under the Bankruptcy Clause to enact the RRRA.[4]

The New Haven Trustee does not challenge the doctrine that Congress has broad authority under Art. I, §8, Cl. 4 to pass laws on the subject of bankruptcies. The issue is not whether such power exists, but whether in the RRRA Congress, in purporting to exercise it, has transgressed the limits of the Due Process and Takings clauses of the Fifth Amendment. See New Haven Trustee's brief as Cross-Appellant (at 37-51), wherein the legal and factual setting of the RRRA is analyzed. The RRRA is, as Judge Fullam has recognized, an "*amalgam* of sale, reorganization and eminent domain concepts." (JA 77; emphasis added). See New Haven Trustee's brief as Cross-Appellant (at 47-51).

Indeed, each time the United States and USRA assert that a Tucker Act remedy exists, they implicitly

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[4]The arguments ignore Fifth Amendment limitations, and assert only the positive power granted by Art. I, §8, Cl. 4, as is evident from the captions:

"A. The Rail Act Operates As A Reorganization Statute Under Which Creditors Have No Constitutional Right To Payment of Their Claims in Cash." (United States' brief at 26).

"A. Congress Has Broad Authority To Provide for the Adjustment of Creditors' Claims in Corporate Reorganizations." (USRA's brief at 35).

recognize that the RRRA is, at least in substantial part, an eminent domain statute. The Tucker Act remedy could exist only under the theory of "inverse eminent domain." See New Haven Trustee's brief as Appellee (at 38-64).

The cases cited by the United States and USRA to uphold the authority of Congress to pass laws providing for reorganization of financially embarrassed railroads stand only for the proposition that §77 of the Bankruptcy Act is valid legislation as applied to railroads which are able to reorganize, either on an income basis, or by sale of their properties to a trunk-line carrier, or conceivably by sale of their properties to public authorities in negotiated transactions or by condemnation.

The problem presented by the RRRA as it relates to Penn Central is that Penn Central cannot be "reorganized" in the accepted legal definition of that term. If Penn Central were an ordinary business corporation, and not affected with an overriding public interest, based on the findings of fact in Opinion and Order No. 1543 (JA 89-101) there would be no alternative to its being adjudicated a bankrupt and its properties liquidated for the benefit of its creditors and stockholders. If the overriding public interest does in fact require a different result, without regard to the wishes of the present owners of and claimants to Penn Central's property, then it is reasonably obvious that the constitutional power which Congress must look to is the eminent domain power. As Judge Fullam noted in his opinion below:

> "...the plain purpose of the entire arrangement [of the RRRA] would be to insure the continued availability of these rail properties for use in meeting the public need for continued rail service, without regard to the wishes of the present owners of the properties." (JA 78).

As the arguments for and against the Tucker Act remedy attest, the real issue in the New Haven Trustee's cross-appeal is not whether the RRRA can be sustained *entirely* as a Bankruptcy Clause enactment. The real issue is, given the "amalgam" of eminent domain, sale and reorganization concepts which find expression in the RRRA, can Congress enact a "chameleon" like statute which is supportable in part under the Bankruptcy Clause, but when that Clause is exhausted by Fifth Amendment limitations, can change color so as to be a putatively valid exercise, in part, of the eminent domain power.

IV

PENN CENTRAL IS ENTITLED TO RECEIVE THE HIGHEST AND BEST USE VALUE OF ITS PROPERTIES AS A COMPLETE TRANSPORTATION SYSTEM IN MONEY OR ITS PERFECT EQUIVALENT; THE NEW HAVEN TRUSTEE IS ENTITLED TO FORECLOSURE ON HIS LIENED PROPERTY, OR THE FAIR VALUE THEREOF

A. The Railroad Enterprise Which Would Survive the RRRA, if It Is Not Enjoined, Will Be in Substance a Public Authority

The United States and USRA seek to negate the clear implication of §301 of the RRRA that Conrail will, in substance, be a public authority with a governmentally appointed management.

The history of Penn Central's reorganization during the past four years strongly suggests that Conrail will be dependent upon the Government indefinitely

for its capital funds.[5] Penn Central could not, even with the priority accorded to Trustees' Certificates, raise capital funds except with government guarantees. Amtrak, which was originally in concept supposed to be a private for-profit enterprise, is not private and is not profitable; it is, rather, dependent upon annual congressional budget appropriations both to finance its capital expenditures and its enormous operating losses. The losses result in large part from its payments in excess of $100 million per year to Penn Central for intercity passenger train service, without the receipt of which Penn Central's loss would be much greater.[6]

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[5]In a speech to the Fourth Annual Transportation Forum on September 30, 1974, Arthur D. Lewis, Chairman of USRA, stated:

> "First, the task of restructuring the bankrupt railroads into an economically healthy system is one which will require substantial financial aid. The current state of the Penn Central demonstrates the dimension of the capital investment required to create an efficient, economical and dependable physical plant for the railroads of the region.
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> * * *
>
> "Obviously, the problem is immense in scope and complexity. Penn Central has estimated that restoration of its properties will require over $3.3 billion, in 1973 prices, spent over the next eight years. Only a little over $2.0 billion will be generated internally and more than $1.0 billion will have to come from outside sources of capital. These figures are staggering, especially when viewed in the light of today's inflationary trends. This expenditure program will take place when costs will average half again as much as in 1973 (if we are lucky). The implications for the Association and for the entire rail industry as well are quite serious: much higher levels of revenues, investment and profitability will have to be achieved than ever achieved in the past, if private capital is to be used for the massive rebuilding requirements of railroad properties." Press Release of USRA, Office of Public and Governmental Affairs, Sept. 30, 1974, at 3.

[6]In the calendar year 1973, Amtrak's remuneration to Penn Central amounted to $131,510,000. Form R-1 Report, Schedule 600. In spite of payments received on account of contract service for Amtrak's account, Penn Central's passenger rail operations resulted in a loss (before fixed charges) of $45,825,000. Form R-1, Schedule 300, Col. (j).

In a Press Release dated August 22, 1974, a copy of which is reprinted as Appendix B to the September 30, 1974 decision of the Special Court,[7] USRA candidly acknowledges:

> "The level of rehabilitation . . . required and the possible payment of 'real' money [presumably as contrasted with paper securities] for the assets at some point in time *makes Conrail viability uncertain.* To protect government funding *against this risk of default* the law *already* sets up Presidential appointments as the majority of the *Conrail* board for an unspecified (but lengthy) period of time. The more federal funding required . . . the greater the risk of a *permanent federal role.*" Slip opinion at B-3 (emphasis added).

B. Since the RRRA is Invalid as Bankruptcy Legislation, the Compulsory Conveyance Provisions, Considered as an Exercise of Eminent Domain Power, Require Application of Principles of Condemnation Law to Determine Whether Payment of the "Constitutional Minimum" is Assured

USRA argues that establishment of the legal standard of "constitutional minimum" is one reserved by Congress exclusively to the Special Court, and that no prior decision of this Court has any bearing on the issue of the valuation methodology to be employed in giving body to the skeletal phrase "constitutional minimum" employed in the RRRA (USRA's brief at 58-64). This argument is not addressed to any relevant issue in this cross-appeal. The New Haven Trustee does not seek an advance declaratory judgment from the Court that will be binding on the Special Court when, as and if proceedings mandated by §303(c) of the

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[7] *In the Matter of Penn Central Transportation Co.* (Special Court, Regional Rail Reorganization Act, No. 74-8 *et al.*, September 30, 1974), slip opinion at B1-B3.

RRRA are instituted, which could only be *after* the conveyances provided in §303(b). The New Haven Trustee seeks to enjoin §303(b) from being implemented on the ground that it is unconstitutional insofar as §303(c) does not assure Penn Central or the New Haven Trustee of the receipt of money for their respective property interests.

C. Penn Central's Rail Properties Have a Condemnation Value as a Complete Transportation System Which is Greater than the "Bare Bones" Liquidation Value of its Rail Properties

USRA's brief (at 64-70) asserts that the precedents of the *Fifth Avenue Bus*[8] and *Hudson Rapid Tubes*[9] cases do not apply to a federal eminent domain statute. USRA claims that the United States is subject to a lesser standard of just compensation than the states when Congress concludes that a major interstate railroad has in the 1970's encountered the same difficulties which the urban street railways, subway systems and bus companies encountered in the period of the 1940's, 1950's and 1960's.[10] USRA does not spell out its rationale for contending that a railroad operating in more than one state has lesser constitutional rights than a railroad which operates, for example, solely in the State of New York. To the extent that relevant constitutional decisions of state courts are relied upon by the New Haven Trustee, those decisions are based on the Fifth Amendment's "just compensation" clause, and cite precedents of the Court interpreting

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[8] *In re City of New York (Fifth Avenue Coach Lines)*, 18 N.Y. 2d 212, 219 N.E. 2d 410, *appeal dismissed sub. nom. Fifth Avenue Coach Lines v. City of New York*, 380 U.S. 778 (1966).

[9] *In re Port Authority Trans-Hudson Corp.*, 20 N.Y. 2d 457, 231 N.E. 2d 743, *cert. denied sub. nom. Port Authority Trans-Hudson Corp. v. Hudson Rapid Tubes Corp.*, 390 U.S. 1002 (1968).

[10] The United States' brief does not address this issue.

the United States Constitution as well as precedents of the state courts. For example, in the first decision by the Court of Appeals of New York in the *Fifth Avenue Bus* case, it was noted that:

> "When private property is taken for public use, our State and Federal Constitutions alike mandate the payment of 'just compensation' (N.Y. Const., art. I., §7; U.S. Const. 5th Amdt.)." 219 N.E. 2d at 415 (Keating, J., dissenting on other grounds).

The rationale of the majority of the Court of Appeals[11] stressed that a regulated public utility, whose rates were fixed in large part by political expediency rather than by the value of the service it performs for the public, is in a peculiarly disadvantageous position in a period of high inflation:

> "The problems raised in this condemnation proceeding are difficult and to a degree unique. In this era of spiraling inflation such proceedings will continually reoccur since it is beyond the resources of private enterprise to provide mass transportation at modest rates, dictated by political exigencies and confiscatory as far as the equity in the business is concerned." 219 N.E. 2d at 411.[12]

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[11]All seven judges of the Court of Appeals of New York approved the concept that the two bus companies (Fifth Avenue, which operated in Manhattan, and Surface Transportation, which operated in The Bronx) were entitled to be paid for their physical assets on the basis of "reproduction cost new, less depreciation;" and all seven judges further agreed that the bus companies were entitled to an additional amount reflecting their going-concern or "assemblage" value as complete transportation systems, in spite of the fact that their operations were substantially unprofitable. The Court of Appeals, in complete agreement on the law, split 4-3 as to whether the Appellate Division had correctly applied the law.

[12]*Cf.* USRA brief (at 66) arguing that any valuation of Penn Central that would allow value to be ascribed to Penn Central Company's stock interest in Penn Central would amount to "a rich $13.5 billion bonanza against which valid pre-bankruptcy claims may total no more than $2.7 billion." USRA plainly intends that the RRRA shall not result in any pay-

(footnote continued on following page)

Judge Burke then quoted from the Court's opinion in the *Monongahela Navigation* case,[13] indicating that in his view the words "just compensation" have the same meaning in the New York State Constitution as in the United States Constitution.

Judge Burke concluded:

> "In the case before us, claimants' property was a viable operative transit system and was taken as such, with a clearly expressed intent to so operate it after the forced transfer of title. . . . Claimants' undeniably competent and efficient personnel were taken over by the City along with the claimants' routes, franchises, operating schedules, accounting and maintenance records, etc.—all going concern assets for which claimants must be duly compensated." 219 N.E. 2d at 415.

The effect of the RRRA in transferring Penn Central as a complete transportation system to the ownership of Conrail is substantially identical.

The New Haven Trustee agrees that "condemnees may not demand an artificial or inflated value based on the public need."[14] He does not seek a "hold-up" value, as alleged by USRA (USRA's brief at 65). However, as all seven judges of the Court of Appeals recognized in the *Fifth Avenue Bus* case, when a public authority takes a privately-owned transportation facility for continued public use because of the public need for its service, and the inability of private enterprise to

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ment in respect of Penn Central Company's equity in Penn Central Transportation Company. It is also significant that USRA excludes approximately $1 billion of post-reorganization liabilities in comparing the reproduction-cost-new-less-depreciation value of the assets with the claims against the estate.

[13] *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893).

[14] Keating, J., dissenting on other grounds in the first *Fifth Avenue Bus* decision, 219 N.E. 2d at 415.

operate profitably, the condemnee, while not entitled to "hold up" the public or to claim an award based on the amount it would cost the public to construct a new facility having comparable public service benefits, is entitled to compensation for "assemblage" value of its transportation system beyond the "bare bones" of its physical assets valued under the reproduction-cost-new-less-depreciation formula.[15]

In the *Hudson Rapid Tubes* case, Judge Keating, who dissented in the *Fifth Avenue Bus* case, wrote the opinion of the court.[16] Judge Keating relied on this Court's holding in *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950) that

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[15]Judge Keating, dissenting on other grounds, observed:

"In addition [to the value of the physical assets], there is real value attributable to the fact that these tangible assets are not isolated units. They are fully integrated and operating transit systems, held together by personnel available and working, franchises, operating schedules, established routes, accounting and maintenance records and all of the other elements which spell the difference between 'bare bones' and a transportation system in operation. These are but elements of a 'going concern' for which a buyer would willingly pay. . . . As elements of a business which have value, it is only proper that they should be considered part of the 'just compensation' to which the condemnees are entitled and so the case law has consistently held." 219 N.E. 2d at 416.

The cases cited by Judge Keating include the following decisions of this Court: *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *Des Moines Gas Co. v. City of Des Moines*, 238 U.S. 153 (1915); *City of Omaha v. Omaha Water Co.*, 218 U.S. 180 (1910); *Denver v. Denver Union Water Co.*, 246 U.S. 178 (1918). *Kimball Laundry Co. v. United States, supra*, is cited in USRA's brief (at 67 n. 77 and 69 n. 83) as *contra* authority to the New York State Court decisions; it is not.

[16]USRA's brief at 69 states:

"In a forceful dissent, the author of the Fifth Avenue opinion [i.e. Judge Burke] noted the illogic of basing an award on original cost when the current market value did not reflect that cost."

The same Judge Burke, one year later, in his second *Fifth Avenue Bus* decision, 22 N.Y. 2d 613, 241 N.E. 2d 717 (1968), stated:

"In the *Port Authority* case, the 'willing buyer' rule was rejected and the rule set forth in *Fifth Avenue* reaffirmed." *Id.* at 720.

(footnote continued on following page)

" '. . . when [the] market value [of a condemnee's property] has been too difficult to find, or *when its application would result in manifest injustice to owner or public*, courts have fashioned and applied other standards.' " 231 N.E. 2d at 738, quoting 339 U.S. at 123 (emphasis supplied by Judge Keating).

The significance of the *Fifth Avenue Bus* and *Hudson Rapid Tubes* cases to the issues presented by this cross-appeal is as follows:

1. It cannot be the law that states are forbidden to take private property for public use without just compensation payable in money, but the federal government is not subject to the same strictures. Any suggestion that the rationale of *Fifth Avenue Bus* and *Hudson Rapid Tubes* is not applicable here because we are dealing with the Fifth Amendment's "just compensation" clause, and not the State of New York's "just compensation" clause, should be rejected. Contrariwise, if the compulsory conveyance provision of the RRRA were held to be a valid device by which the United States Government could take the properties of an interstate railroad for public purposes and issue securities of the taking authority as the payment therefor, then the State of New York could not be prohibited from authorizing, for example, a take-over of a

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It is obvious that Judge Burke's dissent in the *Hudson Rapid Tubes* case turned on his very different view of the facts: in his view, the tunnel railroad constituted a "decrepit, financially hopeless transportation system, tailored to the measurements of an ancient, badly mended tunnel. . . ." 231 N.E. 2d at 742 n.1.

On its facts, Penn Central more closely resembles the *Fifth Avenue Bus* situation than it does the *Hudson Rapid Tubes* situation. Penn Central's present plight is in large measure the result of years of regulatory constraints, including the necessity to operate money-losing passenger train and freight services. But for these regulatory constraints, Penn Central might well be a profitable railroad, just as Fifth Avenue Bus Company might have been profitable had it been allowed to charge fares determined solely by business considerations.

railroad such as the Long Island Railroad in exchange for securities of a state transportation authority. Yet such a result would be difficult to reconcile with the decisions interpreting the Fourteenth Amendment.

2. In the valuation of physical properties of a complete transportation system in condemnation, the whole may well be worth more than the sum of the parts. Whether the excess value is called "going concern value" or "assemblage" value, it is clearly a value which must be reflected in a condemnation award. That value need not be the same as today's cost in assembling transportation corridors, because today's assemblage cost would represent value to the condemnor, not loss to the condemnee.

3. On the other hand, the assemblage value is not proven to be zero by reason of the unprofitability of the private transportation system in the regulated environment in which it was forced to operate. That is the meaning of *Fifth Avenue Bus*. The United States cannot first insist that Penn Central incur large losses by requiring it to maintain rail passenger operations at huge deficits, and to service lightly used freight lines; and then, when it condemns the property for the same use, declare that the "going concern" value is zero because "substantial prices are not paid for the privilege of conducting a business at a loss."[17]

4. The value of the physical properties themselves will vary depending on whether they are single-use or multi-use properties and on many other factors. A series of railroad tunnels which bisect mid-town Manhattan and are absolutely essential for through passenger trains from Washington to Boston, as one

[17]Mr. Justice Cardozo in *Roberts v. City of New York*, 295 U.S. 264, 282 (1935), quoted in USRA's brief at 67.

example, are likely to have a value of a different order of magnitude than a tunnel of equal length bisecting mountains in rural Pennsylvania where alternative rail routings exist. The *Hudson Rapid Tubes* case does not stand for the proposition that historical cost less depreciation is the guide; if it did, it would be inconsistent with both the first and second *Fifth Avenue Bus* decisions, where the physicial assets were valued at reproduction cost new less depreciation. As the Court pointed out in *New Haven Inclusion Cases, supra,* 399 U.S. 392, 482 n. 80 (1970), the decisional principle for which both *Fifth Avenue Bus* and *Hudson Rapid Tubes* can be cited is that the New York courts "awarded the owners the value reflecting the highest and best price for their properties," which the Court held was "precisely the treatment accorded the New Haven" in its sale of rail properties to Penn Central.

The New Haven Trustee and the Penn Central Trustees are in agreement on the proposition that, in an eminent domain context, Penn Central is entitled to the highest and best use value for its properties. Such value will, in turn, assure secured creditors of Penn Central that they will receive either payment of their claim in full, or if the properties securing their claim have a lesser value, the value of the properties so determined. Such a result would be in perfect harmony with the Court's decision in *Wright v. Union Central Life Ins. Co.,* 311 U.S. 273 (1940), discussed in USRA's brief at 44-47. See also United States' brief at 26 and 32 n. 14.

D. The Governmental Appellees Cannot Have it Both Ways—Either the RRRA Is an Unconstitutional Attempt to Take Private Property Without Exercising Eminent Domain Powers; or the RRRA Is Equivalent to Nationalization of Penn Central

USRA mistakenly asserts that the New Haven Trustee affirmatively advocates nationalization of Penn Central, and seeks to have the Court exceed its proper role by advising Congress on "how to amend or replace" the RRRA. USRA's brief (at 70-72). This is a distortion of a section of the New Haven Trustee's brief as Cross Appellant which discusses a public interest solution which might, but only if Congress (not the Court) concurred, be deemed a navigable route between the Scylla of a complete cessation of rail operations in the most heavily industrialized area of the United States and the Charybdis of a Tucker Act judgment against the United States Treasury amounting to hundreds of millions or billions of dollars. See New Haven Trustee's brief as Cross-Appellant (at 88-92).[18]

The Federal Appellees should not be permitted to have it both ways at once—either the RRRA is sustainable as eminent domain legislation, in which case there is a Tucker Act remedy; or it is not so sustainable, in which case it is unconstitutional.

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[18]To carry the metaphor one step further, it is a well-charted seaway marked by the nearly universal experience of the industrialized democracies—England, France, Germany, Italy, Switzerland, Japan and even, to a great extent, Canada—all of whom have nationalized their more important railroads while allowing peripheral lines to remain private. It is not a demonstrable fact that these nations have experienced "higher costs and inefficiencies that public ownership implies." USRA's brief at 71. Moreover, as the New Haven Trustee pointed out (Cross-Appellant's brief at 89 n. 81), if Conrail proves to be profitable, the United States can turn it back to the private sector; if it turns out to be not profitable, the case law suggests that the economic burdens must be distributed equitably via taxation.

The New Haven Trustee does not, as USRA asserts

> "prefer to have that [a public-interest solution] accomplished by nationalization, a process he believes will constitutionally entitle him to compensation wholly in cash, and possibly in a much higher amount than obtainable in reorganization." USRA's brief at 71.

The New Haven Trustee's position, so far as here relevant, is set forth at 88-92 of his brief as Cross-Appellant, and speaks for itself. Contrary to USRA's characterization of his argument, the New Haven Trustee believes that the value of the properties subject to his liens is in excess of $123,809,404 plus interest; he believes, based on his knowledge as to the value of these rail properties, that he will ultimately receive $123,809,404 plus interest; he cannot, under any imaginable circumstance, claim *more* than $123,809,404 plus interest; and, so long as he retains his liens and ultimately receives either the right to foreclose on his properties or the cash equivalent of his foreclosure right, the New Haven estate will receive the protection accorded by the Fifth Amendment and the Court's decision in *New Haven Inclusion Cases.*

Under the theory of *Armstrong v. United States, supra,* it is reasonably clear that the United States cannot expropriate, without payment, the New Haven Trustee's liens securing his $123,809,404 claim. This case concerns expropriation, not nationalization. See §303(b)(2) of the RRRA. USRA asserts that the Court's role is limited to adjudicating whether the RRRA is constitutional or not. The New Haven Trustee agrees. If the Court upholds the Tucker Act argument of the United States and USRA, however, it is reasonable to infer from the views of the sponsors of this legislation in both the House and the Senate that Congress may well decide to repeal the RRRA. If the Court upholds

the injunction issued below, but does not reach the issue raised by the New Haven Trustee's cross-appeal, Congress will be in the dark as to the limits of its constitutional powers when it comes to amend or repeal the RRRA. If the Court decides the cross-appeal in favor of the New Haven Trustee, Congress will be on notice as to the applicable Fifth Amendment principles. That will fulfill the Court's role, and leave the political decision to Congress and the President.

V

THE LACK OF PRE-CONVEYANCE JUDICIAL REVIEW OF THE FAIRNESS AND EQUITY OF THE MANDATORY CONVEYANCES OFFENDS DUE PROCESS

USRA attempts to justify the RRRA's failure to afford procedural due process by comparing it to §77(o).[19] However, §77(o) relates essentially to incidental sales; a sale of the nature that would be involved in the compulsory transfer to Conrail has been held to be beyond the scope of §77(o).[20] Further, §77(o) provides significant safeguards that are absent from the RRRA. For example, no transaction of sale may be effected under §77(o) unless the trustees of the debtor, who have fiduciary duties to the creditors and stockholders, affirmatively recommend that it is in the best interest of the debtor's estate; and even then any proposed transaction must be approved *as to its specific terms* by the reorganization court.

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[19] "The whole of the Rail Act is very roughly analogous to Section 77(o). . . ." USRA's brief at 41.

[20] *In re Penn Central Transportation Co. (Park Avenue Properties)*, 484 F. 2d 323 (3d Cir.), *cert. denied sub nom. Baker v. Morgan Guaranty Trust Co. of N.Y.*, 42 U.S.L.W. 3334 (U.S., Dec. 3, 1973).

More to the point is a significant concession contained in the United States' brief:

> "We concede that in the absence of a Tucker Act remedy the bankrupt estates would as a group be constitutionally entitled to a preconveyance judicial determination of the fairness and equity of the total amount of the consideration payable under the final system plan." United States' brief at 39.

The New Haven Trustee concurs with that view of the United States, so far as it goes. Aside from the RRRA being inadequate from the point of view of compensation when analyzed as a taking statute, it is also deficient insofar as §§303(b) and (c) require the Special Court to order conveyances willy-nilly, before determining whether the final system plan certified by USRA is "fair and equitable," and permit only a subsequent review of the merits or lack thereof of the final system plan under the fair and equitable rubric.[21]

On this issue, *Catlin v. United States*, 324 U.S. 229 (1945), discussed in the New Haven Trustee's brief as

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[21] Before the Special Court, the United States and USRA argued that the Special Court would, under the statutory time-table, have 110 days after Congressional approval of the final system plan before having to order transfer of the properties, and that such period could be utilized to review the *prima facie* fairness and equity of the plan. (The same argument as to timing is made here; see USRA's brief as Cross-Appellee at 30-31; 33 n. 29). The New Haven Trustee pointed out that the RRRA provides no procedure for that *prima facie* review and that the Government has it in its power to reduce the 110 days to 11 or 12 days. The Government continued to press its position before the Special Court, which has held that even 110 days would not afford it enough time to make a meaningful preconveyance decision as to whether the final system plan is fair and equitable to the Penn Central estate. Yet when it became expedient to adopt the argument that the 110 days could be shortened, the Government parties did so. See transcript of the hearing on September 19, 1974 before the Penn Central Reorganization Court, at 13,627-30. When it was pointed out that Congress was considering postponing the RRRA time-table by 120 days, the United States responded that the conveyance need be only slightly delayed because the Government could "speed up" the period between Congressional approval and transfer. *Id.* at 13,630.

Appellee (at 59 n. 50) is in point. *Catlin* involved an eminent domain statute under which the United States took property for military purposes. The statute provided for title to be vested in the United States in advance of any judicial determinations as to the legitimacy of the taking. The Court construed the statute to permit post-taking reconveyances of the property, saying:

> "The alternative construction, that title passes irrevocably, leaving the owner no opportunity to question the taking's validity *or one for which the only remedy would be to accept the compensation which would be just if the taking were valid, would raise serious question concerning the statute's validity.*" 324 U.S. at 241 (emphasis added).

The United States argues that under §303(b) of the RRRA, once conveyances are ordered by the Special Court (apparently without any pre-conveyance appellate review), "reconveyance of all the rail properties would not be feasible" (United States' brief at 38 n. 17),[22] even if the Special Court finds in its subsequent §303(c) proceedings (a) that the final system is not fair and equitable, and (b) that none of the remedies provided by the RRRA suffice to cure the lack of fairness and equity. Such findings, if made by the Special Court, or if made by this Court on its §303(d) review of the Special Court's §303(c) decision, will mean that an unconstitutional final system plan will have become final and binding on the parties, who presumably are then remitted to a possible Tucker Act remedy in the Court of Claims. And, as previously shown (New Haven Trustee's brief as Appellee at 67-75), Congress

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[22]Contrary to note 17 of the United States' brief, the New Haven Trustee does not "assume . . . that reconveyance of all the rail properties would not be feasible." However, reconveyance, which might be required to rectify unconstitutional takings, would be much less desirable, both to private and public interests, than a pre-conveyance injunction.

could then act to prevent any Tucker Act remedy, either by repealing the sovereign's consent to suit or by refusing to appropriate the funds required to enable the Secretary of the Treasury to satisfy execution upon any Court of Claims judgment. The above-cited concession by the United States (United States' brief at 39) is fatal to its case. The lack of pre-conveyance judicial review (including appellate review here of any decision by the Special Court), based on actual knowledge of the terms of the final system plan, as to the fairness and equity of the mandatory conveyances as applied to individual railroads, such as Penn Central, takes property without due process of law, irrespective of whether or not the provisions for compensation in the form of securities of a public authority are valid.

PART TWO: LEGAL ANALYSIS OF THE SPECIAL COURT'S SEPTEMBER 30, 1974 DECISION, IN THE MATTER OF PENN CENTRAL TRANSPORTATION CO. (NO. 74-8)

I

PROCEDURAL STATUS OF SPECIAL COURT'S DECISION IN RELATION TO THE INSTANT APPEALS AND CROSS-APPEAL

On September 30, 1974, the Special Court, Regional Rail Reorganization Act (Henry J. Friendly, Presiding Judge, Carl McGowan and Roszel C. Thomsen, Judges) entered a conditional order reversing the Penn Central Reorganization Court's Order No. 1596[23] (JA 124-152), as well as that Court's Secondary Debtor decision (JA 153-56). The order of reversal was conditioned by a stay pending further order of the Special Court after a final determination by the Court of this cross-appeal and the related appeals (Nos. 74-165, 74-166, 74-167 and 74-168), and the Special Court reserved jurisdiction to modify its opinion and order in light of the decision of the Court.

The Special Court refused to give *res judicata* or collateral estoppel effect to the prior judgment of the three-judge district court below in *Connecticut General Ins. Corp. v. United States Railway Ass'n.* and related cases which are the subject of these appeals and cross-appeal; at the same time, the Special Court has indicated that it will give preclusive effect to the Court's decision herein:

> "We also state, for whatever bearing it may have, that the last thing we have in mind is to impair in

[23]The Special Court left in effect the Reorganization Court's Order No. 1543, from which no appeals were taken except the New Haven Trustee's appeal limited to jurisdictional issues. The findings of fact in support of Order 1543 are accordingly still in effect.

any way the [Supreme] Court's freedom of action in the *Connecticut General* appeal." *In the Matter of Penn Central Transportation Co.*, Special Court, Regional Rail Reorganization Act, Nos. 74-8 *et al.*, September 30, 1974, slip opinion by Friendly, J., at 35.

Because of the potential importance of the Special Court's analysis of the RRRA, and the conflict between its view of the constitutional safeguards afforded to claimants to the Penn Central estate by the Fifth Amendment and that of the *Connecticut General* court, the New Haven Trustee has included in this Reply Brief an analysis of the Special Court's decision, indicating both the areas with which the New Haven Trustee is in accord and the areas in which the New Haven Trustee respectfully submits that the Special Court was in error. In the following discussion, however, the New Haven Trustee will refrain from any extensive analysis of the evidenciary conclusions of the Special Court based on its record, which is not before the Court at this time and is not relevant to the decision of the constitutional issues presented for decision on the appeals and cross-appeal. Since the Special Court has indicated that its decision ultimately will be guided by the Court's decision of the instant cross-appeal and the related appeals, a definitive conclusion by the Court of the legal issues properly posed by the summary judgment motions of the plaintiffs below and here, in the context of the appeals and cross-appeal, is both legally warranted and of extreme importance to the public and private interests involved. The New Haven Trustee submits that the Court should hold that the RRRA is unconstitutional, either by sustaining the judgment of the court below or by reversing that judgment on the grounds urged by the New Haven Trustee in this cross-appeal; if the Court so holds, the Special Court will be required by its own

indication to enter an order affirming the §207(b) order (Order No. 1596) of the Penn Central Reorganization Court. Thus, the matter will have been properly and expeditiously decided as requested by all the parties in the joint motion for expedited treatment.

The Special Court's decision did not, of course, constitute a reversal of the judgment of the three-judge district court convened under 28 U.S.C. §§2282 and 2284; only this Court has appellate jurisdiction to hear appeals from a judgment declaring an act of Congress unconstitutional. While the Special Court's conclusions as to the existence of a Tucker Act remedy are in apparent disagreement with the court below, it is submitted that the Special Court was in error, as more fully developed in the following analysis of Judge Friendly's Opinion. See *infra* at 47-48 for a discussion as to the grounds upon which the decision of the Special Court may properly be remedied by the Court, and as to the appropriate procedural dispositions to be made in this case.

II

ANALYSIS OF SPECIAL COURT'S OPINION

The Special Court's Opinion relating to Penn Central consists of an introductory section (at 1-26) plus eight numbered sections dealing with discrete issues, each of which is summarized below.

A. *Introduction* (1-26)

This section contains a general statement of the case (at 1-10) and summary of the RRRA (at 11-26). Aside from the point noted below,[24] the summary is largely accurate.

B. *Jurisdiction* (26-32)

The Special Court's Opinion does not, it is submitted, correctly address the Article III issues raised by the New Haven Trustee. The New Haven Trustee did not argue that the "case or controversy" was lacking because of the lack of adversary pleadings (Opinion at 27). The following head note of the New Haven Trustee's brief in the Special Court summarized the argument actually made on this point:

> "Even if §207(b) is interpreted not to confer new jurisdiction upon a §77 court, it requires an Article III court to exercise legislative and administrative functions and to issue an advisory opinion."[25]

The New Haven Trustee cited the following cases in support of that contention: *National Mutual Ins. Co.*

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[24]See Opinion at 24, n. 20, stating that "it is common knowledge" that the labor protective conditions in the Penn Central merger were a cause of the Penn Central debacle. It is unlikely that this was a significant cause, particularly as compared with the crew-consist issue, as to which see n. 21. The RRRA provides no relief from excessive and needless costs in the crew-consist area.

[25]Brief of New Haven Trustee, Appellant as to jurisdictional issues, before the Special Court (No. 74-8), August 2, 1974, at 11.

v. Tidewater Transfer Co., 337 U.S. 582 (1949); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 472 (1957) (Frankfurter, J., dissenting, explaining the position of a majority of the Justices in the *Tidewater Transfer* case); *Yakus v. United States*, 321 U.S. 414, 468 (1944) (Rutledge, J., concurring: "It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements, or, what in some instances may amount to the same thing, without regard to them.").

The Special Court's Opinion fails to address the arguments actually made by the New Haven Trustee. The applicability of the cases cited above are not discussed at all. Further, the decision of the Special Court as to the Tucker Act remedy is in fact an advisory opinion in the sense that it will not be a final judgment unless Congress, upon reviewing the situation, decides that it is willing to contemplate the entry of a deficiency judgment against the United States in the Court of Claims.[26] We respectfully disagree that *McGrath v. Kristensen*, 340 U.S. 162 (1950) is the answer to the New Haven Trustee's contention that §207(b) called for an advisory opinion as to a matter upon which Congress retains the ultimate power of decision in §208. The New Haven Trustee cited *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) and more recent authority, such as *Chicago & Southern Airlines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948) for the proposition that §207(b) called for a non-judicial decision as to a matter subject to legislative revision. Indeed,

[26]Congress may act to preclude a Tucker Act judgment of substantial amount either by vetoing all final system plans submitted to it under §208(a), or by amending the RRRA to limit expressly the potential liability of the United States. Neither of these steps would constitute a repeal of the Tucker Act; but each would effectively make the United States immune to suit, or limit the aggregate dollar amount of any liability to which Congress chooses to expose the Treasury.

the indication that the Special Court may not have the power to bind the Court of Claims (Opinion at 106 n. 109[27]) as to the existence of any substantive cause of action, or as to the amount of damages if there be such a cause of action, makes its entire Tucker Act remedy discussion (see Sections VII and VIII, at 83-117) an advisory opinion, contrary to both Article III limitations and the Court's holdings in *United States v. Sherwood*, 312 U.S. 584 (1941) and *United States v. King*, 395 U.S. 1 (1969).

Finally, the Special Court disposed of Part II of the New Haven Trustee's brief on jurisdictional issues[28] on the ground that it "falls by the wayside" in view of the pendency of these appeals before the Court. (Judge Friendly's Opinion at 31-32). Since the New Haven Trustee was contending that the RRRA improperly affected the outcome of a case or controversy (his §77(g) Motion) which was pending at the date of enactment of the RRRA, a matter which is not now before the Court, the Special Court erred in dismissing this contention. The New Haven Trustee cited *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), *Battaglia v. General Motors Corp.*, 169 F. 2d 254, 257 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948), *Lockerty v. Phillips*, 319 U.S. 182 (1943), and *Yakus v. United States, supra*, in support of his position that §207(b) was repugnant to the Constitution insofar as it purported to withdraw the Reorganization Court's power to dismiss the re-

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[27]Note 109 reads: "We intimate no opinion to what extent, if at all, the Court of Claims would be bound by our determination as to the value either of the compensation issuable under the Act or of the assets conveyed." See *infra* at 44-46 for a discussion of this point.

[28]This argument was headnoted:

"§207(b) Confers New Jurisdiction Upon the Reorganization Court and this Court, and Withdraws Jurisdiction from the Supreme Court, in a Designed Attempt to Dictate a Rule of Decision in a Pending Case, the New Haven Trustee's §77(g) Motion." (at 28).

organization proceedings under §77(g) of the Bankruptcy Act. The New Haven Trustee further contended that the latent power to dismiss under §77(g) is the constitutional "safety-valve" under which secured creditors of Penn Central have been restrained from exercising their contractual rights for over four years. The Opinion addresses none of these contentions; and yet the Special Court's order expressly prohibits entry of an order under §77(g) by any of the reorganization courts.

C. *Collateral Estoppel* (32-35)

The Special Court was admittedly faced with a situation not contemplated by Congress when it established the Special Court and required it to render an appellate decision in a number of distinct cases arising from appeals of orders of reorganization courts under §207(b). Prior to the decisions by the respective reorganization courts, a three-judge federal court with jurisdiction of the subject matter and the persons of most of the parties to the Penn Central proceeding had adjudicated that the RRRA was void in certain respects for repugnance to the Constitution; and that decision was on appeal and cross-appeal to this Court. The Penn Central Reorganization Court in its §207(b) decision, Opinion and Order No. 1596, seems not to have given the *Connecticut General* decision binding effect, but Judge Fullam explained that this was necessitated by the refusal of a majority of the three judges to reach and decide the issue of the constitutional validity of the compulsory conveyance provisions (JA 125).[29] Judge Friendly, however, declares that the Special

[29]Judge Fullam, concurring below, stated that:

"The policies embodied in 28 U.S.C. §2282 appear applicable in this case. . . . It is preferable that the deliberate and collegial judgment of this three-judge court should determine the constitutionality of the RRRA's conveyancing provisions." (JA 59).

Court is not bound even by decisions of the duly constituted §2284 court on issues which it did reach—such as the non-availability of a Tucker Act remedy. The ground cited is that Congress did not intend that the Special Court's decision could be governed by a prior decision of another district court. Yet, it is undisputed that Congress left 28 U.S.C. §§2282 and 2284 in effect as to any complaint asserting that an act of Congress is unconstitutional.[30] Moreover, irrespective of Congress' intent, a duly constituted Article III court has already declared that the RRRA is unconstitutional and is not saved by the alleged existence of a Tucker Act remedy; and that court's decision is reviewable *only* by this Court. In upholding a collateral attack upon the prior holdings of a court with clear jurisdiction of the subject matter, the Special Court has seemingly assumed that it has jurisdiction to set aside the judgment of the §2284 Court. Recognizing that, without more, a non-appealable decision by the Special Court might itself be viewed as a final disposition of issues, such as the constitutionality of the RRRA and the alleged existence of a Tucker Act remedy, a wholly untenable position, the Opinion (at 34) declares that "great cases often demand departures from procedural rules" otherwise applicable. The Opinion asserts that because of the alleged non-reviewability of the Special Court's decision (based on the last sentence of §207(b), a provision which the New Haven Trustee contends is itself void under Article III) its decision should not be permitted to have a preclusive effect on this Court in the instant cross-appeal and related appeals. By accepted jurisprudential standards, the Special Court should

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[30]On March 25, 1974, the Judicial Panel on Multidistrict Litigation denied the attempt of the governmental parties herein to transfer all constitutional litigation under the RRRA to the Special Court. *In re Litigation under the Regional Rail Reorganization Act of 1973*, Docket No. 166 (J.P.M.L. March 25, 1974). See *supra* at 4, n. 1.

have deferred to the holding of a fellow district court of the United States in a case in which, though the decision was under appeal as to its merits, the other court had clear jurisdiction of the subject matter and the parties. See Hart & Wechsler, The Federal Courts and the Federal System (2d Ed. 1973) at 1232-34.[31] See also *New Haven Inclusion Cases, supra,* 399 U.S. at 419-30.

D. *The Requirement of Uniformity* (35-37)

In the *Connecticut General* decision, a majority of the court (Judges Fullam and Bechtle) held that the RRRA is invalid insofar as it rests on the Bankruptcy Clause because it is not, on its face, a uniform law on the subject of bankruptcies. Judge Aldisert agreed that the RRRA failed to comply with the uniformity requirement, but reasoned that creditors of Penn Central, who are treated alike regardless of where they reside, lack standing to raise the constitutional defect of want of uniformity. The Special Court, having decided that it was not bound by the *Connecticut General* decision, adopted the position of the United States and USRA, that had also been advanced by them below and rejected without discussion by the §2284 court, that the RRRA is uniform legislation due to the happenstance that all active railroads in reorganization were, on January 2, 1974, located in geographical areas which are within the defined region. It is respectfully submitted that the Special Court's disposition of the uniformity issue was in error.

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[31] "Should it be a postulate of federal judicial administration that there ought to be no more than one trial of a controversy between the same parties at the same time in the federal courts, and that accordingly, when duplicating actions of this kind are instituted, the only problem is to decide which action should be allowed to proceed?" *Id.* at 1232.

E. *Fair and Equitable Process—General Considerations* (37-41)

The Special Court in this section of its Opinion has made some general observations[32] which are pertinent only to the inquiry which the Special Court was engaged in: a determination whether the process of the RRRA will be fair and equitable. The Special Court correctly pointed out that if the RRRA is unconstitutional as to any non-severable provision, it must be held not fair and equitable. It is for this reason that the Special Court's ultimate judgment cannot stand if the Court sustains the holding below as to uncompensated interim erosion, or if the Court accepts the argument of the New Haven Trustee that the compulsory conveyance provisions are unconstitutional.

F. *Erosion of Investors' Rights* (41-57)

The Special Court wholly disagreed with the *Connecticut General* court's handling of the interim erosion issue. The Special Court's view of erosion is based on the authority of Judge Friendly's 1969 opinion in the New Haven proceedings,[33] which is cited (Opinion at 44) to sustain the proposition that Penn Central

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[32]The New Haven Trustee must respectfully disagree with one of the Special Court's observations:

> "The idea that billions of dollars of liquidation proceeds of these bankrupt railroads are lurking just around the corner is unrealistic in the last degree." Opinion at 39.

This statement, carried to its logical conclusion, would mean that Penn Central will be a "bankrupt bankruptcy," unable to pay even its priority administration claims, now in excess of $1 billion. It also casts grave doubt upon there being any Tucker Act remedy.

[33]In *New York, N.H. & H. R.R., First Mortgage 4% Bondholders' Committee v. United States*, 305 F. Supp. 1049, 1055-59 (S.D.N.Y. 1969), *rev'd sub nom. New Haven Inclusion Cases, supra*, 392 U.S. at 419-30, a three-judge district court headed by Judge Friendly approved two "discounts" on liquidation value of New Haven's rail assets imposed by the ICC (334

(footnote continued on following page)

could not achieve a termination of operations except after lengthy proceedings before the ICC. It is submitted that the earlier case is improperly cited, and that the Court's opinion in *New Haven Inclusion Cases*, 399 U.S. at 461, did not affirm the decision of the three-judge court headed by Judge Friendly. The Court did not even pass on the merits of Judge Friendly's earlier opinion, because it ruled that the three-judge Court headed by Judge Friendly should have deferred to the New Haven's reorganization court (Anderson, j.).[34]

Part IV of the Opinion is accordingly premised on the erroneous legal concept that the public interest is entitled to two "bites of the apple,"[35] the first comprising the period during which creditors can constitutionally be restrained while efforts to reorganize the railroad are explored, and the second, a period in which the ICC and the state regulatory agencies can process abandonment applications in the usual and

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(footnote continued from prior page)

I.C.C. 25 (1968)), one based on an assumed one-year delay by the ICC in acting upon a hypothetical abandonment application (the granting of which, the court held, would have been constitutionally required) and the other a "bulk sale" discount, based on an alleged risk factor that a hypothetical buyer of properties in bulk would have discounted for if he purchased the properties at the date the ICC finally approved the hypothetical abandonment application. Judge Weinfeld dissented on both points, 305 F. Supp. at 1066-69. The New Haven's reorganization court rejected these discounts imposed by the ICC. *In re New York, N.H. & H. R.R.*, 304 F. Supp. 793, 800 (D. Conn. 1969), *aff'd sub nom. New Haven Inclusion Cases, supra*, 392 U.S. at 457-73.

[34]Had the Court passed on the merits of Judge Friendly's opinion in 305 F. Supp. at 1055-59, it would have reversed. This is abundantly clear from the dissenting opinion of Justices Black and Harlan, who would have reviewed the decisions of both district courts and sustained the discounts imposed by the ICC, thereby affirming Judge Friendly's opinion at 305 F. Supp. at 1055-59. See *New Haven Inclusion Cases, supra*, 399 U.S. at 502.

[35]*In re New York, N.H. & H. R.R., supra*, 304 F. Supp. at 801, quoted, with approval, *New Haven Inclusion Cases*, 399 U.S. at 466.

customary fashion as though no Fifth Amendment rights were at stake. It is further submitted that *Palmer v. Massachusetts*, 308 U.S. 79, 88 (1939) does not stand for the proposition for which it is cited in the Opinion (at 44). *Palmer* is clearly applicable during the period prior to a finding that the railroad is not reorganizable on an income basis within a reasonable time, but its applicability thereafter is doubtful in the light of *New Haven Inclusion Cases*.

Judge Fullam has found Penn Central not to be reorganizable on an income basis under §77; all parties to this cross-appeal and the related appeals agree with that conclusion. Earlier the ICC had found that Penn Central could be reorganized only with massive government aid.[36] By taking the position that the ICC can in the public interest subject a railroad in reorganization to a kind of "one last chance" doctrine (in Judge Friendly's words, "a final opportunity to come up with plans that may prevent serious injury to the public interest"—Opinion at 44), the Special Court has undermined the doctrine of the *Brooks-Scanlon* line of cases,[37] while at the same time giving lip service to its continued vitality.

Having incorrectly determined the law applicable to erosion and the right of creditors to demand a reasonably prompt cessation of deficit rail operations once it has been determined that the railroad is not reorganizable, the Opinion then compares the effect of the RRRA, particularly §304(f), to the prospects "that would have prevailed in its absence." (Opinion at 47).

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[36] *Penn Central Transportation Company Reorganization*, Report on Reorganization Plans, Finance Docket No. 26241 (ICC, September 28, 1973), J.D.S. 54.

[37] *Brooks-Scanlon Co. v. Railroad Commission*, 251 U.S. 396 (1920); *Bullock v. Railroad Commission of Florida*, 254 U.S. 513 (1921); *Railroad Commission v. Eastern Texas R.R.*, 264 U.S. 79 (1924).

Assuming that the Fifth Amendment notwithstanding, Congress and the ICC could subject Penn Central to the task of proving no adverse environmental impact as a result of a total cessation of service, see *Harlem Valley Transportation Ass'n. v. Stafford*, 360 F. Supp. 1057 (S.D.N.Y. 1973), *aff'd.*—F. 2d—(2d Cir. 1974), Judge Friendly concluded that the RRRA by making the National Environmental Policy Act of 1969 ("NEPA") inapplicable (RRRA, §601(c)), simply replaces one burdensome set of regulatory hurdles to abandonment with another. It is submitted that this conclusion is incorrect. The Opinion does not deal with the argument that NEPA itself would be unconstitutional if it prevented, or unduly delayed, a decision permitting cessation of operations to which the Penn Central creditors would be otherwise entitled by reason of the Fifth Amendment.

Turning to a factual discussion of the erosion issue, the Special Court first defines erosion incompletely,[38] and then asserts that there is no "convincing evidence" in the record that erosion is likely in the 620 days (which has now become 740 days, see USRA's brief as Appellee at 3 n. 1) prior to the first date a final system

[38]Judge Friendly's minimum definition of erosion includes issuance of trustees' certificates, deferral of property taxes, accrual of other administration expenses, and use of cash or property subject to mortgages for payment of operating expenses. Opinion at 51. Each of these elements is a consequence of continued net losses from operations; but such net losses produce other forms of erosion. In any event, the minimum definition fails to treat with the following elements of erosion: decline in value of railroad equipment due to retirements in excess of depreciation reserves; the excess of depreciation of equipment and of track and structures, to the extent that it reflects actual wear and tear and obsolescence, over new investment therein; borrowings otherwise than on trustees' certificates from the Government and its agencies to the extent used to defray operating expenses in excess of revenues from rail operations; and diversion of non-rail income from real estate and investments to defray operating expenses.

plan can become effective.[39] Not only does the Opinion fail to treat with the evidence of erosion in the record (such evidence consisting primarily of undisputed facts that are stipulated in this proceeding), but it seemingly reverses the trial court's findings of fact in Opinion and Order No. 1543 (JA 84-103) without any determination that they are erroneous under the standard for appellate review and in a situation where neither the Government nor USRA had appealed Order No. 1543. Judge Fullam found that Penn Central will have *negative* cash available for operations of $153,700,000 at December 31, 1975, a date which is within the 740 days allowed for a final system plan to become effective. Opinion and Order No. 1543, Finding of Fact No. 26 (JA 99-100). *Negative* cash of this magnitude necessarily will require the financing of *cash* deficits by borrowings having the priority of administration claims.

The Opinion as to erosion indicates that the Special Court viewed its role under §207(b) of the RRRA as one calling for a trial *de novo*, not an appellate proceeding. It appears that the Special Court considered that it could reach its own conclusions without regard to the factual findings of the reorganization courts.[40] In the erosion discussion, the Opinion places great weight on the 10% temporary rate increase granted by the ICC in *Ex Parte 305* (see Opinion at 52 and n. 44, 45)

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[39]The court below correctly granted summary judgment on the ground of uncompensated interim erosion, treating the Stipulation as to Factual Matters and the uncontested findings of fact of Judge Fullam in Opinion and Order No. 1543 (JA 84-103) as conclusive evidence that some erosion was likely in the 620 days preceding the effective date of any final system plan.

[40]Thus, in a later section (Opinion at 70-83), the Special Court decides how much weight it considered appropriate to give to the respective witnesses on Conrail viability, without regard to the findings of the respective reorganization courts.

and even concludes, based on the month of July, 1974 (a month following the trial court's decision)[41] that Penn Central's operations will now be profitable (on the basis of net railway operating income, not net income after fixed charges). See Opinion at 54 n. 49. The Special Court, which was plainly given an appellate function by §207(b), erred when it applied its own views to the facts of the case *de novo*.[42]

G. *The Compelled Conveyance and the Adequacy of the Consideration* (57-83)

The New Haven Trustee agrees with the Special Court's analysis of §§302 and 303 of the RRRA as the product of congressional reasoning which was too "simplistic" (Opinion at 61); and with the observation:

> "The mere fact, if it be one, that Conrail might make *some* profit would not necessarily give its securities a value sufficient to render them fair compensation." *Id.* (emphasis in original; footnote omitted).[43]

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[41]Section 207(b) of the RRRA required a decision by the reorganization courts not later than July 1, 1974, and accordingly reliance upon evidence arising after that date by an appellate court is improper.

[42]On review of the §2284 court's decision, this Court's role is of course limited to the determination of whether the trial court's judgment is supported by substantial evidence. As Mr. Justice Stewart observed in *New Haven Inclusion Cases, supra*:

> "It is not for us to pass upon the myriad factual and legal issues as though we were trying the cases *de novo*. 'It is not enough to reverse the District Court that we might have appraised the facts somewhat differently. If there is warrant for the action of the District Court, our task on review is at an end.' " 399 U.S. at 435, quoting *Group of Institutional Investors v. Chicago, M., St. P. & Pac. R.R.*, 318 U.S. 523, 564 (1943).

[43]If the Special Court's observation (Opinion at 60) that:

> "Congress is entitled to insist on the continued operation of rail lines earning or capable of earning a profit. . ." (footnote omitted)

(footnote continued on following page)

The New Haven Trustee agrees with the analysis of the deficiencies of §303(c)(2) of the RRRA (Opinion at 62-67); that section "fails to supply an adequate tool with which to cure any deficiency in the consideration." (Opinion at 67).

Thus, the Special Court found that, absent a Tucker Act remedy, the process of the RRRA is not fair and equitable (Opinion at 68-69), since there was no showing that the combination of Government guaranteed obligations, the securities of Conrail and the "other benefits" would provide just compensation. (Opinion at 69-83).[44]

(footnote continued from prior page)

means that Congress is entitled to insist on continued operation of a line or segment of railroad so long as that line or segment makes a positive rather than negative contribution to net railway operating income, even if not sufficient to provide any return on invested capital, then it is far too broad and not supported by the Court's modern decisions, such as *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

[44]It is appropriate to note in passing that the entire discussion of Conrail viability (Opinion at 69-83) is based on a *de novo* trial approach, rather than appellate review of evidence in the record; and this error is compounded by the use in the Penn Central case of evidence from the Ann Arbor case which was never subjected to cross-examination. See Opinion at 80-81. Considered as a *de novo* trial, the proceedings before the Special Court were unfair to the Penn Central estate and its creditor and stockholder claimants, and violated due process of law, because no opportunity was afforded to parties who submitted evidence as to Conrail's non-viable status to introduce evidence or to cross-examine evidence relied upon by the Special Court. Not only was the decision in the appeal from the Penn Central Reorganization Court decided on the basis of evidence *dehors* the record in that proceeding, but the Government and USRA in effect disavowed the Ann Arbor evidence on the ground that it is not possible at this time to know what form Conrail will take, thereby requiring all predictions as to its viability to be based on assumptions which cannot be verified. See transcript of hearings before the Special Court at 85, 88, 91-92. Moreover, the states of Wisconsin and Michigan, which introduced evidence as to Conrail's potential viability in the Ann Arbor proceeding, where, by agreement, it was not subjected to cross-examination, had standing to introduce the same evidence in the Penn Central proceedings (where it would have been subject to cross-examination) and did not do so.

H. *Availability of a Remedy Under the Tucker Act* (83-102)

The Special Court's analysis of the Tucker Act remedy issue is exclusively premised upon the conclusion that the *jurisdiction* of the Court of Claims was not repealed, expressly or impliedly, by the RRRA. The New Haven Trustee submits that the judgment below, that there is no Tucker Act remedy, is sound whether or not the jurisdiction of the Court of Claims was repealed.

The Special Court stated that its disagreement with the *Connecticut General* court was that the court stated the wrong issue; according to the Opinion, the issue is whether Congress expressed an affirmative intent "to withdraw a remedy that would otherwise exist." Opinion at 85. The Opinion thus fails to differentiate between (a) affirmative intent to withdraw the consent of the sovereign to suit and withhold jurisdiction affirmatively granted in 28 U.S.C. §1491 to the Court of Claims, and (b) assuming that the waiver of sovereign immunity and conferral of jurisdiction are still in effect, affirmative intent to preclude any plaintiffs from being able to prosecute a substantively valid cause of action in the Court of Claims.[45]

The Opinion does not discuss any of the cases relied on by the New Haven Trustee in his Tucker Act remedy analysis save *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), which is dismissed with the observation:

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[45]The Court of Claims has itself recognized this critical distinction, pointing out that: "... it is not every claim involving or invoking the Constitution, a federal statute or a regulation which is cognizable here." See *Eastport S.S. Corp. v. United States*, 372 F. 2d 1002, 1007 (Ct. Cl. 1967), quoted in New Haven Trustee's brief as Appellee at 38-40.

"The basis of the doubt [as to adequate remedy at law in the Court of Claims for the seizure of the steel mills] was that the Executive's action there was without authorization in law." Opinion at 102, n. 106.

The Special Court thus did not address the New Haven Trustee's contention that *Youngstown* has a different meaning which is to be derived from the Court's citation in *Youngstown* of *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949).[46] So far as the New Haven Trustee can discover, no case has ever held that an *unconstitutional* taking has an adequate remedy at law in the Court of Claims, although there are legions of inverse eminent domain cases holding that a constitutional taking which is inadequately compensated gives rise to a valid cause of action under the Tucker Act.

The Opinion correctly discounts the applicability of *Hurley v. Kincaid, supra*, to the problem at hand (Opinion at 94-99), but then relies upon another opinion of Mr. Justice Brandeis, *Lynch v. United States*, 292 U.S. 571 (1934) (Opinion at 99-102). *Lynch* involved an unusual action by Congress which came very close to repudiation of the public debt, just as the RRRA involves an unprecedented attempt by Congress to exercise the power to cancel the contractual rights of mortgage bondholders.[47]

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[46] *Youngstown* is a case where equitable relief was deemed appropriate because the governmental action complained of was unconstitutional, thereby qualifying under the test of *Larson* (as explained in *Malone v. Bowdoin*, 369 U.S. 643 (1962)) for the applicability of the doctrine of *United States v. Lee*, 106 U.S. 196 (1882). *Youngstown*, and numerous other cases which relied on the *Lee* decision, stand in contrast to cases where the government action alleged to constitute a taking is conceded by the condemnee to be constitutional (*e.g.*, *Hurley v. Kincaid*, 285 U.S. 95 (1932); *United States v. Causby*, 328 U.S. 256 (1946); and *Larson*).

[47] The *Lynch* opinion casts doubt on the availability of a substantive cause of action in the Court of Claims by its holding that Congress retains the power to withdraw the consent of the sovereign to suit. See 292 U.S. at 581-82.

I. *The Adequacy of the Remedy Under the Tucker Act* (102-116)

The Opinion (at 104) cites *Bauman v. Ross*[48] for the proposition that Congress is not bound to provide compensation in money or its perfect equivalent for a taking under the eminent domain power. It is submitted that *Bauman v. Ross* holds only that if the condemning authority's activity will benefit land of the condemnee not taken, that benefit may be taken into account in determining the condemnee's loss as to the land which is taken. *United States v. 1,000 Acres of Land, More or Less, in Plaquemines Parish, La.*,[49] stands for the same proposition. The extravagant dictum contained in the latter opinion, quoted by the Special Court (Opinion at 105), cannot be reconciled with recent decisions of the Court.

At most, the cases cited in the Opinion (at 104-105) stand for the proposition that "other benefits" conferred upon a condemnee by the sovereign may be taken into account in determining a condemnation award. It is doubtful that the RRRA confers "other benefits" upon the holders of railroad mortgages, and it is likewise doubtful that "other benefits" are conferred upon the Penn Central estate. The privilege to discontinue common carrier operations, which is a right conferred by the Fifth Amendment, is not such an "other benefit."

The Opinion adverts to the problem posed by the *Sherwood* and *King* cases, *supra*, barring an effective declaratory judgment by the Special Court in its §303(c) proceedings that could be binding on the Court of

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[48]167 U.S. 548 (1897).

[49]162 F. Supp. 219 (E.D. La. 1958).

Claims, but never reveals the Court's judgment on this issue. Opinion at 106 n. 109. Under *Sherwood* and *King*, the Special Court's §303(c) judgment as to the existence of a "shortfall" for which a remedy exists in the Court of Claims will be an advisory opinion binding on no one. Rather than being an "exercise in literalism" (Opinion at 102 n. 106), the contention that the Special Court should not have even considered the Tucker Act remedy was well founded in the doctrine of sovereign immunity discussed in the *Sherwood* and *King* cases.

The New Haven Trustee agrees that marketable debt instruments guaranteed as to principal and interest by the United States may be, in fact, the perfect equivalent of money if they carry a current market rate of interest. The issue, however, is whether a "shortfall" remedy in the Court of Claims is adequate (assuming it exists as a valid cause of action) if it compensates only for the difference between condemnation value of the property, on the one hand, and a theoretical value of Conrail securities plus $500 million of Government guaranteed obligations, on the other. Conrail's securities may in fact have a market value much less than the amount which is determined to be their "face value" for issuance in a reorganization. The nub of the controversy here is whether market value or so-called "intrinsic" value will govern. If the Court of Claims were to accept the Special Court's "shortfall" rationale, there might, in fact, be no recovery in the Court of Claims for the difference between the "intrinsic value" of Conrail's securities and their actual market value.[50]

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[50]The RRRA is uniquely burdensome in this regard because the securities will be valued by the Special Court many years before they are likely to achieve the status of a publicly traded security. For example, §77 plan proceedings for Penn Central that will result in distribution of the condemnation proceeds, might well take the better part of a decade, con-

(footnote continued on following page)

The Opinion advances the proposition that there can be a statute which, while not valid as a Bankruptcy Clause enactment alone, is valid as a Bankruptcy Clause enactment if supplemented by an eminent domain power. The same statute is both a "reorganization" and a "taking" at one and the same time, so that even though it would be invalid solely as a reorganization or solely as a taking, it is valid as an amalgam of the two. (Opinion at 105-108).

The Bankruptcy Clause and the eminent domain power have never before been considered to complement one another, so that a statute which fails as a reorganization law because it provides securities of insufficient value, and fails as an eminent domain law because it pays compensation otherwise than in money or its perfect equivalent, can be held valid because of a remedy in the Court of Claims.

(footnote continued from prior page)

sidering the multitude of proofs of claim filed and Penn Central's extraordinarily complex debt and lien structure. And the §77 plan proceedings cannot even begin until after completion of "horrifyingly" long valuation proceedings in the Special Court, appellate review by the Court, and then a lengthy Court of Claims proceeding. Thus, under the statutory scheme of superimposing the RRRA on §77, a traditionally lengthy process has become a modern day equivalent of Charles Dickens' *Jarndyce v. Jarndyce*, and the "escape valve" based on unreasonable delay (§77(g)) has been removed. If, as is likely, the 21st century will have been closely approached, or even reached, before the Conrail securities will be available for distribution, it is clear that their fair market value when received may be far less than the "intrinsic" value determined by capitalization of projected earnings. Even if the Penn Central Trustees could shorten this process by securing Reorganization Court approval to sell the Conrail securities, such sale would presumably have to await conclusion of a Tucker Act deficiency judgment proceeding. Unless Conrail had reported substantial net income for one or more years, it is unlikely as a practical matter that an underwritten public offering of Conrail's common stock could take place, particularly in the light of disclosure requirements of the Securities Act of 1933. Accordingly, there may not be a public market where Conrail's securities can be traded, and thus no way to ascertain their fair market value.

CONCLUSION

Based on the foregoing, it is the position of the New Haven Trustee that:

1. The decision of the court below in *Connecticut General* should be affirmed insofar as it relates to the interim taking;

2. The court was correct in concluding that an adequate Tucker Act remedy is not available to cure the constitutional defects of the RRRA;

3. The court was correct in concluding that insofar as the RRRA is a law on the subject of bankruptcies it is in violation of the constitutional requirement of geographical uniformity;

4. The decision of the court below should be reversed, as requested in this cross-appeal, insofar as it failed to enjoin implementation of the compulsory conveyance provisions of the RRRA on the ground that they effect a taking of private property for public use without just compensation;[51] and

5. In deciding this cross-appeal and the related appeals the Court can properly disregard the Special Court's §207(b) decision on the ground that the decision below in *Connecticut General* was binding as to the constitutional issues decided and that, in other respects, the decision of the Special Court is not relevant to the issues here before the Court.

The order sought here by the New Haven Trustee will presumably cause the Special Court to modify its §207(b) order dated September 30, 1974 so as to affirm Order No. 1596 of the Penn Central Reorganization Court (JA 152), thus precluding application of the RRRA to Penn Central.

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[51]See New Haven Trustee's brief as Cross-Appellant at 107-09 for the precise terms of the order requested.

If after hearing argument of the instant appeals and cross-appeals, the Court were to consider that the RRRA is facially constitutional as to both its interim erosion and compulsory conveyance aspects, there would still remain issues determined by the Special Court as to the fairness and equity of the process of the RRRA, which urgently require review because of their constitutional implications. The record in the Special Court's §207(b) proceedings would then be required in order to adjudicate definitively all aspects of the case, including the issue of availability of a substantively adequate Tucker Act remedy, and it would be proper for the Court to withhold its decision in these cases pending a decision to review, pursuant to a writ of certiorari to the Special Court under 28 U.S.C. §1651, the Special Court's §207(b) order;[52] in such event, the petition for review of the Special Court's order could be consolidated with the instant appeals and cross-appeal for decision on the merits. The Court would thus be in a position to review the issue of whether or not the RRRA provides a process which is fair and equitable, an issue which must be reached in the event that the Court determines that a Tucker Act action exists, but otherwise need not be decided.

---

[52]The New Haven Trustee plans to file with the Court, as soon as possible in the premises, such a petition for a writ of certiorari under 28 U.S.C. §1651 to review the Special Court's §207(b) order. The petition will assert that this Court has jurisdiction to issue the writ in aid of its appellate jurisdiction under §303(d); that there is no other statutory provision whereby the decision of the Special Court can be reviewed by the Court; that the last sentence of §207(b) of the RRRA purporting to preclude appellate review of the Special Court's §207(b) decision is void for repugnance to the Constitution; that §207(b) confers jurisdiction improperly in view of the constraints of Article III of the Constitution; and that the Special Court's decision on the merits was erroneous, based on errors of law and errors of fact.

October 10, 1974

Respectfully submitted,

Of Counsel:

MORRIS RAKER
CHARLES W. MORSE, JR.

SULLIVAN & WORCESTER
225 Franklin Street
Boston, Massachusetts
02110

JOSEPH AUERBACH
225 Franklin Street
Boston, Massachusetts
02110

JAMES WM. MOORE
54 Meadow Street
New Haven, Connecticut
06506

Attorneys for Appellant
Richard Joyce Smith, Trustee
of the Property of The New York,
New Haven and Hartford Railroad
Company, Debtor

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-165
No. 74-167
No. 74-168

UNITED STATES RAILWAY ASSOCIATION,

Appellant,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION FOR SPECIAL LEAVE OF COURT TO ARGUE ORALLY AS AMICUS CURIAE ON BEHALF OF 104 MEMBERS OF THE UNITED STATES CONGRESS

BROCK ADAMS
United States Representative
436 Cannon House Office Bldg.
Washington, D.C. 20515
Attorney for Amici Curiae

October, 1974

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

MOTION FOR SPECIAL LEAVE OF COURT TO ARGUE ORALLY AS AMICUS CURIAE ON BEHALF OF 104 MEMBERS OF THE UNITED STATES CONGRESS

1. The Attorney for *amicus curiae*, United States Representative Brock Adams, hereby respectfully moves, pursuant to Rule 44(7), for special leave of court to participate in the oral argument scheduled for October 23, 1974, as attorney for himself and certain other United States Representatives who have filed a brief *amicus curiae* in the above entitled cause. Counsel respectfully requests that the court grant ten minutes of time for this purpose.

2. Motion for leave of court to file a brief *amicus curiae* was filed by counsel in August 1974 pursuant to Rule 42. The brief *amicus curiae* filed with that motion has been circulated to all members of the House of Representatives prior to the filing of this motion for leave to argue orally. Counsel has been joined by 103 United States Representatives, the names of whom are listed hereinafter, in the submission of this motion.

3. Counsel for one of the parties offered to relinquish a proportionate amount of time if all the other parties agreed to do the same. The Solicitor General, however, refused to grant any time, even on this basis.

4. The *amici curiae* participated as members of the national legislature in the legislative process which led to the enactment of the Regional Rail Reorganization Act, and have a direct and immediate interest that the intent of the Congress in passing this law be accurately and properly presented to this Court.

Oral argument by counsel for the *amici curiae* would on some crucial points differ from the arguments of both the Government parties and the creditor interests already represented before the Court in this litigation, and would thereby afford this Court assistance not available from any other party.

Wherefore, counsel for *amici curiae* respectfully requests special leave of the Court to participate for ten minutes in the oral argument of the above entitled cause.

Respectfully submitted,

Brock Adams
United States Representative
Attorney for Amici Curiae

BROCK ADAMS
JOSEPH P. ADDABBO
LES ASPIN
HERMAN BADILLO
WILLIAM A. BARRETT
ROBERT E. BAUMAN
BOB BERGLAND
TOM BEVILL
JONATHAN B. BINGHAM
EDWARD P. BOLAND
JOHN BRECKINRIDGE
GARRY BROWN
GEORGE E. BROWN, JR.
YVONNE BRAITHWAITE BURKE
BILL D. BURLISON
PHILIP BURTON
TIM LEE CARTER
CARDISS COLLINS
SILVIO CONTE
GEORGE E. DANIELSON
JOHN H. DENT
CHARLES C. DIGGS, JR.
JOHN D. DINGELL
ROBERT F. DRINAN
BOB ECKHARDT
DON EDWARDS
JOSHUA EILBERG
FRANK E. EVANS
DANTE B. FASCELL
DANIEL J. FLOOD

THOMAS S. FOLEY
WILLIAM D. FORD
DONALD M. FRASER
BILL FRENZEL
LOUIS FREY, JR.
BENJAMIN A. GILMAN
JAMES M. HANLEY
JULIA BUTLER HANSEN
MICHAEL HARRINGTON
JAMES F. HASTINGS
WILLIAM D. HATHAWAY
WAYNE L. HAYS
H. JOHN HEINZ, III
HENRY HELSTOSKI
FLOYD V. HICKS
FRANK HORTON
JAMES J. HOWARD
ALBERT W. JOHNSON
JAMES R. JONES
EDWARD I. KOCH
DAN KUYKENDALL
PETER KYROS
ROBERT L. LEGGETT
NORMAN F. LENT
THOMAS A. LUKEN
MIKE McCORMACK
JOSEPH M. McDADE
STEWART B. McKINNEY
JAMES R. MANN
SPARK M. MATSUNAGA
ROMANO L. MAZZOLI
LLOYD MEEDS
RALPH H. METCALFE
DALE MILFORD
PATSY T. MINK
PARREN J. MITCHELL
JOE MOAKLEY
WILLIAM S. MOORHEAD
THOMAS E. MORGAN
JOHN E. MOSS
JOHN M. MURPHY
LUCIEN N. NEDZI
JAMES G. O'HARA
EDWARD J. PATTEN
CLAUDE PEPPER
J. J. PICKLE
OTIS G. PIKE
W. R. POAGE
RICHARDSON PREYER
ALBERT H. QUIE
THOMAS M. REES
OGDEN R. REID
DONALD W. RIEGLE, JR.
ROBERT A. ROE
ANGELO D. RONCALLO
FRED B. ROONEY
BENJAMIN S. ROSENTHAL
WILLIAM R. ROY
EDWARD R. ROYBAL
DICK SHOUP
ALAN STEELMAN
LOU STOKES
GERRY E. STUDDS
FRANK THOMPSON, JR.
ROBERT O. TIERNAN
BOB TRAXLER
MORRIS K. UDALL
RICHARD F. VANDER VEEN
GUY VANDER JAGT
CHARLES A. VANIK
JOSEPH P. VIGORITO
LAWRENCE G. WILLIAMS
CHARLES WILSON (TEX)
ANDREW YOUNG

TABLE OF CONTENTS

	Page
Statement of Interest	3
Argument	
The Act, and specifically §304(f), is constitutional as applied to Reading, and therefore cannot be unconstitutional on its face	4
The three-judge court should have deferred to the various reorganization courts for the determination of when the Fifth Amendment overrides §304(f)	9
The injunctive relief granted was improper, in that it should have been more limited in scope	13
Conclusion	15

TABLE OF CITATIONS

Cases:

Brooks-Scanlon v. Railroad Commission of Louisiana, 251 U.S. 396 (1920)	6
In re New York, New Haven and Hartford Railroad Co., 330 F.Supp. 131 (D. Conn. 1971)	12
Knoxville v. Knoxville Water Co., 189 U.S. 434 (1909)	14
Liverpool, New York & Philadelphia SS Co. v. Commissioners of Emigration, 113 U.S. 33 (1885)	8
The New Haven Inclusion Cases, 399 U.S. 392 (1970)	9, 11
State of Texas v. Eastern Texas Railway Co., 258 U.S. 204 (1922)	4
Younger v. Harris, 401 U.S. 37 (1971)	14

Constitutional Provisions and Statutes:

U.S. Constitution	
Fifth Amendment	6, 8, 12

TABLE OF CITATIONS—(*Continued*)

Constitutional Provisions and Statutes:	Page
Interstate Commerce Act:	
49 USCA §1 (18)	4, 5
Regional Rail Reorganization Act of 1973:	
87 Stat. 985	1, 4
28 USCA §§2282, 2283, 2284	9, 10

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The undersigned, Trustees of the Reading Company (Reading), currently in reorganization (Bky. No. 71-828, E.D. Pa.), respectfully move this Court for leave to file the accompanying brief *amicus curiae*. The consent of attorneys for the appellees was requested but unanimous consent was refused.

On July 1, 1974, pursuant to §207(b) of the Regional Rail Reorganization Act of 1973 (Act), the reorganization court of Reading, in Order No. 650, determined that it could not conclude that the Act provided a process which was unfair or unequitable to Reading. Immediately prior to the printing of this brief, the Special Court, created by §209(b) of the Act, affirmed this order. The significance of this order is that the property in the estate of Reading shall be available for inclusion in the Final System Plan to be devised by the United States Rail Association (USRA), created by §201(a) of the Act, which Plan shall be certified to the Special Court pursuant to §209(c).

While the court below was convened to consider the constitutionality of the Act, including the provisions regarding the formulation of the Final System Plan, in the context of only the Penn Central reorganization proceedings, the Court rendered an apparently expansive judgment declaring §304(f) of the Act unconstitutional on its face. Accordingly, the Court enjoined USRA from certifying to the Special Court a Final System Plan *per se* and not merely a Plan which included Penn Central properties, even though the evidence on which the injunction was based related exclusively to the record of the Penn Central proceedings.

Herein lies the interest of the *amicus* in the instant litigation. For if the injunctive relief granted below is upheld, it will preclude the inclusion of Reading properties in the Final System Plan by functionally extinguishing the Final System Plan itself. Specifically, sanctioning the

grant of injunctive relief will have the effect of collaterally undermining the jurisdiction of Reading's reorganization court to determine that it should be subject to the processes of the Act, and vitiating the express provision of the Act that the review of such determination shall lie exclusively with the Special Court. (§207(b)).

Given the ramifications of permitting such a collateral attack, the *amicus* urges that that such attack should not be permitted. The *amicus* suggests that the injunctive relief granted by the Court below should therefore be expressly circumscribed to enjoin USRA, if at all, from certifying to the Special Court only a Final System Plan which includes properties of Penn Central and not a Final System Plan *per se*.

The Trustees of Reading therefore respectfully request this Court to grant permission to file the annexed brief.

Respectfully submitted,

David F. Maxwell
Howard H. Lewis
Barry J. Hart

1418 Packard Building
Philadelphia, Pa. 19102

Counsel for Amicus Curiae,
Trustees of Reading Company

Of Counsel:

Alfred W. Hesse, Jr.
Lockwood W. Fogg, Jr.
William C. Jamouneau

STATEMENT OF INTEREST

The Trustees of the Reading estate, quite obviously, have a very direct and immediate interest in discharging their responsibilities to preserve the estate and rehabilitate it as a viable going concern. Towards that end, the Trustees believe that it is in the best interest of the estate to be subject to the processes of the Regional Rail Reorganization Act of 1973 (Act), with its panoply of protective and rejuvenative features. Accordingly, the Trustees basically support the positions of the appellants in this litigation, the United States Rail Association (USRA) in No. 74-167 and the United States in No. 74-168.[1]

The fact that the Trustees, on behalf of the public and creditors of the estate, have a large financial stake in the outcome of this litigation distinguishes their interest from that of the appellants, whose interest is to discharge their legislatively mandated executive and governmental responsibilities. Because of this distinguishing feature, the Trustees believe that they are in a unique position to complement the arguments proffered by the appellants in support of the constitutionality of the Act, and that because of their fiduciary obligations it is incumbent upon them to offer such complementary support.

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1. To the extent that the appellant's positions are divergent with respect to their interpretation of the lower court's judgment (compare the brief of USRA, p. 62, interpreting the lower court's judgment that §304(f) is null and void to mean that §304(f) is unconstitutional on its face, with the brief of the United States, p. 16, which states that the lower court did not declare §304(f) invalid on its face), the *amicus* concurs with USRA's interpretation of the lower court's judgment.

ARGUMENT

The Act, and specifically §304(f), is constitutional as applied to Reading, and therefore, cannot be unconstitutional on its face.

The nub of the three-judge court's constitutional adjudication is found in paragraph 4.b. of its order, wherein it declared:

> That §304(f) of the Regional Rail Reorganization Act of 1973 is null and void as violative of the Fifth Amendment of the United States Constitution, *to the extent that it would require continued operation of rail services* at a loss in violation of the constitutional rights of the owners and creditors of a railroad. (emphasis added)

Unhappily, the meaning of the entire clause explaining the reason why §304(f) is unconstitutional, is itself not free from doubt, and in particular the italicized portion of the clause. It is, however, fair to suggest that since only USRA, by the terms of §304(f), has power to require continued operation of rail services, the court construed §304(f) as conferring authority on USRA to forbid abandonment of rail operations even where the Fifth Amendment would command an abandonment of such rail operations to avoid an unconstitutional (because uncompensated) taking. The declaration that §304(f) was therefore unconstitutional (apparently on its face) inexorably followed.

In *State of Texas v. Eastern Texas Railway Co.*, 258 U.S. 204 (1922), the Supreme Court was confronted with a similar issue of statutory construction when it was called upon to construe a provision of the Transportation Act of 1920 which imported §1(18) into the Interstate Commerce Act. That section, in pertinent part, provided that ". . . no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the [ICC] a certificate that the present or future

public convenience and necessity permit of such abandonment." (49 U.S.C.A. §1(18)).

The State of Texas alleged that Congress, in enacting §1(18), authorized the ICC to grant permission to a carrier to abandon wholly *intra*state rail operations, and not merely *inter*state operations, and that as such, Congress unconstitutionally exceeded its power (presumably under the Commerce Clause). The Court, however, construed §1(18) as authorizing the ICC to sanction abandonments of only *inter*state rail operations, and not *intra*state operations, expressly heeding the canon of statutory construction that where a statute is susceptible of two constructions, one of which raises grave constitutional questions and the other which avoids such questions, the Court's duty is to adopt the latter.

Departing from the above canon of statutory construction, the three-judge court, in the instant case, construed §304(f) as unconstitutionally authorizing USRA to forbid abandonments which the Constitution itself would mandate. A more reasonable construction, one which comports not only with the presumptive validity of an act of Congress but also the historical principle of statutory construction enunciated by this Court, would have read §304(f) as investing USRA with authority to compel continued rail operations only where such compulsion would not violate the Constitution.

As noted above, the lower court's opinion reasonably suggests that it construed §304(f) as authorizing USRA to forbid an abandonment of rail operations even where the Fifth Amendment would require an abandonment. Under what circumstances then would the Fifth Amendment require such abandonment?

The lower court states in paragraph 4.b. of its declaratory judgment that the Fifth Amendment mandates abandonment where rail operations cannot be maintained except "at a loss." While free from patent ambiguity, the *amicus* submits that this language suffers from latent ambiguity, in that it can reasonably mean either of the following when

taken in conjunction with the court's construction of USRA's authority: first, it can mean that Congress has authorized USRA to compel continued rail services of a carrier in reorganization at a loss, where such loss results in an interim erosion (i.e. actual diminution in value) of the debtor's estate to the extent that the property of pre-bankruptcy creditors is taken in violation of the Fifth Amendment; or secondly, it can mean that Congress has authorized USRA to compel continued rail services at a loss (even if such deficit operations do not cause an interim erosion, due to the simultaneous appreciation in the value of the property in the estate) where no reasonable prospect of profitability exists within the proscription of *Brooks-Scanlon v. Railroad Commission of Louisiana*, 251 U.S. 396 (1920). By either interpretation, the application of §304(f) to the estate of Reading Company is constitutional, in that, first, Reading is suffering no interim erosion, and secondly, Reading does indeed have a reasonable prospect of profitability.

During the course of the "180 day" hearings held by Reading's reorganization court pursuant to §207(b) of the Act, Julian Green, then Reading's Vice-President, Finance, testified that the estate was suffering no interim erosion since the projected net loss was based on annual depreciation of approximately $10,000,000 while the estate was benefiting from the simultaneous appreciation in value of real and personal property in the estate of approximately $11,000,000. His determination of the amount of appreciation was based on the minimum value reasonably assignable to assets in the estate, that of net liquidation value as reflected in the Day and Zimmerman study prepared in January, 1972, and a modest inflation factor of 5% to 8%. Indeed, the credible and uncontradicted testimony of Mr. Green can reasonably support the judgment that the estate of Reading is experiencing a net appreciation, even considering projected net operating losses. Parenthetically, it should be noted that the projected net loss, in itself, is questionable since subsequent to his testimony Reading has

enjoyed net income for the months of August and September, 1974, in the respective amounts of approximately $400,000.00 and $500,000.00. Surely his testimony supports the judgment that the estate is suffering no interim erosion.[2]

With respect to the proposition that Reading has a reasonable prospect for profitability, on January 2, 1974, the effective date of the Act, joint study committees previously formed by the Reading Company and the Lehigh Valley Railroad Company, both in reorganization under §77, formulated and published a joint plan of reorganization.[3] This plan proposed the formation of a Mid-Atlantic Railroad Company (MARC), which would be the consolidation of selected economic lines of the above companies, as well as those of the Central Railroad Company of New Jersey and the Lehigh and Hudson River Railway Company (also in reorganization under §77). The results of this study indicate with reasonable certainty that there is a genuine and substantial prospect of profitability for the estate of Reading as augmented by the economic lines designated in the MARC plan, and that such profitability can be reasonably assured within five (5) years, given, of course, the assistance available in reorganization pursuant to the provisions of the Act.[4]

Hence, under either of the above possible interpreta-

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2. The Special Court, in its opinion of September 30, 1974, pursuant to §207(b) of the Act, similarly concluded that ". . . There is no substantial likelihood that Reading will experience interim erosion . . ." (Slip opinion, p. 55, n. 50).

3. Because of the length of the Plan, and the fact that it is replete with detailed charts, graphs and financial projections, inclusion in an appendix was thought to be of limited usefulness to the Court. If the Court desires to review the Plan, however, copies shall be promptly provided.

4. The consolidation envisioned by the MARC Plan has recently been given genuine viability by the decision of the Special Court. Pursuant to §207(b) of the Act, the Special Court decided that the properties of the above carriers will be available for inclusion in the Final System Plan called for in §303(c) of the Act.

tions to be given the reasoning of the three-judge court, §304(f) as applied to Reading is demonstrably constitutional. While the impingement of §304(f) on the Fifth Amendment may have presented a concrete, justiciable controversy with respect to the Penn Central estate, this controversy does not exist with respect to the Reading estate, since under neither of the above possible meanings does the application of §304(f) to the estate of Reading violate the Fifth Amendment.

The fact that a statute is unconstitutional, as applied to one party does not permit a court to reason inductively that the statute is therefore unconstitutional on its face, and hence unconstitutional as applied to all parties. While concededly the federal courts have the power to declare an act of Congress unconstitutional, it is a power subject not only to constitutional constraints but also judicially self-imposed restraints. As this Court stated in *Liverpool, New York & Philadelphia SS Co. v. Commissioners of Emigration*, 113 U.S. 33 (1885):

> "This court, as is the case with all federal courts, has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other *never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.*" (p. 39, emphasis added).

The declaratory judgment issued by the three-judge court in the instant case clearly violated the latter rule of judicial self-restraint. If the lower court had any doubts as to the constitutionality of §304(f) as applied to Penn Central, it need only have declared that the application of §304(f) to the estate of Penn Central produced an unconstitutional result, and not the seemingly broad-based declar-

ation that §304(f) was unconstitutional on its face. The declaratory judgment issued by the lower court must therefore be expressly circumscribed to indicate that §304(f) is not unconstitutional on its face, but rather, if at all, only in its application to the estate of Penn Central.[5]

The three-judge court should have deferred to the various reorganization courts for the determination of when the Fifth Amendment overrides §304(f).

While it may be conceded that the convening of the three-judge court, pursuant to 28 U.S.C.A. §§2282 and 2284, was technically proper in view of the colorable constitutional claim on the part of the plaintiffs, nonetheless the three-judge court should, as a matter of judicial self-restraint, have abstained from passing upon the constitutional issues. The three-judge court should have deferred to the respective reorganization courts for their various determinations if and when the Act, including §304(f), operates to violate the taking clause of the Fifth Amendment. Because the application of the absention doctrine to §77 reorganization proceedings was expressly considered in *The New Haven Inclusion Cases*, 399 U.S. 392 (1970), a review of the facts of those cases in some detail is warranted.

On November 16, 1967, the ICC determined the price to be paid by Penn Central for the assets of the New Haven estate to be included in the merged Penn Central system. On January 23, 1968, the New Haven bondholders commenced five (5) separate actions in the District Court for

5. While the lower court in the declaratory judgment portion of its order did not limit its constitutional holding with regard to interim erosion to the precise facts presented by the Penn Central operations, clearly those facts inspired its consideration of the §304(f) interim erosion issue in the body of its opinion. See Typed Opinion pp. 29-35. Whether the declaratory judgment suffers merely from infelicity of expression which obscures the lower court's intent to render a constitutional adjudication limited to the facts before it, or whether the court intended to render an expansive constitutional adjudication, the judgment in any event must be expressly circumscribed to apply only to the facts before the lower court.

the Southern District of New York, seeking to have the ICC order set aside; a three-judge court was therefore convened pursuant to 28 U.S.C.A. §2283. On March 29, 1968, the ICC certified the sale (including the price) of the New Haven assets to the latter's reorganization court sitting in Connecticut; pursuant to §77(e) the New Haven bondholders also objected to the price in this forum. Thus the identical question of price came at the same time before the three-judge court in New York and the reorganization court in Connecticut.

The three-judge court in New York, in rejecting motions to dismiss the action in that forum, noted that while concurrent jurisdiction was awkward, technically the bondholders' actions to secure a three-judge court review of the ICC order were correct (by virtue of 28 U.S.C.A. §2283), and that therefore, the three-judge court should retain jurisdiction. Both forums then proceeded to render conflicting judgments on the merits, appeals from which were taken and consolidated for joint consideration by this Court.

While not disturbing the three-judge court's finding that it technically had jurisdiction in the matter, this Court indicated that the circumstances of the case did not inexorably command review in both forums, as the reorganization court had plenary authority to render a decision on the merits. Accordingly, it was suggested that the three-judge court might well have stayed its hand under the traditional principle that the court which first acquires jurisdiction through the possession of property in any particular matter is vested to hear and determine all controversies relating thereto. Noting that regard for this principle was particularly acute in §77 reorganization proceedings, the Court therefore vacated the judgment of the three-judge court, stating:

> "In short, with identical issues before the two courts . . . with congruent standards of review . . . the three-judge court should have stayed its hand in the New Haven bondholders litigation." (footnote omitted, p. 428).

The fact that in the instant case a three-judge court was convened pursuant to 28 U.S.C.A. §§2282 and 2284 to determine the constitutionality of federal legislation neither defeats the policies underlying the abstention doctrine nor distinguishes the instant case from the *New Haven Inclusion Cases, supra.* The policies underlying §77 in reinforcing the primary jurisdiction of each reorganization court to consider all controversies relating to property before those courts are equally applicable to constitutional as well as "mundane" controversies.[6]

If each reorganization court is separately permitted to determine the impact of the interplay between §304(f) and the Fifth Amendment on each estate, this will promote the principle that a rule of constitutional law is never formulated on grounds "broader than is required by the precise facts to which it is to be applied." *Liverpool, supra.* The §207(b) 180-day proceedings pursuant to the Act illustrate the essentially *ad hoc* nature of formulating such a rule, and hence the importance of deferring to the primary jurisdiction of each reorganization court. While Judge Fullam, Penn Central's reorganization court, in Order No. 1596, decided in essence that Penn Central should not be subject to the processes of the Act on constitutional grounds, Judge Ditter, Reading's reorganization court, in Order No. 650, dismissed as prematurely raised similar constitutional objections, given the facts peculiar to the Reading estate, and in essence determined that Reading should be subject to the processes of the Act. To permit this particularized judgment to be thwarted by an expansive constitutional holding of the lower court, based on facts

6. Judge Fullam, in his separate and concurring opinion in the lower court, considered whether that court should defer to the various reorganization courts in determining the various constitutional issues activated by §207(b) proceedings under the Act. He decided against deferral on the grounds that "the deliberate and collegial judgment of this three-judge court" should prevail to determine those issues. (See separate opinion, pp. 4-5). It is submitted that this rationale should not prevail over the traditional principle of judicial deference to the primary jurisdiction of the reorganization courts.

wholly alien to the record in the Reading matter, would seriously undermine the above principle.

Moreover, the fact that the injunctive relief granted by the three-judge court, enjoining USRA, *inter alia*,

> ". . . from taking any action to enforce the provisions of §304(f) of the Regional Rail Reorganization Act of 1973, with respect to any abandonment, cessation, or reduction of service *which has been or may hereafter be determined by a court of competent jurisdiction* to be necessary for the preservation of rights guaranteed by the United States Constitution," (emphasis added),

is not self-executing, but rather dependent upon the subsequent adjudication of a reorganization court, indicates the prematurity of the lower court's judgment and further militates in favor of deferral by that court to the respective reorganization courts. The tentative nature of the injunctive relief granted tacitly recognizes that it is not within the province of the three-judge court to declare when continued deficit operations compelled by §304(f) violate the Fifth Amendment, but rather that such a determination rests exclusively within the "sound discretion of the reorganization court." *In re New York, New Haven and Hartford Railroad Co.*, 330 F.Supp. 131, 147 (D. Conn. 1971) *rev'd. on other grounds*, 457 F.2d 683 (2d Cir. 1971), *cert. den.*, 409 U.S. 890 (1971).

The desirability of deferring to each reorganization court in passing upon the constitutionality of the Act as applied to each estate is demonstrated by the instant proceedings. This Court is now called upon to adjudicate the constitutionality of the Act based on the facts present in the record of only one of the seven affected railroads in reorganization. As pointed out above, the facts present in the Reading record do not in any way support the judgment of the lower court, and moreover militate against it, as may be the case with the records of the other affected railroads.

The judgment of the lower court should therefore be vacated, for any constitutional claims can be presented to the respective reorganization courts, which are uniquely situated to assess the validity of such claims.

The injunctive relief granted was improper, in that it should have been more limited in scope.

While the *amicus* concurs in the position of the appellants, USRA and the United States, that the injunctive relief granted was overbroad even if appellants' arguments were rejected on the merits, we wish to offer yet another reason for delimiting the scope of injunctive relief granted. Upon this reason rests the entire interest of the *amicus* in this matter.

In the first paragraph of its order granting injunctive relief, the three-judge court declared that:

> "... the defendant, United States Railway Association, is enjoined from certifying a Final System Plan to the Special Court pursuant to §209(c) of the Regional Rail Reorganization Act of 1973."

By granting such sweeping relief to protect the estate of Penn Central from an unconstitutional taking, the three-judge court in effect used a blunderbuss where only a pistol was required.

Although the three-judge court, in the declaratory judgment portion of its order, seemingly declared §304(f) unconstitutional on its face, it is reasonably clear that the injunctive relief which flowed therefrom was primarily aimed at protecting the estate of Penn Central from an unconstitutional taking occasioned by §304(f).[7] If so, then the lower court need only have enjoined USRA from certifying a Final System Plan under §209(c) *which included any properties of Penn Central*, and need not have enjoined the certification of the Final System Plan *per se*.

7. See n. 3, *supra*, and the opinion of the lower court (Typed opinion pp. 29-35).

If a federal court should not formulate a rule of constitutional law "broader than the facts to which it is to be applied", then *a fortiori*, a federal court should not issue injunctive relief broader than the facts to which it is to be applied.[8] To give meaning to this logical inference in the instant case requires that this Court circumscribe the scope of injunctive relief granted in the first paragraph of the lower court's order, and enjoin USRA, if at all, only from certifying a Final System Plan which includes Penn Central properties, and *not* enjoin USRA from certifying the Plan *per se*. In this manner, the court could tailor the injunctive relief sought to the specific facts presented before the court below, and in doing so would recognize the plenary authority of the reorganization court of Reading to determine that its estate shall be subject to the process of the Act, and hence its properties available for inclusion in any Final System Plan.[9]

Finally, it is important to note that a decision by this Court declaring that the Act is unconstitutional as applied to Penn Central and enjoining USRA from certifying only a Final System Plan which includes Penn Central properties, will not materially frustrate the Congressional purpose in assuring continued rail operations in the midwest

8. Even assuming a statute is unconstitutional, injunctive relief is not necessarily appropriate. *Younger v. Harris*, 401 U.S. 37 (1971). Especially where the allegation that a statute allegedly violates the Fifth Amendment rests upon a disputed questions of fact, a court should refrain from issuing injunctive relief. *Knoxville v. Knoxville Water Co.*, 189 U.S. 434 (1909).

9. Such a determination was made by the reorganization court of Reading on July 1, 1974, in the context of §207(b) proceedings under the Act. This determination was affirmed on September 29, 1974 immediately prior to the printing of this brief by the Special Court pursuant to §207(b). Also, it is of interest to note that the Special Court reversed the determination by Judge Fullam, Penn Central's reorganization court, that Penn Central properties would not be available for inclusion by USRA in a Final System Plan. In doing so, the Special Court rejected Judge Fullam's position regarding the unconstitutionality of the Act.

and northeast regions of the United States.[10] The consolidation of Reading and other railroads currently in reorganization in the manner envisioned by the MARC Plan mentioned above will provide a viable carrier capable of meeting the passenger and freight needs in these regions.

CONCLUSION

For the above reasons, the judgment of the lower court should be vacated.

In the alternative, the judgment of the lower court should be modified to indicate that §304(f) (and hence §303(c)) is not unconstituional on its face, but rather, if all all, only in its application to the estate of Penn Central.

Accordingly, the first paragraph of the lower court's order enjoining USRA from certifying a Final System Plan to the Special Court should likewise be modified to enjoin USRA, if at all, from certifying only a Final System Plan which includes properties in the estate of Penn Central, and not from certifying a Final System Plan *per se*.

Respectfully submitted,

David F. Maxwell
Howard H. Lewis
Barry J. Hart
1418 Packard Building
Philadelphia, Pa. 19102

Counsel for Amicus Curiae,
Trustees of Reading Company

Of Counsel:

Alfred W. Hesse, Jr.
Lockwood W. Fogg, Jr.
William C. Jamouneau

10. Note that Congress, in §604 of the Act, expressly provided that should the application of the Act to any party be held invalid, the application to other parties shall not thereby be likewise invalid.

In the
Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-165; 74-166; 74-167; 74-168

REGIONAL RAIL REORGANIZATION CASES

UNITED STATES OF AMERICA, *et al.*, Appellants

v.

CONNECTICUT GENERAL INS. CORP., *et al.*, Appellees

(No. 74-168)

UNITED STATES RAILWAY ASSOCIATION, Appellant

v.

CONNECTICUT GENERAL INS. CORP., *et al.*, Appellees

(No. 74-167)

ROBERT W. BLANCHETTE, *et al.*, Trustees of Penn Central Transportation Company, Debtor, Appellants

v.

CONNECTICUT GENERAL INS. CORP., *et al.*, Appellees

(No. 74-165)

RICHARD JOYCE SMITH, Trustee, Cross-Appellant

v.

UNITED STATES OF AMERICA, *et al.*, Cross-Appellees

(No. 74-166)

ON APPEALS AND CROSS-APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OBJECTION OF NEW HAVEN TRUSTEE AND PENN CENTRAL COMPANY TO MOTION OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Each of the undersigned is a party in one or more

of the four related cases set forth above,[1] and in such capacity, each objects to the motion of the National Industrial Traffic League for leave to file a brief *amicus curiae*. The Court is urged to deny the motion for the following reasons:

1. Notwithstanding its public interest assertions, the National Industrial Traffic League's interest must be deemed, in the context of these cases, to be essentially private. Since the League did not seek intervention in the court below where its position could have been met on a party-to-party basis, it should not be allowed now to further its private interest in these cases without having the responsibilities of a party.

2. Even if, *arguendo*, the League's interest were deemed to be more public than private, the public interest is already protected in these cases by the parties. In addition, the undersigned have not opposed the motion of certain Members of Congress to file a brief as *amici curiae*.

---

[1]Richard Joyce Smith, as Trustee of The New York, New Haven and Hartford Railroad Company, Debtor, is the cross-appellant in No. 74-166 and an appellee in Nos. 74-165, 74-167 and 74-168; Penn Central Company is an appellee in Nos. 74-165, 74--167 and 74-168.

CONCLUSION

The motion of National Industrial Traffic League to file a brief *amicus curiae* should be denied.

October 1, 1974

Respectfully submitted,

JOSEPH AUERBACH
225 Franklin Street
Boston, Massachusetts
02110

JAMES WM. MOORE
54 Meadow Street
New Haven, Connecticut
06506

Attorneys for
Richard Joyce Smith, Trustee

DAVID BERGER
1622 Locust Street
Philadelphia, Pennsylvania
19103

Attorney for Penn Central Company

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-165

ROBERT W. BLANCHETTE, ET AL., TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR, APPELLANTS

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, ET AL.

No. 74-167

UNITED STATES RAILWAY ASSOCIATION, APPELLANT

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, ET AL.

No. 74-168

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR THE FEDERAL PARTIES[1]

1. In our opening brief,[2] we advanced two independent arguments for reversing the district court's narrowly phrased injunction against enforcement of Section 304(f) of the Rail Act: (1) that, as a matter of law, compelled loss operations pending implementation of the final system plan would not constitute a taking of the property of the claimants against the bankrupt railroad estates and (2) that a remedy for any otherwise uncompensated taking would in any event be available under the Tucker Act. We have now concluded that there are certain possible circumstances in which the first of these arguments would not apply.

Our argument with regard to interim erosion was based upon two propositions, one of law and one of fact; that the claimants against a bankrupt railroad may constitutionally be compelled to bear the burden of continuing its operations in the public interest for a reasonable time pending substantial good faith efforts to restore it to financial viability, and that the Rail Act represents such an effort. We still believe those propositions to be sound.

But necessarily implicit in our argument was the unstated premise that the final system plan would be

---

[1]This reply brief is submitted on behalf of all federal parties other than the United States Railway Association, a federally-established nonprofit corporation, which is represented by separate counsel.

[2]We inadvertently failed to refer to Nos. 74-165 and 74-167 in the caption of our opening brief. We support the position of the appellants in those cases to the extent that they urge reversal of the judgment below. See Rule 10(4) of the Rules of this Court.

implemented within a reasonable time. We have no reason to question the factual accuracy of that assumption, but it may nevertheless prove false.[3] Difficulties now unforeseen and unanticipated could in fact delay final implementation of the final system plan. For example, Congress could, in theory, successively disapprove several proposed final system plans. Thus, whatever the probabilities, the parties and this Court have no absolute assurance that the plan will in fact be implemented within a reasonable time. For that reason, we have determined that a taking of property through interim erosion, although extremely unlikely, remains a theoretical possibility under the Rail Act.

Accordingly, we believe that an injunction preventing the Association from denying applications for discontinuance of service under Section 304(f) in those circumstances might be appropriate unless, as we contend, a remedy for any otherwise uncompensated taking will be available under the Tucker Act.[4] We are therefore per-

---

[3]We note that a bill (S. 4003) has been introduced to extend by 120 days the deadline for submitting the final system plan to Congress. See 120 Cong. Rec. S16619 (daily ed., September 16, 1974). In our view, such a brief extension cannot significantly affect the legal rights of the parties.

[4]The district court's injunction bars the Association from denying any application for a "reduction of service which has been or may hereafter be determined by a court of competent jurisdiction to be necessary for the preservation of rights guaranteed by the United States Constitution" (J. App. 82). We assume that, in making such a determination, a court would of course consider the availability under Section 303 of the Rail Act of compensation for interim erosion amounting to a taking. See pp. 38-39 of our opening brief. We therefore believe an injunction of that kind, although not necessarily in those identical terms, would, in the absence of any Tucker Act remedy, cure any constitutional defect by preventing any takings through interim erosion for which there would be no just compensation.

suaded that this Court must reach and decide the "Tucker Act question" presented by these appeals.

2. We showed in our brief as appellees in No. 74-166 (pp. 16-24) that the question whether the final conveyance provision (Section 303) of the Rail Act will in fact effect a taking of property is not ripe for adjudication. Unlike appellant Smith in No. 74-166, appellees Connecticut General Insurance Corporation, *et al.* in these cases do not contend that the final conveyance provision will in fact effect a taking of property. Their contention is instead (Br. 109-112), that the Rail Act itself fails to furnish assurance of just compensation for any taking effected by the final conveyance and that that failure presents an alternative ground for affirming the district court's injunctions against certification of the final system plan under Section 209(c) and enforcement of Section 303. See, also, pp. 36-58 of the brief for appellee Penn Central Company. We disagree. Any failure of the Rail Act itself to provide assurance of just compensation would at most provide, even in the absence of a Tucker Act remedy, a basis only for temporarily enjoining certification pending a judicial determination of the fairness and equity of the total amount of consideration to be made available under the plan. See p. 39 of our brief as appellees in No. 74-166.

But we agree with appellants Blanchette, *et al.* (see pp. 48-54 of their opening brief), that the question whether a remedy for any otherwise uncompensated taking effected by the final conveyance will be available under the Tucker Act is now justiciable.[5] This conclusion is

---

[5]Of course, we maintain our contention that any assessment of the respective values of the rail properties to be conveyed and the securities to be received in return would at this point be uninformed and premature. See pp. 16-24 of our brief as appellees in No. 74-166.

reinforced by the Special Court's determination that the reorganization process prescribed by the Rail Act satisfies the statutory standards of fairness and equity if but only if this Court holds that the Court of Claims will have jurisdiction to try taking claims arising out of the final conveyance. See *In the Matter of Penn Central Transportaion Company, et al.*, Nos. 74-8, *et al.*, decided September 30, 1974 (Special Court), slip op. of Judge Friendly, pp. 111-116. The Tucker Act question raised by appellants Blanchette, *et al.* is, however, indistinguishable from the question whether a Tucker Act remedy will be available for any takings resulting from interim erosion. No one has suggested any reading of the Rail Act which would deprive the Court of Claims of jurisdiction over suits based upon some but not all forms of alleged takings arising under the Rail Act. The Tucker Act question presented by these appeals is therefore single and indivisible - *i.e.*, whether the Court of Claims has jurisdiction to hear just compensation suits based upon alleged takings arising under the Rail Act. We showed in our opening brief (pp. 39-48) that the Court of Claims does possess such jurisdiction.

3. Appellees[6] contentions against the availability and adequacy of a Tucker Act remedy are fully answered in the opinion of the Special Court (*In the Matter of Penn Central Transportation Company, et al., supra,* slip op. of Judge Friendly, at pp. 83-111) and the reply brief for appellant United States Railway Association, upon both of which we rely.

---

[6]"Appellees" refers to the parties appearing as appellees in all three cases (Nos. 74-165, 74-167, and 74-168).

For the foregoing reasons, and for the reasons stated in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

CARLA A. HILLS,
Assistant Attorney General.

KEITH A. JONES,
Assistant to the Solicitor General.

JAMES F. DAUSCH,
Attorney.

RODNEY E. EYSTER,
General Counsel,

JEROME E. SHARFMAN,
Attorney,
Department of Transportation.

OCTOBER 1974.

DOJ-1974-10

Nos. 74-165, 74-167 and 74-168

MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

October Term, 1974

UNITED STATES OF AMERICA, et al.,
Appellants in No. 74-168,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, PENN CENTRAL COMPANY, et al.,
Appellees.

UNITED STATES RAILWAY ASSOCIATION,
Appellant in No. 74-167,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, PENN CENTRAL COMPANY, et al.,
Appellees.

ROBERT W. BLANCHETTE, RICHARD C. BOND AND JOHN H. McARTHUR AS TRUSTEE OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR,
Appellants in No. 74-165,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, PENN CENTRAL COMPANY, et al.,
Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

REPLY BRIEF FOR APPELLEE PENN CENTRAL COMPANY.

DAVID BERGER,
GERALD J. RODOS,
PAUL J. McMAHON,
EDWARD H. RUBENSTONE,
1622 Locust Street,
Philadelphia, Pennsylvania,
Attorneys for Appellee Penn Central Company.

Of Counsel:
DAVID BERGER, P. A.,
Attorneys-at-Law.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

INDEX.

	Page
INTRODUCTION	1
ARGUMENT	2
CONCLUSION	7

TABLE OF AUTHORITIES.

Cases:	Page
Brooks-Scanlon Co. v. Railroad Commission, 251 U.S. 396 (1920)	4
Connecticut General Insurance Co. et al. v. United States Railway Association, et al., C. A. Nos. 74-189, 74-1107, 74-1149 (E. D. Pa. dated June 25, 1974)	1, 3
Continental Illinois Nat'l. Bank & Trust Co. v. Chicago, R.I. & P. Ry., 294 U.S. 648 (1935)	4
In the Matter of Penn Central Transportation Company, No. 74-8 (decided September 30, 1974)	2
Penn Central Co. v. United States of America, Doc. No. 129-74, United States Court of Claims, filed April 10, 1974	5
Statutes:	
1973 Regional Rail Reorganization Act:	
Generally	4, 5, 6
Section 207(b)	2, 7
Section 209(c)	7
Section 303	7
Section 304(f)	7
Tucker Act, 28 U.S.C. § 1291	2
Miscellaneous:	
Senate Joint Resolution 59	5
U.S. Constitution, Fifth Amendment	5



REPLY BRIEF OF APPELLEE PENN CENTRAL COMPANY.

Appellee Penn Central Company submits this Reply Brief in further support of the Order of the three-judge court in *Connecticut General Insurance Co. et al. v. United States Railway Association, et al.*, C. A. Nos. 74-189, 74-1107, 74-1149 (E.D. Pa. dated June 25, 1974).

ARGUMENT.

Penn Central Company wishes to emphasize to the Court the unique position which it occupies both in these reorganization proceedings and in connection with the question of interim erosion which bears so heavily upon the recent decision of the Special Court in *In the Matter of Penn Central Transportation Company, No. 74-8* (decided September 30, 1974).

The Special Court, pursuant to Section 207(b) of the 1973 Regional Rail Reorganization Act, is authorized to review the Section 207(b) findings of the Reorganization Court as to the fairness and equity to the estate of the processes provided by the Act for the reorganization of the debtor railroads. In this instance, the Special Court reversed the findings of Judge Fullam and held that the Act did indeed provide a process which would be fair and equitable to the estate of Penn Central. Primarily, the court rested its decision upon its conclusion that the remedies provided for by the Tucker Act, 28 U.S.C. § 1291, would be available to creditors and shareholders of Penn Central to compensate for any interim erosion which takes place and for any deficiencies which might result if Council is ultimately unsuccessful. As such, the Special Court reversed the lower court's decision and stayed its mandate pending the determination of the instant proceedings by this Court.

Penn Central Company is the parent holding company of the Penn Central Transportation Company, owner of 100% of the stock in the Transportation Company, an unsecured creditor of the Transportation Company in the approximate amount of $41.8 million, and is the representative in the reorganization proceedings of approximately 160,000 shareholders. As the equity owner of Penn Central Transportation Company and as an unsecured creditor,

Penn Central Company's interests in the Debtor's estate are the first to feel the effects of any erosion of assets. The impact of the erosion which has already occurred upon the shareholders' interests, as the figures cited below clearly demonstrate, has been substantial.

As early as January 1, 1973, the Trustees of the Penn Central Transportation Co. indicated, in unambiguous terms, the damaging effect of continuing erosion upon the assets and future operations of the railroad were of such magnitude that:

> ". . . the value of the estate has already been substantially eroded and the trustees are presently unable to prevent continuing erosion . . .
>
> "There is, simply, not enough cash to cope with continuing claims and to embark upon the capital improvements program which would permit a continuation of service improvements. Not only is the ability to preserve earning power jeopardized, but Penn Central's essential public services cannot be sustained on this basis.
>
> "The Trustees conclude that further progress can reasonably be expected in the direction of satisfying the conditions to reorganization, but that the evidence does not support the hope that such progress will be fast enough to prevent the erosion of the estate in which claimants have undeniable constitutional rights, and the ultimate deterioration of the property." Trustees' Interim Report of January 1, 1973, p. 4 (Doc. No. 4911), cited in *Connecticut General Insurance Corp. v. United States Railway Association* (J. A. p. 39).

It should be emphasized that on June 21, 1970, the date upon which the Penn Central entered bankruptcy, shareholders' equity in the estate was quite substantial, totalling

approximately $1,666.6 million (Penn Central Transportation Co., Balance Sheet of June 21, 1973, Doc. No. 218). However, as of January 1, 1973, the date of the Trustees' above-quoted remarks, that same equity had been cut almost in half to approximately $856.7 million (Trustees' Statement of Assets and Liabilities of Debtor as of December 31, 1972). As of January 2, 1974, the date on which the Regional Rail Reorganization Act of 1973 was enacted into law, shareholders' equity had shrunk to approximately $684.1 million (Trustees' Statement of Assets and Liabilities as of December 31, 1973). Thus, interim erosion had, by this time, made inroads into that equity of approximately $980 million between the date the petition for reorganization was filed and the passage of the Act.

Up until the issuance of the Trustees' Report of January 1, 1973, it could have responsibly been asserted that the rights of creditors to dispose of their property should be suspended to permit the development of a feasible plan of reorganization under the teaching of *Continental Illinois Nat'l. Bank & Trust Co. v. Chicago, R.I. & P. Ry.*, 294 U.S. 648 (1935). However, once the findings of the Trustees were made known, the likelihood of successful future reorganization under § 77—the sole justification for delaying the exercise of creditors' rights—virtually ceased to exist. From that date forward, it is apparent that continued rail operations were carried out solely for the benefit of the public interest, that costs of continuing erosion were impermissibly imposed upon creditors and shareholders alike, and that the widely-accepted teachings of *Brooks-Scanlon Co. v. Railroad Commission*, 251 U.S. 396 (1920), and its progeny, were being ignored and the rights of plaintiffs were being subjugated to the interests of the public.

In conjunction with the balance sheet figures and the statements of the Trustees is the fact that on February 8,

1973—after the Trustees' Report had made clear that a successful reorganization was impossible—Congress enacted, and the President thereafter approved, Senate Joint Resolution 59 which required the Transportation Company to continue to provide rail operations under existing conditions, in the public interest, despite the clear certainty that such a continuance of operations would result in substantial operating deficits and concomitantly, a resultant depletion of the stockholders' equity.*

Subsequent to the Senate Joint Resolution, Congress passed and the President signed the 1973 Regional Rail Reorganization Act which again mandated continued rail operations for an indefinite period of time despite the already substantial losses which had been previously borne by the shareholders and creditors of the estate. Needless to say, as plaintiff has demonstrated in its Brief as Appellee, the 1973 Act fails to provide just compensation for that interim erosion as is required by the Fifth Amendment, despite almost universal recognition that the payment of such compensation is indeed required.

It is apparent that the interests of Penn Central Company and the individuals it represents have been severely damaged by governmental actions requiring the Transportation Company to continue deficit operations even after all likelihood of successful reorganization had vanished. As a result, shareholders of Penn Central have been forced to absorb crippling and unconstitutionally inflicted losses within a relatively short period of time. The Special Court decision completely ignored this ominous state of affairs. Furthermore, if the Special Court, in its opinion, intended

* Penn Central Company has initiated litigation in the United States Court of Claims to recover damages for the unconstitutional taking of its property for the period commencing February 8, 1973 and for the period commencing January 2, 1974 to the present. *Penn Central Co. v. United States of America*, Doc. No. 129-74, United States Court of Claims, filed April 10, 1974.

to imply that the shareholders did not retain any equity in the Debtor's estate as of January 2, 1974, such an implication is clearly erroneous. There was and is no evidence in the record which would support such a finding. Indeed, the evidence, as noted above, clearly indicates that the shareholders' equity as of that date totalled $684.1 million. As such, this Court is respectfully requested to give special heed to the position of Penn Central Company and its shareholders in this reorganization process and to recognize the inequitable manner in which interim erosion and the entire 1973 Rail Act affects the constitutionally protected interests of Penn Central Company in the Debtor's estate.

CONCLUSION.

For all of the reasons stated above and in its Brief as Appellee filed with the Court in this action, it is clear that the equity interests of Penn Central Company as shareholders and unsecured creditors in the estate of the Debtor have been substantially and unconstitutionally eroded by the actions of the government in requiring continued, uncompensated deficit rail operations for the public benefit. Therefore, appellee Penn Central Company respectfully requests that the Order of the three-judge court dated June 25, 1974, enjoining the United States Railway Association from certifying a Final System Plan pursuant to Section 209(c) of the Act, enjoining defendants from taking any action to enforce the provisions of Section 304(f) of the Act, enjoining all parties from enforcing or implementing portions of Section 207(b), declaring Section 303 of the Act null and void, declaring Section 304(f) of the Act null and void, and declaring portions of Section 207(b) null and void be affirmed.

Respectfully submitted,

DAVID BERGER,
GERALD J. RODOS,
PAUL J. MCMAHON,
EDWARD H. RUBENSTONE,
1622 Locust Street,
Philadelphia, Pa. 19103
Attorneys for Appellee
Penn Central Company

Of Counsel:
DAVID BERGER, P. A.,
Attorneys-at-Law.

Nos. 74-165, 74-166, 74-167, and 74-168

OCT 17 19
MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

REGIONAL RAIL REORGANIZATION ACT CASES

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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BRIEF FOR COMMONWEALTH OF PENNSYLVANIA AMICUS CURIAE

ISRAEL PACKEL, *Attorney General*
Capitol Annex
Harrisburg, Pa. 17120

GORDON P. MacDOUGALL,
Special Assistant Attorney General
705 Ring Building
Washington, D.C. 20036

Attorneys for Commonwealth of Pennsylvania

October, 1974

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INDEX

	Page
INTEREST OF PENNSYLVANIA	1
The Danger of Conrail	3
Events Leading to Enactment	4
Judicial Proceedings under the Rail Act	8
Decision of the Special Court	11
The Connecticut General Decision	12
ARGUMENT	13
I. A Railroad in Reorganization May Be Required to Suffer Losses During A Necessary Period Pending Such Reorganization	13
II. Section 207(b) Should Be Held Void in Its Entirety	14
Due Process	15
Separation of Powers	17
III. The Certification of the Final System Plan Should Be Enjoined	19
CONCLUSION	21
APPENDIX	
Opinion of Special Court (45 U.S.C. 719), dated May 24, 1974, dismissing appeals from first sentence of section 207(b) for lack of jurisdiction	App.

TABLE OF AUTHORITIES

Page

Cases:

Baker v. Pennsylvania,
400 U.S. 875 and 401 U.S. 902 (1971) 14

B. & O. R. Co. v. United States,
386 U.S. 372 (1967) 4

Flast v. Cohen,
392 U.S. 83 (1968) 19

In Re Boston & Maine Corporation,
378 F. Supp. 68 (D. Mass. 1974) 2

In Re Lehigh and Hudson River Railway Company,
374 F. Supp. 4 and 377 F. Supp. 475 (S.D.N.Y. 1974) . . 2

In Re Litigation Under Reg. Rail Reorganization Act of 1973,
373 F. Supp. 1404 (Mult. Dist. 1974) 21

In Re Penn Central Transportation Co.,
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Page

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Page

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-165, 74-166, 74-167, 74-168

REGIONAL RAIL REORGANIZATION ACT CASES

On Appeal from the United States District Court for The Eastern District of Pennsylvania

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BRIEF FOR COMMONWEALTH OF PENNSYLVANIA AMICUS CURIAE

INTEREST OF PENNSYLVANIA

This brief Amicus Curiae is sponsored by the Attorney General of Pennsylvania on behalf of the Commonwealth of Pennsylvania. Probable jurisdiction was noted on October 9, 1974.

The position of Pennsylvania is that the judgment below should be affirmed in part, and reversed in part. Section 304(f) of Regional Rail Reorganization Act of 1973 ("Act"), which prohibits abandonments of line and discontinuances of service for a limited period, is constitutional, and the judgment below should be reversed to that extent; however,

Section 207(b) of the Act, which sets forth the process by which a railroad will come under the Act upon pain of dismissal of the reorganization proceeding, is unconstitutional, and the judgment below should be affirmed on this ground, but reversed to the extent Section 207(b) is not void in its entirety.

We support the injunction against certification of a Final System Plan. The Act should be returned to Congress for appropriate revisions, or for an entirely different approach.

The Governor of Pennsylvania, Hon. Milton J. Shapp, was an active participant in the legislative forum during consideration of the Act by the Congress. The Act is viewed as "Phase II" of the Penn Central merger disaster.[1]

The Attorney General of Pennsylvania participated in all of the so-called "120-day" and "180-day" decisions under Section 207(b) of the Act, with the exception of the proceeding involving the Ann Arbor Railroad Company.[2] Pennsylvania was an appellee before the Special Court, in support of the determination of various reorganization

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[1] Hearings on S. 1031, S. 2188 & H.R. 9142, *Northeastern and Midwestern Railroad Transportation Crisis*, before Surface Transportation Subcommittee of the Committee on Commerce, U.S. Senate, 93rd Cong., 1st Sess., Ser. No. 93-8, at pp. 161-204 and 832-44 (1973).

[2] Penn Central Transportation Co., Lehigh Valley, Reading, Central R.R. Co. of New Jersey, Lehigh & Hudson River, Erie Lackawanna, and Boston & Maine. Some of these decisions have been reported. *In Re Lehigh and Hudson River Railway Company*, 374 F. Supp. 4 and 377 F. Supp. 475 (S.D. N.Y.); *In Re Boston & Maine Corporation*, 378 F. Supp. 68 (D. Mass.); *In Re Reading Company*, 378 F. Supp. 474 and 378 F. Supp. 481 (E.D. Pa.).

courts not to be reorganized under the new Act,[3] and was an appellant before the Special Court seeking to reverse the decision of the Reading court that Reading Company be reorganized under the Act.[4]

The Danger of Conrail

These appeals are largely concerned with whether a Tucker Act[5] remedy is available to enable the U.S. Court of Claims to enter a deficiency judgment against the United States of America for any interim erosion, or for a taking of property by way of conveyance pursuant to a final system plan.

This issue arises primarily, in our judgment, because of the general consensus among transportation experts that Conrail will not prove economically viable. The evidence before the various reorganization courts is summarized in the opinion of the Special Court,[6] where the court found –

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[3] Penn Central, Lehigh Valley, Central R.R. Co. of New Jersey, and Lehigh & Hudson River.

[4] There were at least two reorganization courts that issued "120-day" orders without a formal proceeding. One of these is the Cadillac & Lake City Railroad, mentioned in Judge Friendly's opinion for the Special Court, at p. 7, fn. 9. The other is *New Hope & Ivyland Railroad Company* (Bank. No. 70-324, E.D. Pa.), where District Judge Luongo on May 2, 1974, entered an order under the first sentence of Section 207(b) finding the railroad reorganizable on an income basis within a reasonable time under Section 77 of the Bankruptcy Act and that the public interest would be better served by continuing the present reorganization proceedings rather than by a reorganization under the Act.

[5] 28 U.S.C. 1491.

[6] Special Court, opinion of Sept. 30, 1974, at pp. 57-83.

> "Conrail's prospects to be sufficiently doubtful that . . . we would not find the processes of the Act to be fair and equitable, absent a Tucker Act remedy." (p. 69)
>
> "The upshot is that the investors cast sufficient doubts on Conrail's prospects that it would be unfair and inequitable to remit them solely to the inadequate remedies provided in Section 303(c)(2)." (p. 83)

Pennsylvania is concerned with the viability of Conrail in the context of adequate railroad service to meet the needs of the citizens and businesses of the State. We concur in the doubts concerning Conrail's viability. Since the shipping and traveling public would not have a remedy, it is our suggestion that the Act be returned to Congress, *now*, so that injury may be avoided.[7]

Events Leading to Enactment

Regional Rail Reorganization Act of 1973 – with the creation of Conrail – is the direct result of the disastrous merger of the former Pennsylvania Railroad Company (PRR) with the former New York Central Railroad Company (NYC), which was consummated February 1, 1968.[8] The PRR had paid dividends in every year until its merger. The NYC likewise had an excellent financial history. Neither railroad had ever been in reorganization until, once merged on February 1, 1968, the behomoth went bankrupt two years later in June, 1970.

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[7] See testimony of Governor Shapp, fn. 1, *supra.*

[8] See: *B & O R. Co. v. United States,* 386 U.S. 372 (1967) and *Penn-Central Merger Cases,* 389 U.S. 486 (1968).

The rationale underlying the Penn-Central merger was that railroad traffic would dramatically decrease, such that merger would bring railroad plant in line with available railroad business. The I.C.C. adopted important findings of its hearing examiners in approving the merger. *Pennsylvania R. Co.-Merger-New York Central R. Co.*, 327 I.C.C. 475, 481-82 (1966):

> "Continuously declining traffic levels over the past years have resulted in a reduction in plant for both applicants. Their application to merge is another step in that direction and which applicants have shown will be fruitful of operating economies in the long run." 327 I.C.C. at 681.
>
> "From a traffic and revenue standpoint, every evidentiary factor indicates a longrun decline broken only by normal cyclical variations and under existing circumstances, no prudent justification exists for expecting a radical recovery from this long-range trend." 327 I.C.C. at 911.
>
> "Rail output will continue to fluctuate around the 600 billion ton-mile mark with approximate upper and lower limits of 650-660 and 550-560.
>
> "Eastern District roads and the NYC-PRR specifically will face a continued decline in output.
>
> "In light of the long-term growth of real output, the increasing transportation demand of the economy will be supplied by modes, public and private, other than rail." 327 I.C.C. at 739.

In actual fact – as is now well known – Penn Central traffic at the time of entry into reorganization was about 40 percent higher than projected.[9]

The asserted need to reduce the railroad plant – which proved so disastrous and so incorrect in the case of the Penn Central merger – is now claimed as the rationale to create an even greater merger.

The push for legislation began in early 1973. The Penn Central trustees, in reports issued January 1 and February 1, 1973, advised the reorganization court that –

> "without governmental financial assistance for improvement of the railroad, a reorganization of Penn Central cannot be achieved in 1976, as they had considered possible."

Shortly thereafter, on February 8, a one-day work stoppage occurred throughout Penn Central's system. It was charged that there was no labor issues, and that the dispute was merely a vehicle to get to the Congress.[10] In any event, Congress enacted P.L. 93-5, 87 Stat. 5, within hours. The legislation placed a 90-day moratorium on the so-called labor strike, and required the U.S. Secretary of Transportation to submit a report by March 26 which –

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[9] Class I rail output in 1973 amounted to 852 billion ton-miles. Yearbook of Railroad Facts (1974 Ed.), Assn. of American Railroads, at p. 29.

[10] See: Hearings on S.J. Res. 59, *Penn Central Railroad Dispute – February 1973*, before U.S. Senate Committee on Labor & Public Welfare, 93rd Cong. 1st Sess., 31 (1973); Hearings on H.J. Res. 331, *Penn Central Railroad Crew Consist Labor-Management Dispute*, before U.S. House Committee on Interstate & Foreign Commerce, 93rd Cong., 1st. Sess., Ser. No. 93-2, at 13 (1973). See also: Senate Report No. 93-18, *Consideration of Legislation for Temporary Settlement of Railroad-Labor Dispute.*

> ". . . provides a full and comprehensive plan for the preservation of essential rail transportation services in the Northeast section of the Nation, including the President's proposals, if any, regarding federal financial expenditures necessary for restoration or preservation of essential transportation services imperiled by the financial failure of rail carriers. . . ."

The legislation also provided that during the 90-day period no change could be made by the court in the conditions out of which the dispute arose.

The Penn Central reorganization court on March 6, 1973, *sua sponte*, stated it was highly doubtful that Penn Central could properly be continued to operate beyond October 1, 1973. A hearing was set for July 2, 1973, for the trustees to present a feasible plan for reorganization or proposals for liquidation. *In Re Penn Central Transportation Company*, 355 F. Supp. 1343 (E.D. Pa.).

The Penn Central trustees on July 2, submitted a plan of liquidation as their plan of reorganization. After extensive hearings by I.C.C., the agency determined the trustees' plan not to be a plan of reorganization within the meaning of Section 77 of the Bankruptcy Act, and rendered a comprehensive report to this effect on September 30, 1973. *Penn Central Reorganization*, 347 I.C.C. 45.

Thereafter, attention shifted to the legislative scene. The approach taken by the Senate Committee on Commerce was to provide interim financial assistance to the railroads in reorganization during a planning period by the I.C.C., Department of Transportation, and the Congress. Under the principal Senate proposal, S. 2188, the implementing legislation for the actual restructuring of the railroad network would not be finalized until after the planning process

was completed.[11] On the other hand, the House Committee on Interstate & Foreign Commerce desired immediate enactment of the restructuring legislation, even prior to the commencement of the planning process. No hearings were held by the House Committee on the H.R. 9142, although hearings had been held on other proposed legislation for the Northeast railroads. The bill H.R. 9142 was reported November 3, 1973 by the House committee, and it passed the House on November 8, 1973.

Hearings were then held by the Senate Committee in late November on H.R. 9142 and S. 2188. A revised version of H.R. 9142 (S. 2767) was reported December 13. The Conference report was agreed to in late December, and the measure signed by the President on January 2, 1974.

Judicial Proceedings under the Rail Act

The proceedings held by the various reorganization courts under section 207(b) of the Act, with the exception of the Ann Arbor and Reading, resulted in decisions by the reorganization courts not to be reorganized under the new Act.

The Government did not appeal the Erie Lackawanna and Boston & Maine decisions to the Special Court. These two roads connect with the Delaware & Hudson Railway Company ("D&H") to provide a through route between Chicago, Ill. and Portland, Me. See: *Norfolk & W. Ry. Co. and New York, Chicago & St. Louis,* 330 I.C.C. 780 (1967), sustained in *Penn-Central Merger Cases,* 389 U.S.

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[11] See: S. Rept. 93-365 (Report on S. 2188); S. Rept. 93-302 (Report on S. 1925); and S. Rept. 93-344 (Report on S. 2060).

486 (1968). The D&H is not in reorganization. It is a subsidiary of Norfolk & Western Railway Company.

On the other hand, the Government did appeal the decisions of the Penn Central, Lehigh Valley, Central R.R. Co. of New Jersey and Lehigh & Hudson River reorganization courts to the Special Court.

Commonwealth of Pennsylvania was an appellee in the Special Court proceedings, except with respect to the Reading decision.[12]

Earlier, Pennsylvania had appealed various of the "120-day" decisions, entered about May 2, 1974, to the Special Court.[13] The Special Court declined to consolidate the appeals from the "120-day" decisions with the forthcoming "180-day" decisions to be rendered by the reorganization courts on or about July 1, 1974. In fact, the Special Court dismissed the "120-day" appeals for lack of jurisdiction. The Special Court's opinion of May 24, 1974 is set forth in the appendix to this amicus brief.[14] One effect of

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[12] Pennsylvania was not a party to the Ann Arbor proceeding.

[13] The New Haven Trustee also appealed the "120-day" decision to the Special Court.

[14] Penn Central's trustees, on April 3, 1974, publicly announced their view to their reorganization court that the Act did not provide a process which would be fair and equitable. The Special Court on April 26 adopted rules requiring an appellant to the forthcoming reorganization court order under the first sentence of section 207(b), anticipated about May 2, to show cause why the appeal should not be dismissed for lack of jurisdiction. See: *Rules of the Special Court under Section 209 of Regional Rail Reorganization Act of 1973*, preceding vol. 374 of Federal Supplement.

the Special Court's procedural ruling was to place primary emphasis upon whether the process of the act is "fair and equitable" to creditors and investors, rather than upon the public interest question.[15]

Commonwealth of Pennsylvania appealed the "120-day" decisions to the U.S. Court of Appeals for the Third Circuit[16] and to the Second Circuit.[17] A panel of the Third Circuit heard argument on July 18, 1974, but has determined not to decide the appeals until after a decision from the U.S. Supreme Court in this case.[18] Similarly, Commonwealth of Pennsylvania appealed the "180-day" decisions

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[15] The ultimate decision of the Special Court was to reverse the order of the reorganization courts that the Act does not provide a process which would be fair and equitable to the estate of the railroad. (Opinion, p. 116-17).

[16] Nos. 74-1556/8 and 74-1589. The appeals were heard with that taken by the New Haven Trustee, No. 74-1501.

[17] No. 74-1684. The Lehigh & Hudson River Ry. is undergoing reorganization in the U.S. District Court for the Southern District of New York.

[18] Letter from Clerk of Court to all counsel, dated July 22, 1974. Pennsylvania's subsequent efforts to secure a ruling from the Third Circuit have been unavailing. The situation is reminiscent of a similar occurrence during judicial review of the Penn Central merger, where a suit attacking the basic validity of the merger and inclusion had been stayed by a three-judge district court at a time when the railroad interests and the Government (but not the record), were before the U.S. Supreme Court. *Penn-Central Merger Cases*, 389 U.S. 486, 502-7, 527-28, 528-48 (1968). See the description given by the General Attorney for Penn Central. Helmetag, Carl, *Railroad Mergers*, 54 Va. L. Rev. 1493, 1521 and fn. 164 (1968).

under the second sentence of section 207(b) to the respective U.S. Court of Appeals.[19] The appeals involve the constitutionality of section 207(b) as applied to various railroads.

Decision of the Special Court

The Special Court reversed all of the decisions of the reorganization courts, except those of the Ann Arbor and Reading Courts, and, of course, its reversal did not affect the two railroads, Erie-Lackawanna and Boston & Maine, whose reorganization court decisions the Government had elected not to appeal.

Although Pennsylvania's notices of appeal from the "120-day" orders had been dismissed by the Special Court for lack of jurisdiction, and although Pennsylvania did not appeal the "180-day" decisions to the Special Court, except for Reading, the Special Court nevertheless proceeded as if Pennsylvania had appealed certain constitutional issues to the Special Court.[20]

Concerning the first portion of the first sentence of section 207(b), the Special Court concluded that there was no substantial difference with the "undue delay" of section 77(g) of the Bankruptcy Act. (Opinion, Thomsen, p. 4):

> "Finally, we find no substantial difference between the standard used in section 207(b) – 'reorganizable on an income basis within a reasonable time under section 77' – and the standard – 'undue delay' – used in section 77(g)".

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19 Nos. 74-1686/9 (3rd Cir.); 74-2018 (2d Cir.).

20 Opinion, Thomsen, pp. 1-4, 7-8, 12, 15.

With respect to the "public interest", mentioned in the second portion of the first sentence of section 207(b), the Special Court in the opinion by Judge Friendly, stated that except for the Penn Central Secondary Debtors, there was no occasion for the reorganization courts to consider whether reorganization under Section 77 of the Bankruptcy Act would better serve the public interest. (Opinion, Friendly, p. 28) On the other hand, Judge Thomsen for the Special Court concluded that the public interest would be better served by reorganization under the Act. (Opinion, Thomsen, pp. 3-4; 15)

The Connecticut General Decision

The proceedings below involved attacks upon the constitutionality of the Act by creditors and shareholders of Penn Central.

The three-judge court ruled that section 304(f), which prevents interim abandonments without approval by the United States Railway Association, is null and void to the extent it would require continued operation of rail services at a loss in violation of the constitutional rights of the owners and creditors of a railroad. (J.A., pp. 82-83).

The court also ruled that section 207(b) is unconstitutional to the extent it requires reorganization courts to dismiss proceedings under section 77 of the Bankruptcy Act. (J.A., p. 83).

We point out that the threat of the *in terrorem* dismissal of the proceedings, in our judgment, resulted in a limited participation by public bodies in the "120-day" and "180-day" proceedings. The only public bodies in the Penn Central proceedings, and before the Special

Court, were the States of New Jersey and Pennsylvania and the City of Pittsburgh.[21]

ARGUMENT

Of the many questions presented by these appeals, this brief is primarily concerned with two issues. These are (1) whether Section 304(f) of the Act is null and void by requiring continued rail operations at a loss and, (2) whether section 207(b) is void in its entirety. Section 304(f), 45 U.S.C. 744(f), is set forth in the Joint Appendix (J.A., p. 418), as is section 207(b), 45 U.S.C. 717(b). (J.A., p. 406).

We urge that Section 304(f) is constitutional, but that section 207(b) is unconstitutional in its entirety.

The transmission of the final system plan should be enjoined, and the Act returned to the Congress.

I. A RAILROAD IN REORGANIZATION MAY BE REQUIRED TO SUFFER LOSSES DURING A NECESSARY PERIOD PENDING SUCH REORGANIZATION.

We do not believe an extended argument is necessary concerning the proposition that a railroad in reorganization can be required to operate some facilities at a loss for a reasonable period pending reorganization. Section 304(f) of the Act is addressed to an "interim abandonment". The recent decisions of this court in *Penn-Central Merger Cases*, 389 U.S. 486, 510-11 (1968) and *New Haven Inclusion Cases*, 399 U.S. 392, 492 (1970), sustain the proposition

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[21] The States of Wisconsin and Michigan participated only in the Ann Arbor appeal. New York's Dept. of Transportation filed an amicus brief in the Special Court.

that the public interest can require a deficit operation pending reorganization. The brief of appellant, United States Railway Association, appears adequate on this score.[22]

The three-judge district court erred in finding section 304(f) unconstitutional in any respect. The "freeze" on railroad abandonments, during the planning process of the United States Railway Association, is similar to the moratorium on passenger train discontinuances during the planning period by the U.S. Department of Transportation under Rail Passenger Service Act of 1970. 45 U.S.C. 642. *Baker v. Pennsylvania*, 400 U.S. 875 and 401 U.S. 902 (1971).

II. SECTION 207(b) SHOULD BE HELD VOID IN ITS ENTIRETY.

The three-judge court ruled that section 207(b) is unconstitutional on the ground that it violates the uniformity requirement of the Bankruptcy clause, in that it directs the reorganization court to dismiss the proceeding in the event the debtor is found not to be reorganizable *on an income basis* within a reasonable time under section 77 of the Bankruptcy Act. (J.A., pp. 61-65, 82-83). The majority went beyond the uniformity issue to suggest (J.A., p. 65):

> "Indeed it seems probable that the same portion of section 207(b) is vulnerable on due process and equal protection grounds, and perhaps on the ground of separation of powers as well."

We agree that section 207(b)'s dismissal provision is unconstitutional, and the three-judge court should be affirmed

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[22] No. 74-167 at pp. 82-97.

in this regard. However, we urge the court below erred in not going further to declare section 207(b) void in its entirety.

Due Process. The Penn Central reorganization has been governed by section 77 of the Bankruptcy Act. Pennsylvania has claims against Penn Central, and Pennsylvania has a strong interest in adequate railroad transportation.

A section 77 proceeding can be dismissed only after a finding of "undue delay", and prior consultation with the Interstate Commerce Commission, as set forth in section 77(g). The dismissal of a section 77 case heretofore has been considered as a last resort.

The new Act says that a section 77 proceeding should be dismissed if the process of the new act would be unfair and inequitable to the Estate. However, even if the process is fair and equitable, section 207(b) requires reorganization under the new Act, transfer of property to Conrail, and the summary abandonment of lines not included in the Final System Plan, if the railroad is not "reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act and that the public interest would be better served by continuing the present reorganization proceedings than by a reorganization under the new Act."

It clearly violates the due process clauses to cut-off substantial rights of Commonwealth of Pennsylvania, and the interest of its citizens and businesses in opposition to abandonments, in the manner chosen by the Congress.

The Special Court attempted a cure by interpreting the phrase "reorganizable on an income basis within a reasonable time under section 77" to mean the same as "undue

delay" under section 77(g), thus warranting dismissal of the proceeding. (Opinion, Thomsen, p. 4)

There is no basis for such a comparison. Dismissal under section 77(g) requires prior consultation with the Interstate Commerce Commission, and usually a report by the I.C.C. See: *New York, O. & W. Ry. Co. Reorganization,* 295 I.C.C. 346 (1956).

The phrase "reorganizable on an income basis within a reasonable time under section 77" is not the same as "undue delay" under section 77(g). It derives from the language of *In Re Third Avenue Transit Corp.*, 198 F.2d 703, 706 (2d Cir. 1952) –

> "That the debtor can be reorganized in accordance with the Act, within a reasonable time."

The standards of *Third Avenue Transit* do not relate to dismissal of a reorganization proceeding, but are the standards for issuance of trustees' certificates for operating expenses which would supersede existing mortgage liens. The *Third Avenue Transit* test has been used frequently in the Penn Central reorganization cases. See: *In Re Penn Central Transp. Co.*, 474 F.2d 832, 835-6 (3rd Cir. 1973); 484 F.2d 323 (3rd Cir. 1973), cert. den. 414 U.S. 1079 (1974); 494 F.2d 270 (3rd Cir. 1974), cert. den. ____ U.S. ____ (10/15/74).

It may very well be the case that a railroad does not have a likelihood of reorganization within a reasonable time, yet it would be premature to dismiss the proceeding. Moreover, the requirement of an "income basis" reorganization is not contained in section 77, and a railroad's operations could be reorganized by merger or inclusion in another system, as suggested by the majority below. (J.A., pp. 64-65)

Section 207(b) has caused a radical revision in an on-going section 77 proceedings to the prejudice of Pennsylvania. The wording of section 207(b) is simply not the equivalent to the "undue delay" governing dismissal of the proceedings under section 77(g), and it is not requisite that a reorganization be on an "income basis".

Separation of Powers. Congress cannot delegate the overall broad "public interest" directly to the reorganization court. The various reorganization courts attempted to avoid the issue on the ground that the railroad was not reorganizable on an income basis within a reasonable time under section 77. Of course, where a doubt of constitutionality exists, a construction which is fairly possible will be attempted so as to avoid the question. *United States v. Delaware & H. Co.*, 213 U.S. 366 (1908); *United States v. Congress of Industrial Organizations*, 355 U.S. 106 (1948). However, such a construction cannot do violence to the Act.

Here, reading the "public interest" out of section 207 (b) is directly contrary to the intent of Congress. The I.C.C.'s guideline in approving a plan of reorganization is the "public interest" as stated in section 77(d).[23]

Moreover, because the term "and" is used between the two portions of the first sentence of section 207(b), the presumption is for the conjunctive sense, unless the legislative intent is clearly to the contrary. Sutherland (4th Ed.), Section 21.14, fn. 2. We suggest the "reorganizability" and "public interest" provisos must be read together and balanced against each other. In a somewhat analogous

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[23] Judge Thomsen, for the Special Court, made express findings on the public interest. (Opinion, Thomsen, pp. 3-4, 15).

situation, in proceedings under section 13a of the Interstate Commerce Act, 49 U.S.C. 13a, the "undue burden" and "public convenience and necessity" findings were balanced rather than entered separately. See: *Illinois Commerce Commission v. United States,* 320 F. Supp. 205, 208-9 (E.D. Ill. 1970); *Southern R. Co. v. North Carolina,* 376 U.S. 93, 101-5 (1964); Bard, Robert L., *Rail Passenger Service,* 34 U. of Chi. L. Rev. 301, 319-23 (1967). Cf. *Public of State of Indiana v. United States,* 325 F. Supp. 1223, 1226 (N.D. Ind. 1971).

The Conference Report clearly adopted the conjunctive interpretation of the "reorganizability" and "public interest" features in section 207(b). H. Rept. No. 93-744, at p. 52:

> "The conference substitute provides that, within 120 days after the date of enactment, the reorganization or other court must decide whether a railroad in reorganization is reorganized on an income basis within a reasonable period of time and that the public interest would be better served by continuing the present reorganization proceedings than by a reorganization under this bill. If the court decides that a railroad is not so reorganizable, the court is then required to order the railroad to proceed with reorganization pursuant to the bill."

This type of "public interest" is a legislative power administered by Congress. This Court stated in a leading case involving a railroad in reorganization that such "public interest" has been entrusted to administrative agencies. *Palmer v. Massachusetts,* 308 U.S. 79, 86 (1939):

> "It has become the settled social policy of both the states and the nation to entrust the type of public interest here in question to expert administrative

> agencies because of "the notion" as Judge Learned Hand pointed out below, "that a judge is not qualified for such duties."

Such traditional and general "public interest" in railroad reorganizations limits the power of the judiciary. The Court stated in *Flast v. Cohen*, 392 U.S. 83, 97 (1968):

> "Federal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process."

The "public interest" here is a legislative matter, and is not thought of as being capable of resolution through the judicial process. It violates the separation-of-powers concept. *National Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 590-91 (1949). The cases cited by the Special Court to the contrary are easily distinguishable, and the public interest was not of the broad scope involved here. (Opinion, Friendly, p. 29)

Section 207(b) should be held void in its entirety.

III. THE CERTIFICATION OF THE FINAL SYSTEM PLAN SHOULD BE ENJOINED.

The three-judge court enjoined the United States Railway Association from certifying a final system plan to the Congress. (J.A., p. 82). Pennsylvania concurs in that portion of the judgment. The result would be that the Act be returned to the Congress for revision.

The principal thrust of the brief for the United States Railway Association is the notion that the present railroad difficulties stem in large part from excess capacity, and

that the elimination of such alleged excess capacity -- particularly track – is key to railroad reorganization.

The report of the U.S. Secretary of Transportation, issued February 1, 1974 under section 204 of the Act, called for the elimination of apx. 25 percent of the rail network in the region. The report of the Interstate Commerce Commission, issued May 2, 1974 under section 205 (d)(1), was highly critical of this suggested plant reduction.

The scheme underlying the new Act is that a merger of many railroads into a single Conrail will serve the public interest and allow a reduction in capacity. The Penn Central trustees rejected dissolution of the Penn-Central merger because of "additional turmoil" in favor on Conrail:[24]

> "on hindsight, the merger of the Pennsylvania and the New York Central may not have been the best alinement of those roads. However, it is now, after great turmoil from labor, shipper, and management viewpoints, serving as an effective trunkline railroad. We see real disadvantage in dismembering the enterprise with all the additional turmoil that such a dismemberment would entail."

While the premise of the new Act is a contraction of railroad facilities, the very committee reports acknowledge that rail business is at an all-time peak. S. Rept. No. 93-601 at p. 11; H. Rept. No. 93-620, at p. 26.[25]

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[24] See: Testimony of Jervis Langdon in Hearings on H.R. 6591, *Northeast Rail Transportation*, before House Committee on Interstate & Foreign Commerce, Ser. No. 93-30, at 251-52 (1973).

[25] Appendix B to the Special Court's opinion suggests that legislative changes may be under consideration; however, such cannot be assured absent action by this Supreme Court in the instant appeals.

The Act should be returned to the Congress to remedy the obvious inconsistencies and to prevent very real damage to the national economy.[26]

CONCLUSION

The judgment should be affirmed in part and reversed in part, as suggested herein.

Respectfully submitted,

ISRAEL PACKEL, *Attorney General*
Capitol Annex
Harrisburg, Pa. 17120

GORDON P. MacDOUGALL,
Special Assistant Attorney General
705 Ring Building
Washington, D.C. 20036

Attorneys for Commonwealth of Pennsylvania

October, 1974

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26 We have assumed throughout this brief that this Court has complete freedom of action regarding constitutional questions. See: Opinion of Special Court, Friendly, at p. 35. Moreover, the Judicial Panel on Multidistrict Litigation, after extensive argument and briefing, declined to transfer the constitutional cases to the Special Court. *In Re Litigation Under Reg. Rail Reorganization Act of 1973*, 373 F. Supp. 1404-5 (1974).

APPENDIX

Special Court,
Regional Rail Reorganization Act of 1973

Argued May 23, 1974 Decided May 24, 1974

In the Matter of
PENN CENTRAL TRANSPORTATION COMPANY, **No. 74-3**
Debtor.

In the Matter of
READING COMPANY, **No. 74-5**
Debtor.

In the Matter of
LEHIGH VALLEY RAILROAD COMPANY, **No. 74-4**
Debtor.

In the Matter of
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, **No. 74-2**
Debtor.

In the Matter of
THE LEHIGH AND HUDSON RIVER RAILWAY COMPANY, **No. 74-1**
Debtor.

Before FRIENDLY, Presiding Judge, and McGOWAN and THOMSEN, Judges.

PER CURIAM:

We have before us five appeals from "120-day decisions" under the first sentence of §207(b) of the Regional Rail Reorganization Act of 1973 (the Act). In Docket 74-3 Richard Joyce Smith, Trustee of the property of The New York, New Haven and Hartford Railroad Company (the New Haven Trustee), a creditor of Penn Central Transportation Company (Penn Central), appeals from an order of Judge Fullam in the District Court for the Eastern District of Pennsylvania finding that Penn Central is not reorganizable on an income basis within a reasonable time under §77 of the Bankruptcy Act. The Commonwealth of Pennsylvania is the appellant in the four other dockets. In the case of the Lehigh Valley, Judge Fullam made a finding similar to that in the Penn Central; so did Judge Ditter, also in the District Court for the Eastern District of Pennsylvania, in the case of Reading Company, and Judge Augelli in the District Court for the District of New Jersey in the case of The Central Railroad Company of New Jersey. In the case of The Lehigh and Hudson River Railway Company, Judge Ward, in the District Court for the Southern District of New York, found that the railroad could not be reorganized on an income basis within a reasonable time and also that the public interest required reorganization under the Act.

Our study of §207(b) made us doubtful whether we had jurisdiction of appeals that might be taken from "120-day" decisions under the first sentence as distinguished from the "180-day" orders (or failure to make orders) under the third and fourth sentences. Our doubt was not bottomed, as thought by the New Haven Trustee, on any belief that our jurisdiction under §207(b) was limited to orders that would constitute "final decisions" under 28

U.S.C. §1291, but rather on scepticism whether Congress could have meant 120-day decisions as well as 180-day orders to be appealable. In the interest of an expeditious determination of this important procedural question, we provided in our Rule 13 that, immediately on the filing of an appeal from a decision under the first sentence of §207(b), the clerk of this court should send a notice requiring the appellant to show cause, at a time and place specified in such notice, why the appeal should not be dismissed for want of jurisdiction. Such notices were duly sent. Having received briefs and heard argument, we now dismiss all such appeals on that ground.

We begin our discussion by owning less than complete ability to understand why Congress required the district courts to act under §207(b) in two steps rather than in one, although the legislative history, hereafter summarized, affords some clue how this came about. The 120-day decision is rendered before the district court has the benefit of the evaluation of the report of the Secretary of Transportation on Rail Service in the Midwest and Northeast Region by the Rail Services Planning Office under §205(d)(1), which it will have available for 60 days before the 180-day decision is required. Moreover, the 120-day decision does not seem to have any immediate legal consequences, at least when it is adverse to reorganization under §77;[1] in such cases these consequences flow rather from the action required to be taken within the 180-day period. Even if there were no other pertinent considerations, we would require much clearer language than that in §207(b) to hold that such a "decision" is appealable.[2] But there are.

One strong indication that Congress did not intend us to review decisions under the first sentence of §207(b)

such as those here in question is furnished by the time-table. Under the penultimate sentence all appeals under §207(b) must be decided within 80 days after the appeal is taken – a most stringent requirement in light of the number of appeals Congress must have thought probable, the difficulty of the issues, and the voluminousness of the records. Yet if decisions under the first sentence against reorganization under §77 were appealable and we should need the full 80 days to decide them, our decisions would not have been rendered by the time the district courts are required to act under the third sentence. Moreover, we cannot imagine that Congress intended to demand that we hear and decide within such onerous time limits two sets of appeals involving many of the same issues. Similar considerations apply with respect to counsel; if decisions under the first sentence against reorganization under §77 were appealable, counsel would have to be writing their briefs to us at the same time they would be involved in further hearings in the district courts.

Our conclusion that 120-day decisions under the first sentence of §207(b) against reorganization under §77 are not appealable is also fortified by the legislative history. The relevant provision in the House bill, §301, reads as follows:

> Sec. 301. *Determination of Status of Railroads in Reorganization.* – Within sixty days after the date of enactment of this Act, each United States district court having jurisdiction over a railroad in reorganization shall make a finding as to whether or not, based on the financial condition of and prospects for such railroad, it can be reorganized on an income basis under section 77 of the Bankruptcy Act. With respect to a railroad which is found not to be reorganizable on

> an income basis under section 77 of the Bankruptcy Act, the court shall enter an order to the effect that such railroad shall be reorganized in accordance with the provisions of this Act and those provisions of such section 77 not inconsistent with this Act, or the court may entertain a motion to dismiss the section 77 proceedings. In any case in which a United States district court does not make the finding referred to in the first sentence of this section with respect to any railroad in reorganization within the sixty-day period referred to in such sentence, such railroad shall be presumed to be a railroad with respect to which there is a reasonable likelihood that it can be reorganized on an income basis under section 77 of the Bankruptcy Act. In the event that a railroad is found not to be reorganizable on an income basis under section 77 of the Bankruptcy Act, the court shall advise the association with respect to its findings under this section. The finding of each district court under the first sentence of this section, or the presumption created under the third sentence of this section, as the case may be, shall be subject to appeal as in the case of an order granting or denying a preliminary injunction pursuant to rule 52 of the Federal Rules of Civil Procedure and section 1292 of title 28 of the United States Code and any such appeal proceedings shall be concluded on an expedited basis.

See H.R. Rep. No. 93-620, 93rd Cong. 1st Sess., p. 4. Clearly this provided only for one appeal, not for two,[3] although the appeal would be to the appropriate court of appeals and not to a special court, which, under §501,

came into existence at a much later date, after the adoption of the preliminary system plan.

The Senate took an entirely different course concerning the time for district courts to decide whether reorganization should be under §77 or under the Act. The Railway Association was evidently to proceed initially on the assumption that all the bankrupt railroads in the Northeast would come under the plan. Then §207(b) provided:

> (b) *Approval.* – Within 90 days after the adoption and release by the Association of the preliminary system plan pursuant to subsection (a) of this section, each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether or not such railroad shall be reorganized by means of transferring some of its rail properties to the Corporation pursuant to the provisions of this Act. Because of the strong public interest in the continuance of rail transportation in the region pursuant to a system plan devised under the provisions of this Act, each such court shall order that reorganization be proceeded with pursuant to this Act unless it finds (1) that the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by such a reorganization than by a reorganization under this Act, or (2) that reorganization under this Act is not possible on terms which would be fair and equitable to the estate of the railroad in reorganization. An appeal from an order made under this section may be made only to the special court. Appeal to the special court shall be taken within 10

> days following entry of an order pursuant to this subsection, and the special court shall complete its review and render its decision within 20 days after such appeal is taken. There shall be no review of the decision of the special court.

S. Rep. No. 93-601, 93rd Cong. 1st Sess., pp. 70-71. Under the Senate bill there was again to be only one district court decision, although at a date much later than under the House bill, and consequently only one appeal – here to the special court.

Section 207(b) as enacted was evolved in conference. The relevant provision of the Conference Report, H.R. Rep. No. 93-744, 93rd Cong. 1st Sess., p. 52, was as follows:

> (4) the timing for decisions by the reorganization or other courts with regard to whether a railroad is reorganizable on an income basis or whether the "this Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization" has been modified. The conference substitute provides that, within 120 days after date of enactment, the reorganization or other court must decide whether a railroad in reorganization is reorganizable on an income basis within a reasonable period of time and that the public interest would be better served by continuing the present reorganization proceedings than by a reorganization under this bill. If the court decides that a railroad is not so reorganizable, the court is then required to order the railroad to proceed with reorganization pursuant to the bill. This court determination is to be submitted

within 60 days after the Office submits its study and evaluation of the Secretary's report on rail services in the region (180 days after the date of enactment), unless the court finds that the legislation does not provide a process which would be fair and equitable to the estate of the railroad in reorganization. If the court makes such a finding it is directed to dismiss the reorganization (or other) proceedings. Under the House bill the decision to proceed with reorganization under this legislation was to be made within 60 days after enactment in order to give the planners as much advance notice as possible as to those railroad properties which could be included in the final system plan. In the Senate amendment the decision was to be made within 390 days after enactment in order to give the court as much information about the reorganization process as possible. The conferees decided that a decision within 180 days after the date of enactment would provide the planners with adequate time to make their planning decisions, while simultaneously providing the court sufficient information concerning the process of reorganization under this legislation. For example, before the court is required to order a railroad to proceed in reorganization pursuant to this legislation it will have the benefit of the Secretary's report on rail services in the region, the Office's public hearings and its study and evaluation of that report, and study information and preliminary planning endeavors of the Association to consider if any person tries to sustain the burden of showing that the process of reorganization pursuant to this legislation would not be fair and equitable.

While the Conference Report admirably explicates the reason for placing the district court direction for reorganization under the Act 180 days after enactment rather than the 60 days provided in the House bill or the 390 days provided in the Senate bill, it does not explain why two sets of decisions were to be required rather than one. Seemingly the House and Senate bills were simply combined with the time limits changed. However, we cannot believe that by compromising on the time periods for action by the district courts, the Conference Committee meant to authorize two sets of appeals when both the House and the Senate had been satisfied with one.

We wish it to be crystal-clear that in holding that appeals will not lie from 120-day decisions against reorganization under §77 under the first sentence of §207(b), we do not mean that matters determined in such decisions are not reviewable by this court. We mean only that review will come when an appeal is taken from the 180-day order (or non-order). Even when an appeal from an interlocutory order is authorized, failure to take such an appeal will not preclude review of a question that might then have been raised if that question is also presented by the final judgment, see 9 Moore, Federal Practice ¶110.25[2] (Ward ed. 1973). *A fortiori,* as has long been held, *Milwaukee and Minnesota R.R.* v. *Soutter,* 69 U.S. (2 Wall.) 510, 520-21 (1865), a court on appeal from a final judgment must review earlier decisions affecting the judgment that were not appealable.[4] If a district judge who has returned a negative answer to one or both of the questions put in the first sentence of §207(b) should adhere to that position, this will be the predicate for an order directing reorganization under the Act unless the judge finds that the Act does not provide a process fair and equitable to the estate. The determination of non-

reorganizability under §77 or that the public interest would not be better served by proceeding thereunder will thus be reviewable on appeals from the action or inaction by the district courts under the third and fourth sentences of §207(b).

If we entertained more doubt than we do conerning the appealability of the 120-day decisions here at issue, we would consolidate the appeals from them with those that will be taken from the 180-day orders and apply the 80-day time limit to the consolidated appeals, with the time starting to run from the appeals from the later orders. However, since we are convinced that Congress intended one but only one set of appeals from decisions of district courts under §207(b), the instant appeals are dismissed, without costs, for lack of jurisdiction.

/s/
Henry J. Friendly, U.S.C.J.

/s/
Carl McGowan, U.S.C.J.

/s/
Roszel C. Thomsen, U.S.D.J.

FOOTNOTES

[1] The Government suggests that a 120-day decision that a railroad is reorganizable on an income basis within a reasonable time under §77 and that the public interest would be better served by continuing an existing proceeding under that section than by a reorganization under the Act, is appealable since such a decision, unless modified, precludes an order for reorganization under the Act pursuant to the third sentence. Decisions of this sort have been made by Judge Krupansky in the District Court for the Northern District of Ohio with respect to the Erie Lackawanna Railway Company and by Judge Murray in the District Court for Massachusetts with respect to the Boston and Maine Corporation. Since no appeals have been taken from these decisions, we have no occasion to consider the correctness of the Government's suggestion. Our opinion is limited to the appeals here before us.

[2] The New Haven Trustee argues that, independently of §207(b), our jurisdiction can be sustained under §24 of the Bankruptcy Act which gives the courts of appeals "appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final . . ." Apart from the point that, although exercising appellate functions under §207(b), we are not a court of appeals as that term is used in the Judicial Code, the argument ignores the clear intention of Congress that judicial review under the Act should be as provided within its own four corners.

[3] The Commonwealth of Pennsylvania makes an argument to the contrary but we see no basis for it.

[4] Judge Fullam's opinion dealing with the secondary debtors in the Penn Central reorganization vividly illustrates the intertwining of the 120-day decisions and 180-day orders.

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-165
No. 74-167
No. 74-168

UNITED STATES OF AMERICA, *et al.*,
Appellants,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUPPLEMENTAL BRIEF OF APPELLEES, CONNECTICUT GENERAL INSURANCE CORPORATION, *ET AL.*, FILED PURSUANT TO RULE 41(5)

LOUIS A. CRACO
1 Chase Manhattan Plaza
New York, New York 10005
FREDERIC L. BALLARD
1035 Land Title Building
Philadelphia, Pa. 19110
Attorneys for Appellees

Of Counsel:
WALTER H. BROWN, JR.
THOMAS L. BRYAN
MICHAEL B. TARGOFF
CORNELIUS T. FINNEGAN, III
REBECCA T. HALBROOK
WILLKIE FARR & GALLAGHER
1 Chase Manhattan Plaza
New York, New York 10005

ALAN S. FELLHEIMER
BALLARD, SPAHR, ANDREWS & INGERSOLL
1035 Land Title Building
Philadelphia, Pa. 19110

October 18, 1974

TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
I. The Tucker Act Question	3
1. *The Act Itself*	5
2. *The Legislative History*	8
3. *The Legislative Oversight Hearings and Congressional Amicus Brief*	8
II. The Unconstitutionality of the Rail Act in the Absence of a Tucker Act Remedy	11
1. *Erosion*	12
2. *The Compensatory Mechanisms of Section 303*	16
III. Conclusion	18

TABLE OF AUTHORITIES

PAGE

CASES:

Almota Farmers Elev. & Whse. Co. v. *United States*, 409 U.S. 470 17

Duparquet Huot & Moneuse Co. v. *Evans*, 297 U.S. 216 5

In re Penn Central Transp. Co., 494 F.2d 270 (3d Cir. 1973), *cert. denied*, — U.S.L.W. — (U.S. Oct. 15, 1974) (No. 73-1672) (*"Columbus Options"*) 12

In the Matter of Penn Central Transp. Co. (Special Court, Regional Rail Reorganization Act of 1973, No. 74-8, *et al.*, Sept. 30, 1974) ..... 1 *et passim*

New Haven Inclusion Cases, 399 U.S. 392 14

New York, N.H. & H.R.R. First Mtg. 4% Bondholders' Comm. v. *United States*, 305 F.Supp. 1049 (S.D.N.Y. 1969), *vacated on other grounds sub nom. New Haven Inclusion Cases*, 399 U.S. 392 14

CONSTITUTIONAL PROVISIONS AND STATUTES:

U.S. Constitution:

Amendment V 12, 16

Bankruptcy Act:

Section 77, 11 U.S.C. § 205 6

Interstate Commerce Act, 49 U.S.C. §§ 1 *et seq.* .. 6

National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.* 14

Regional Rail Reorganization Act of 1973, 45 U.S.C. §§ 701 *et seq.* .....1 *et passim*

Tucker Act, 28 U.S.C. § 1491 .....2 *et passim*

PAGE

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MISCELLANEOUS:

Sup. Ct. Rule 41(5) 1

Frankfurter, "Some Reflections on the Reading of Statutes", 47 Colum. L. Rev. 527 (1947) 9

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-165
No. 74-167
No. 74-168

UNITED STATES OF AMERICA, *et al.*,

Appellants,

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CONNECTICUT GENERAL INSURANCE CORPORATION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUPPLEMENTAL BRIEF OF APPELLEES, CONNECTICUT GENERAL INSURANCE CORPORATION, *ET AL.*, FILED PURSUANT TO RULE 41(5)

This Supplemental Brief is filed on behalf of Appellees, Connecticut General Insurance Corporation and others, pursuant to Rule 41(5), to acquaint the Court with those Appellees' views concerning the decision of September 30, 1974, handed down by the Special Court established under the Regional Rail Reorganization Act of 1973 (the "Rail Act" or the "Act").[1]

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[1] References to the Opinion of the Special Court by Friendly, J. will be indicated "(Sp. Ct. Op., p.)." References to other opinions in the Special Court will specify the identity of the judge authoring the opinion.

Judge Thomsen summarized as the conclusion of the Court "that the process established by RRRA is fair and equitable, in that a Tucker Act remedy is available for any interim erosion which reaches unconstitutional proportions and for any compelled conveyance for a consideration found not to meet constitutional standards. . . ." (Sp. Ct. Op., Thomsen, J., pp. 9-10).

As the Solicitor General has put it, the Special Court determined "that the reorganization process prescribed by the Rail Act satisfies the statutory standards of fairness and equity if but only if this Court holds that the Court of Claims will have jurisdiction to try taking claims arising out of the final conveyance." (Reply Brief for the Federal Parties, p. 5).

The effect of the Special Court decision, therefore, is to refine considerably the issues as they now confront this Court. In this Brief Appellees deal briefly with the relation of the Special Court's decision to the present posture of this case as to (1) the "Tucker Act issue" and (2) the constitutional inadequacy of the Rail Act on its own terms.[2]

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[2] Appellees believe the Special Court erred in many factual and legal details. For example, its analysis of Penn Central financial data was materially in error; its analysis of the financial prospects of Penn Central based on its misapprehension of income statement figures for a single month—after the 180-Day Decision—led it to economic prognoses inconsistent with the 120-Day Decision and Findings of Fact as well as the stipulations of the parties as to reorganizability; its appraisal of likely regulatory climate as to rate increases to compensate for inflation was unsupported by any evidence and is controverted by massive industry experience; its analysis of rate increases under ICC *Ex Parte 305* was wholly speculative; its analysis of the uncontradicted testimony of witness Ingraham as to the dismal prospects for Conrail relied heavily on modifications of the witness' assumptions for which variations there was not a scintilla of supportive evidence and relied also upon testimony

(Footnote continued)

I.

The Tucker Act Question

The treatment of the Tucker Act issue has assumed a disturbingly artificial character in the Appellants' Briefs and the Special Court Opinion. Appellees contend the issue has to be dealt with in a far less recondite way than the Special Court employed.

Appellees submit that the Special Court's view as to the availability of a Tucker Act remedy of last resort is precluded by any fair reading of the Rail Act itself and is utterly inconsistent with the Congressional purpose and policy in enacting the Rail Act. Moreover, the ostensible availability of a Tucker Act remedy for any constitutional injury sustained by Appellees is wholly illusory and in no real sense affords them any "adequate remedy at law."

These contentions spring from a common origin: Appellees contend that in the Rail Act Congress did precisely what it meant to do, and the resultant statute should be judged

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(Continued footnote)

adduced in the *Ann Arbor* proceedings as to which the Penn Central parties had no opportunity to cross-examine or brief. The Special Court also indulged in dicta, unsupported by any evidence or authority, concerning valuation principles, the impact of economic fluctuations on the value of the estate, proper regulatory behavior and predictable rates of return, and numerous other matters. It also overrode, with virtually no analysis or authority, serious legal positions relating to its decisional role under the doctrine of *res judicata*, the due process implications of its ruling, and the manifest non-uniformity of the Rail Act.

While it is tempting to launch into a rebuttal of the treatment accorded these and other issues in the Special Court Opinion, this Brief will be confined to the large legal issues actually decided by the Special Court which now assume overriding importance in the decisional process of this Court.

on its own terms. Recourse to "saving" canons of construction in this case serve predominantly to alter the concededly "somewhat more natural"[3] reading of the Act, and to defeat the Congressional purpose.

What was the policy and purpose of Congress in enacting the Rail Act? That question must be the starting point in any consideration of the availability of the Tucker Act remedy here. Congress was confronted by a novel situation of immense national importance: the imminent collapse of the rail industry in the Northeast brought on by its inability to generate enough revenues to meet operating expenses. The formulations developed in the depression for dealing with rail properties whose financial problems related to imbalanced capital structures were obsolete: the issue instead was the inability to meet current operating expenses, let alone fixed charges. Moreover, the problem was epidemic. Most of the Class I railroads in the Northeast were in bankruptcy.[4] In this context Congress attempted to deal with an unprecedented situation by confessedly experimental means.

The essence of the experiment was to determine whether the investment of limited federal funds could be leveraged by the use of other governmental powers into the creation of a functional rail system adequately serving the needs of the Northeast. The heart of the approach was and is to maintain in the hands of Congress strict control over the kind and amount of federal investment in the rescue attempt, so as to provide "necessary Federal financial assistance at the lowest possible cost to the general taxpayer" (Rail Act, Section 101(b)(6)). Congress was quite deliberately fashioning a new strategy to deal with the increas-

[3] Sp. Ct. Op., pp. 92-93.

[4] Congress also could foresee similar problems in other capital intensive industries affecting the public, most particularly problems concerning major defense contractors, huge airlines and vital public utilities.

ingly familiar phenomenon of public service industries whose public clientele was unable or unwilling to pay the cost of required service.

Evidence that Congress intended the Act to be a limited, controlled fiscal intervention is pervasive in the terms of the Act, its legislative history, the comments at the legislative oversight hearings [5] and the Amicus Curiae Brief of certain sponsors of the Rail Act in this Court.

1. *The Act Itself.* The Act creates a closed system which requires the continued integrity of the Northeast rail systems; requires conveyance of rail properties in accordance with a Final System Plan; and specifies and limits the amount of federal funds and other benefits to be made available to the explicitly private carrier (Conrail) created to receive them. It provides remedies which are the exclusive prerogative of a Special Court called into being for the purpose and excludes every other court from remedial intervention in the process. These remedies, according to the explicit terms of the Act, were meant to afford to interested parties the constitutional minimum due them, and by fair inference, were intended to leave over no constitutional entitlement to further federal remuneration from any other forum. The Rail Act thus defined the entire scope of the federal intervention which Congress, as a policy matter, wished to make, and prescribed exclusive procedures for its implementation.

That Congress intended to fine tune the investment of federal funds to be committed to the Northeast rail rescue is plainly seen in "the structure of the statute, and the relation, physical and logical, between its several parts," [6] especially in those provisions which govern judi-

[5] Oversight Hearings before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 93d Cong., 2d Sess. (June 14, 1974).

[6] *Duparquet Huot & Moneuse Co.* v. *Evans,* 297 U.S. 216, 218 (Cardozo, J.).

cial intervention in the processes of the Rail Act.[7] In the first place, Congress sought a determination of whether the process of the Act would be fair and equitable to the estates of the debtors (Section 207(b)). While that procedure was, in Appellees' view, itself constitutionally infirm, it did represent the totality of Congressional tolerance toward explicit judicial intervention in the arrangements of the Act prior to the certification of the Final System Plan. The very narrowness of the permissible intervention confirms that Congress intended the process of the Act to be considered and judged on its own terms.

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[7] Appellants and the Special Court both rely on certain explicit repealing provisions in the Rail Act as circumstantial evidence that repeal of the Tucker Act was not intended. Each such provision is plainly intended to facilitate formulation and implementation of the Final System Plan; that is the sole object of the repealers. None of the provisions deals with remedies should effectuation of the Final System Plan fail and they shed no light, directly or inferentially, on Congressional intent in that regard.

Sections 202(a)(10) and 205(c)(2) avoid the usual advertising requirements prior to entry of governmental contracts thus making it easier for USRA and the Rail Services Planning Office to contract for services preparatory to and for implementation of a Final System Plan. Section 601(c) makes detailed environmental studies and statements unnecessary before the effective date of a Final System Plan thereby promoting uninhibited planning for a Final System Plan. Antitrust considerations need not affect such planning since Section 601(a)(2) makes antitrust laws inapplicable to the Plan. Sections 304(c), 304(f) and 601(b) make inoperative provisions of the Interstate Commerce Act when they are inconsistent with the Act. With respect to railroad abandonments, Sections 304(c) and 304(f) prohibit interference by other laws which would inhibit an efficacious design and enforcement system for the Final System Plan. Sections 601(b) and 207(b) eliminate statutory conflict which would impede formulation and implementation of the Plan by requiring dismissal of § 77 proceedings in certain circumstances and by prohibiting Bankruptcy Act application when inconsistent with the Act.

Section 207(b), as well as five other provisions, constrict the jurisdiction of federal courts to provide remedies to aggrieved parties.

(Footnote continued)

The procedures of the Act explicitly exclude any further judicial involvement in their inexorable progress until the Special Court performs the ministerial task of ordering the conveyance of rail properties subject to the Final System Plan pursuant to Section 303. The positioning of the procedures for determining whether the exchange is fair and equitable *after* rather than before the consummation of those conveyances underscores the design of the Act that the "key to the federal treasury" should not be relinquished by Congress to any court that might hold up the conveyances until further funding was made available.

Finally, of course, the closed circle within which those valuation proceedings move under the terms of the Act, with final recourse *against Conrail* by deficiency judgment under Section 303(c)(2)(C) still further emphasizes the exclusivity of the statutory pattern. The Special Court missed the real significance of the deficiency judgment: It is clear evidence in the very terms of the Act that if the provisions for compensation in the Act are themselves inadequate, the federal government, which mandated the taking, is not to be charged with the deficiency in value—the Treasury is not to stand as the guarantor of any such deficiency.

(Continued footnote)

Section 209(b) makes decisions of the Judicial Panel on Multidistrict Litigation non-appealable to any court; Section 207(b) restricts appeals under that section to only the Special Court; Section 209(a) makes the Final System Plan non-reviewable after Congressional approval or the running of a 60-day period; Section 206(d)(3) provides that certain ICC and USRA determinations are non-reviewable; Section 303(b)(2) disallows restraint or injunction by any court of conveyances ordered by the Special Court; and Section 303(d) allows review by the Supreme Court alone of the Special Court's decisions on compensation. All of these jurisdictional restrictions are aimed at expeditious planning and rapid implementation of a Final System Plan.

2. *The Legislative History.* The history of the Act, amply detailed in the briefs already submitted, was thought by the Special Court to be equivocal on whether Congress would prefer the Act to be struck down than to have the Tucker Act held available to make up its deficiencies. However, it takes a strained reading of the passages from the legislative history to render them equivocal. Separately and taken together, the various provisions quite clearly evince the understanding of the legislators as to the limited nature and extent of the intended investment of federal funds in the rescue of the Northeast rail system.

It is irrelevant that the Tucker Act was not mentioned by name so long as it is amply clear from the committee reports and from the debates that the Congressional design was intended to be exactly what the statute turned out to provide: the Rail Act was to be the exclusive mode of injecting federal funds into debilitated railroad systems of the Northeast, and the amounts explicitly provided by its terms were the only federal moneys to be invested in the enterprise.

On that point the history is utterly unequivocal. Assurances were repeatedly sought from the authors of the bill and its responsible managers in both houses that no blank check was being written by the Congress to bail out the destitute Northeast railroads, and that assurance was repeatedly given. The actual structure and plain words of the Rail Act are entirely consistent with that strategy. Residual recourse to the Tucker Act is entirely destructive of it.

3. *The Legislative Oversight Hearings and Congressional Amicus Brief.* The oversight hearings reflect the outrage of the principal sponsors of the bill that the executive branch had taken upon itself to urge the Court below to utter the blank check which the Congress had consciously withheld. There is no ambiguity in the oversight hearings about the hostility of the Congress toward the suggestion

that the judiciary should do indirectly what the legislature had consciously refrained from doing.

The Congressional Amicus Brief in this Court articulates precisely the point that Appellees make here: Congress intended an innovative approach to a novel problem designed to test whether limited federal intervention could produce an adequate functional result. The Amicus Brief rejects the suppositions of the Appellants, and the disposition of the Special Court, that the constituent parts of that experimental approach may properly be adjusted upon judicial review. Congress engaged, we understand its members to say, in a deliberate policy choice about the scope of intervention, and if that policy choice is found by the courts to be wanting, upon its own terms, then, "the Act must fall" (Amicus Curiae Br., p. 22).

The Special Court dismissed both the oversight hearings and the Amicus Brief with inappropriate disdain (Sp. Ct. Op., pp. 92-93, n. 99). Contrary to what the Special Court wrote, neither the oversight hearings nor the Amicus Brief constitutes an attempt to change the Rail Act by retrospective interpretation of its terms; both rather attempt to describe correctly what the mind of Congress was and what the design of the statute is. Justice Frankfurter cautioned that "Statutes cannot be read intelligently if the eye is closed to considerations evidenced in . . . the known temper of legislative opinion."[8] Here, the articulation of principal sponsors of the Rail Act, in formal hearings on the point, and in an extraordinary presentation to this Court on the legislative policy and purpose,[9] displays clearly enough the temper of legislative opinion and ought not be ignored.

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[8] Frankfurter, "Some Reflections on the Reading of Statutes," 47 Colum. L. Rev. 527, 539 (1947).

[9] The ranks of Representatives joining in this presentation have now increased to 104. Motion for Special Leave to Argue, ¶ 2.

The Tucker Act remedy is, then, contrary to the Special Court's Opinion, unavailable—precluded by a statutory scheme consistent only with that view, which effects an explicit Congressional policy to experiment with a limited federal investment in the Northeast railroads.

Beyond that point, however, it must be said that the entire discourse on the availability of the Tucker Act assumes a surreal quality. Every litigant before this Court must recognize the obvious fact of economic and political life that under no set of foreseeable circumstances is Congress going to acquiesce in judicially fashioned access to the Treasury via the Court of Claims. Not only the hostility that such a procedure elicited in the oversight hearings and the Amicus Brief, but the strategic theory underlying the Rail Act itself repels any such notion.

The same ample evidence that Congress has asserted its affirmative intent to control decisively the magnitude of federal funds invested in the rail system of the Northeast makes it certain, as a practical matter, that it is a question of when, not whether, Congress will reassert that control if the courts attempt to wrest it away by engrafting a Tucker Act remedy onto the Rail Act. Congress may act now; it may act upon the presentation to it of the Final System Plan; it may act when a deficiency judgment against Conrail is entered and cannot be paid, thus precipitating a new rail crisis; it may act after a Court of Claims judgment is entered and appropriations to pay it are sought. It has ample opportunities over the long sweep of the procedures of the Rail Act to reassert its intention to limit, in accordance with its best judgment, the size of federal financial commitment to the bankrupt estates.

To say this is not to "impugn the good faith of Congress."[10] Rather it is a recognition of the reality that Congress is a co-equal branch which has enacted an im-

[10] USRA Reply Brief, p. 15.

portant statute after due deliberation, to achieve a planned result, and that Congress ought to be taken seriously when it announces by word and deed the limited character of its financial intervention.

We raise these considerations not to suggest that Congress is "defiant" or will become so.[11] But the Tucker Act question arises in this litigation at all because Appellants have contended that its claimed availability provides an "adequate remedy at law" for the constitutional wrongs of which Appellees complain. The doctrine that an adequate remedy at law bars equitable relief deals with reality, not with formality. Equity itself is historically a rebellion against the formalism of common law. The "adequate remedy at law" formulation distills the practical considerations by which equity courts determine whether a litigant has, in true fact, some way of righting the wrong being done him as direct, certain and efficacious as the interposition of equity would afford.

It would be anomalous for this Court to hold that there exists a legal remedy under the Tucker Act sufficient to have required the lower court to abstain from granting its injunction, when such a remedy is incompatible with the statutory scheme, destructive of the legislative strategy and purpose, at odds with the legislative history and repudiated by the legislators themselves.

II.

The Unconstitutionality of the Rail Act in the Absence of a Tucker Act Remedy.

All three courts which have considered the Rail Act as applied to the Penn Central situation have now held that the Rail Act is unconstitutional in the absence of a Tucker

[11] See *id.*, p. 16.

Act remedy.[12] Differences in result arrived at by the Court below, by the Reorganization Court and by the Special Court are controlled entirely by the fact that the first two courts held that no Tucker Act remedy was available while the last court found that such a remedy was available to cure the otherwise unconstitutional exactions of the statute.[13]

In concluding that the Act, upon its own terms, does not afford sufficient assurance of fair compensation, the Special Court was plainly right. That Court found, in effect, that (the Tucker Act aside) the Rail Act imposed upon the owners and creditors of the estate a risk of loss which was irreconcilable with the concepts of fairness and equity embodied in the statutory standards and implicit in the Fifth Amendment.

The Special Court dealt separately with the issue of erosion and the question of the ultimate compensatory mechanisms of the Act and it is appropriate to address those issues briefly.

1. *Erosion.* The decision of the Special Court on the erosion question is very tightly drawn. Judge Friendly's opinion concludes that, upon a set of assumptions specified in the opinion, erosion either does not present an imminent problem or, if it does, can be dealt with by injunctive relief such as that furnished below (Sp. Ct. Op., pp. 55-57).

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[12] A similar intimation also appears in *In re Penn Central Transp. Co.*, 494 F.2d 270 (3d Cir. 1973), *cert. denied*, — U.S.L.W. — (U.S. Oct. 15, 1974) (No. 73-1672) (*"Columbus Options"*).

[13] It is at least an overstatement for Appellant USRA to argue in its reply brief that the Special Court "decisively rejected" all of the constitutional challenges in these cases. USRA Reply Brief, pp. 1, 3. The Special Court did nothing of the sort. On the contrary, the central constitutional challenge mounted by Appellees—that the terms of the Act itself do not provide adequate assurance of just compensation for either interim erosion or ultimate conveyance—was upheld by the Special Court but for the existence of the Tucker Act (Sp. Ct. Op., pp. 55-57; 68-69).

The problem with the analysis of erosion in the opinion of the Special Court is that the assumptions upon which it entirely rests are, by and large, unsupportable.[14]

For example, the Special Court indulged in an entirely speculative assumption when it declared its belief that the regulatory agencies controlling the revenues of the bankrupt railroads could be expected to grant rate increases during the interim period sufficient in amount and prompt enough in time to keep pace with inflation. No scrap of evidence exists in the record to justify such an assumption, and certainly the Interstate Commerce Commission, which was a party to the proceeding, never made any such commitment. Moreover, such an assumption flies in the face of a massive body of industry experience. The assumption that rate increases sufficient to meet escalating operational expenses can be routinely expected is therefore little more than wishful thinking.

The Special Court made a diametrically opposed assumption with regard to the probable dispatch with which regulatory agencies would process applications for service termination or line abandonments in the event of a judicial determination that continued operations would be unconstitutional. Here, in sharp contradistinction to its expectation that the ICC would act with speed and generosity in granting rate increases, the Special Court assumed that the complexity of environmental and service considerations would bog down such abandonment proceedings for at least as long as the minimum interim period prescribed by the Rail Act. Again, no evidence in the record supported that conclusion. It is true that abandonment procedures had

[14] The Penn Central Trustees, in the Appendix to their reply brief, have addressed directly some of the details of the analysis of erosion contained in the Special Court's opinion, and Appellees subscribe to the views expressed by the Trustees in this respect. In addition, the "Reply Brief" of Penn Central Company points to the unsupported assumption in the Special Court opinion that on the date of enactment of the Rail Act the equity of Penn Central Transportation Company was valueless.

ground to a halt because of litigation over the necessity of filing statements under the National Environmental Policy Act. And it is true that efforts could reasonably be anticipated to keep in service for the account of shippers or localities lines which were sought to be abandoned. But the Special Court nowhere cites any authority that such abanment procedures may properly take their presumably leisurely course when constitutional considerations underlie their prosecution. On the contrary, Judge Friendly in the *New Haven* [15] case observed that a certificate of abandonment under such circumstances was a matter of constitutional right which the applying railroad was entitled to obtain "with appropriate speed." Indeed, in Judge Friendly's opinion in the Special Court, one finds an echo of the doubt that abandonment proceedings under constitutionally impelled circumstances may be impeded by the familiar statutory obstacles (Sp. Ct. Op., pp. 49-50).

Finally, the assumption that the abandonment with dispatch to which the Penn Central might be entitled could nevertheless be suffered to drag on for two years takes no account of the peril that such abandonment procedures might have to be commenced at the end of the interim period if no Final System Plan satisfactory to Congress has by then emerged. Taking the Special Court at its pessimistic word in such eventuality, at least four years of further loss operations would confront the Penn Central system until the interim period had been exhausted and regulatory procedures completed for the termination of hopelessly losing service.

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[15] *New York, N.H. & H.R.R. First Mtg. 4% Bondholders' Comm.* v. *United States,* 305 F.Supp. 1049, 1055 (S.D.N.Y. 1969), *vacated on other grounds sub. nom. New Haven Inclusion Cases,* 399 U.S. 392. On this point see also *New Haven Inclusion Cases* at 459-67.

The most important assumption underlying the Special Court's erosion discussion was that the Final System Plan could be effectuated substantially in accordance with the schedule set out in the Rail Act. The Special Court acknowledged that "reasonably entertained doubt that USRA will be able to meet its prescribed schedule . . . or that Congress may not accept USRA's initial effort would require reformulation or excision of § 304(f) (as imposed, for example, by the *Connecticut General* court) unless a Tucker Act remedy exists" (Sp. Ct. Op., pp. 56-57). It is already clear that USRA will not be able to meet its prescribed schedule and the key assumption underlying the Special Court's decision on erosion has already been belied.

In the first place, as the statutory deadline for the announcement of the preliminary system plan approaches, it is apparent that USRA has not progressed to the point of announcing any such plan. It now appears that USRA is still floating trial balloons, some of them bearing no relation to the scheme set out in the Act, and it is confessedly in no position to outline for Congress and the affected public the character of any proposed system plan.[16] Not being in position to do so on time, USRA plainly cannot receive on schedule the comments of the interested public contemplated by the Rail Act as ingredients in the formulation of the Final System Plan.

Emphasizing the incapacity of USRA to meet the schedule assumed by the Special Court, legislation has been introduced in Congress to postpone for four months each the presentation of the preliminary system plan and the Final System Plan. In addition, the complexity of the task is evidenced by the simultaneous request by USRA for authority to spend $14 million more on the preparation of such plans than was allowed by the Rail Act. Apart from reasonable speculation that a plan requiring 18 months and $40 million to produce may require more than sixty days' consideration by the public before a Final System

[16] See Sp. Ct. Op., App. B.

Plan can be hammered out (Rail Act, Section 207(a), (c)), the effect of these prospective delays is to lengthen the interim period materially beyond that prescribed by the Act and assumed by the Special Court.

On a simple arithmetical basis, the Penn Central estate is experiencing losses at the rate of $16 million a month. These losses are not, of course, the same in every month, and would be aggravated by continued recessional economic developments, by serious adverse weather conditions, by the advent of a threatened coal strike or other similarly foreseeable exigencies, as well as others not now threatened. In light of this, the Federal Appellants now acknowledge that the delays which are presently foreseeable may warrant a court in ordering termination of services under certain circumstances and may justify injunctive relief similar to that entered below, in the absence of a Tucker Act remedy.[17]

Under these circumstances, assuming the absence of a Tucker Act remedy, we read the Special Court as holding that the provisions for compensation contained in Section 303 of the Act are constitutionally inadequate to provide for either the value of the properties to be conveyed or the costs of interim erosion and as expressing the view that the injunctive relief accorded below was justifiable (Sp. Ct. Op., pp. 55-57).

2. *The Compensatory Mechanisms of Section 303.* The Special Court explicitly held, as we have argued here, that, in the absence of a Tucker Act remedy, Section 303 of the Rail Act itself does not provide sufficient assurance that the estates will receive fair compensation meeting the statutory standards of fairness and equity and the constitutional standard of the Fifth Amendment (Sp. Ct. Op., pp. 68-69).

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[17] Reply Brief for the Federal Parties, p. 3.

It is fair to say that the Special Court put the best face possible upon the question of Conrail viability. Indeed, Appellees here contend that the Special Court was excessive in its optimism and unduly liberal in its interpretation of governing legal standards.[18]

Even indulging such generous views, the Special Court nevertheless held that (the Tucker Act aside) the conveyance provisions of Section 303(b) of the Rail Act—which the Special Court characterized as "the very heart of the Act" (Sp. Ct. Op., p. 67)—fail to provide adequate assurance of just compensation or judicial machinery sufficient to protect the bankrupt estates from unconstitutional impositions.

It is plain enough that the Special Court also found these compensatory provisions insufficient to provide for interim erosion to the extent that might be incurred by protraction of the schedule of the Rail Act. On the rosiest view of its provisions and of Conrail's prospects, then, the Special Court was forced to the conclusion that, absent

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[18] For example, the elaborate dictum on the probative value of the Ingraham testimony reflecting the bleak prospects of Conrail involved the Special Court again in the adoption of assumptions wholly unsupported by any record evidence. To cure this deficiency, the Special Court imported into the Penn Central decision expert evidence introduced in the *Ann Arbor* proceedings as to which the Penn Central parties were not privy and had no opportunity to cross-examine or to submit briefs. The *Ann Arbor* affidavits are themselves riddled with error and form no valid basis for a critique of the careful Ingraham presentation. Nonetheless they were given credence by the Special Court. For another example, the Special Court appears to brush aside the decision of this Court in *Almota Farmers Elev. & Whse. Co.* v. *United States*, 409 U.S. 470, and its ancestors requiring that in condemnation the condemnee receive the perfect monetary equivalent of the property he has lost (Sp. Ct. Op., pp. 103-04). Perhaps, speculates the Special Court, an indeterminate package of securities might in some circumstances satisfy that apparently more rigorous standard.

Appellees contend these views represent overgenerous interpretations of the facts and of the law.

a Tucker Act remedy, "we think that the Act would be unconstitutional in any event. . . ." (Sp. Ct. Op., p. 57). That, of course, is substantially the position that Appellees urge here.

III.

Conclusion

At this juncture it seems clear that the Rail Act fails to provide adequate *intrinsic* assurance of fair compensation for either interim erosion or the ultimate conveyances it mandates. None of the courts (including the Special Court) which have examined the application of the Rail Act to Penn Central has held to the contrary.

Two approaches have been suggested by the courts to deal with this constitutional deficiency: The first is to insert into the statutory scheme of the Rail Act an additional guaranty of the availability of federal funds under the Tucker Act in order to create judicially the assurance lacking under the terms of the Act itself. The second is to excise, by a carefully constructed injunction, those portions of the Rail Act which threaten interim or ultimate taking without such assurance, leaving to Congress the opportunity to amend the Rail Act in the light of such ruling. The Special Court chose the former; the Court below chose the latter.

Appellees submit that due respect for the policy and purpose of the national legislature as well as a proper regard for the constitutionally protected interests of the Appellees indicate that the Court below was right in its approach and should be, in all respects, affirmed.

Respectfully submitted,

LOUIS A. CRACO
1 Chase Manhattan Plaza
New York, New York 10005

FREDERIC L. BALLARD
1035 Land Title Building
Philadelphia, Pennsylvania 19110
Attorneys for Appellees

Of Counsel:

WALTER H. BROWN, JR.
THOMAS L. BRYAN
MICHAEL B. TARGOFF
CORNELIUS T. FINNEGAN, III
REBECCA T. HALBROOK
WILLKIE FARR & GALLAGHER
1 Chase Manhattan Plaza
New York, New York 10005

ALAN S. FELLHEIMER
BALLARD, SPAHR, ANDREWS & INGERSOLL
1035 Land Title Building
Philadelphia, Pennsylvania 19110

October 18, 1974

SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

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No. 74-167

UNITED STATES RAILWAY ASSOCIATION,
Appellant,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OBJECTION OF CONNECTICUT GENERAL INSURANCE CORPORATION, *ET AL.* TO MOTION OF TRUSTEES OF THE READING COMPANY FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

LOUIS A. CRACO
1 Chase Manhattan Plaza
New York, New York 10005
FREDERIC L. BALLARD
1035 Land Title Building
Philadelphia, Pa. 19110
Attorneys for Appellees

Of Counsel:
WALTER H. BROWN, JR.
THOMAS L. BRYAN
MICHAEL B. TARGOFF
CORNELIUS T. FINNEGAN, III
REBECCA T. HALBROOK
WILLKIE FARR & GALLAGHER
1 Chase Manhattan Plaza
New York, New York 10005
ALAN S. FELLHEIMER
BALLARD, SPAHR, ANDREWS & INGERSOLL
1035 Land Title Building
Philadelphia, Pa. 19110
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Connecticut General Insurance Corporation, *et al.*, as Appellees in the within appeal, respectfully submit that the motion of the Trustees of the Reading Company for leave to file a brief *amicus curiae* be denied upon the grounds that they have failed to satisfy the requirements of Rule 42(3) of this Court. The Trustees have not demonstrated that the motion is timely and that the issues sought to be presented are of such relevancy to the disposition of the case as to warrant an order granting their motion, nor have they stated an interest in the proceedings sufficient to warrant granting of their motion. The motion of the Reading Trustees should be denied because:

1. The Reading Trustees did not move to intervene during the pendency of the matter below and now seek to enter this case at the 11th hour, after jurisdiction noted (cf. Rule 42(1)), some three and one-half months after the rendering of the opinion and Order below, nearly ten months after the filing of the within complaint, and little more than one week before oral argument in this Court;

2. The primary interest upon which the Reading Trustees base their motion is the possibility of the certification pursuant to Section 209(c) of the Regional Rail Reorganization Act of 1973 (the "Act") of a Final System Plan to the Special Court which might include properties of the Reading even though properties of Penn Central were not included. This possibility is of no relevance to the ultimate determination of the appeals now before this Court in that no responsible party, including United States Railway Association ("USRA"), the party endowed with the responsibility of formulating the Final System Plan, has proposed or even suggested that a Final System Plan which excludes Penn Central rail properties could be approved under the Act. The Reading Trustees also assert that the Court below should have deferred its determination of the constitutionality of the Act to the respective reorganization courts charged with rendering Section 207(b) decisions. This contention of the Trustees is based upon an inapposite reading of *New Haven Inclusion Cases*, 399 U.S. 392, as an appropriate analogy here; and

3. The Reading Trustees have not demonstrated how the interests they proffer will not be adequately defended by the United States of America through the Solicitor General or by USRA.

I.

The Reading Trustees' primary basis for requesting leave to file their *amicus curiae* brief is their argument that the *Connecticut General* Order was overbroad in de-

claring Section 304(f) null and void and unconstitutional on its face and in enjoining certification of a Final System Plan pursuant to Section 209(c). The Reading Trustees so urge because, upon their interpretation of the Order, the *Connecticut General* Court did not limit itself to the Penn Central facts but rather issued its decree so as to interfere with the inclusion of properties of the Reading Company in the Final System Plan.

The Reading Trustees' contention has no relevance to the disposition of the matter and therefore their motion should be denied. As all parties and courts involved in the litigation engendered by the Act have recognized, any hope of a successful implementation of a Final System Plan depends upon inclusion of substantial portions of the rail properties of Penn Central. As noted by Judge Friendly in his opinion for the Special Court (at p. 26): ". . . Penn Central comprises some 94 per cent of the operated rail mileage and 87 per cent of the railroad operating revenues of the roads before [the Special Court]" (footnote omitted). Without Penn Central there will be no Final System Plan and, accordingly, any reshaping of the *Connecticut General* Order to explicate such a contingency is indeed not relevant to the determinative issues at bar.

For the very same reasons, the Reading Trustees have not demonstrated why their interest has not or will not be adequately presented by Appellants. Certainly USRA has not been shown to be disabled in any way from raising and adequately presenting all issues deemed relevant and worthy of presentation to this Court, including issues affecting its ability to formulate a feasible Final System Plan. If USRA believes there is any possibility that a Final System Plan could be implemented without including Penn Central rail properties and that the *Connecticut General* Order was overbroad in scope on this point, the issue will doubtless be presented by USRA.

Finally, and with all due respect, the Reading Trustees' argument is premised on a faulty reading of the *Con-*

necticut General Order with respect to Section 304(f). As fully discussed at pages 102-108 of Appellees' Brief, the Court below took great pains to mold its Order to the precise constitutional infirmities it found. Thus, Section 304(f) was declared "null and void as violative of the Fifth Amendment of the United States Constitution *to the extent that it would require continued operation of rail services at a loss in violation of the constitutional rights* of the owners and creditors of a railroad," (emphasis added). The import of that part of the Order is that the Order has no application unless and until Section 304(f) is attempted to be applied in violation of the constitutional rights of owners and creditors of a railroad. Accordingly, the injunctive part of the *Connecticut General* Order provided that the defendants were enjoined from enforcing Section 304(f) "with respect to any abandonment, cessation or reduction in service *which has been or may hereafter be determined by a court of competent jurisdiction to be necessary for the preservation of rights guaranteed by the United States Constitution.*" (emphasis added) (Joint Appendix at 82).

What this means for the Reading Company is not that the *Connecticut General* Court has unduly interfered with the Reading Trustees' supervision over the Reading estate, but that the *Connecticut General* Court issued an order clearly protective of the interests not only of Penn Central but also of each of the bankrupt railroad estates, including the Reading, in situations where important constitutional rights would otherwise be unprotected.

II.

The Reading Trustees go further and contend that the Court below should have wholly abstained from deciding the constitutional questions properly before it out of deference to the reorganization courts. It is not clear whether the decisional powers of the reorganization courts to which, as movants argue, such deference should have

been paid is thought by them to derive from Section 207(b) of the Rail Act or from residual powers under Section 77 of the Bankruptcy Act. In either event the Reading Trustees are quite wrong in their view of the authority available to the reorganization courts, and in neither situation is the decision of this Court in *New Haven Inclusion Cases*, 399 U.S. 392, supportive of their contention. Insofar as the Reading Trustees perceive a power in the reorganization courts to abort at a later date the procedures of the Rail Act, or to direct cessation of operations, they overlook the critical "notwithstanding" proviso of Section 304(f) which effectively strips those courts of subject matter jurisdiction to enter any such order. In other words, there was no court having "plenary authority to enter a decision on the merits" (Moving Brief, p. 10) to which the Court below could have deferred.

Both with respect to this ostensible source of authority for the reorganization courts and with respect to their power under Section 207(b) of the Rail Act, a review of the *New Haven Inclusion Cases* clearly shows the ineptness of the Reading Trustees' analogy, and, in fact, indicates that any such deferral by the Court below would have constituted an abuse of its jurisdictional discretion.

In *New Haven*, this Court held that although a statutory three-judge district court had jurisdiction to review a decision by the Interstate Commerce Commission, pursuant to Section 5 of the Interstate Commerce Act, with respect to the price to be paid to the New Haven Railroad for the sale of its properties to the merging Penn Central, it should have deferred to the New Haven reorganization court, which was required by Section 77 to make the same review of the same ICC decision. The Court's reasoning included the following, relevant here:

> 1. Each of the courts was to consider "the same pricing questions, to be determined by recourse to the same standards . . ." *Id.* at 425-26.

2. The Section 77 court had "full and complete power not only over the debtor and its property, but also over any rights that [might] be asserted against it." *Id.* at 421, quoting *Callaway* v. *Benton*, 336 U.S. 132.

3. There was no reason to suppose that the Section 77 court would have been unable to adjudicate all relevant questions and the three-judge court had nothing further to decide. *Id.* at 425, 427.

The role and power of the Section 207(b) courts, to which the Reading Trustees contend the Court below should have deferred, stand in unfavorable contrast to those of the New Haven reorganization court:

1. The issue below was the constitutionality of an act of Congress and the propriety of enjoining all or part of that act. Such powers are exercisable only by a three-judge court convened pursuant to 28 U.S.C. Section 2284. Neither the reorganization court nor the Special Court had such powers here.

2. Further, the reorganization courts were allowed to decide only whether the Act provided a fair and equitable process to the estates of railroads in reorganization. Having made such decisions, their options were prescribed by the Act. The issues to be decided, and the statutorily prescribed standard for deciding them, were not as broad as those which would obtain in a constitutional three-judge court action. The remedies available to the reorganization courts were clearly less extensive. Most significantly, Appellees' rights could not, consistent with due process, have been relegated to decision in judicial proceedings which themselves were under constitutional attack.

3. A deferral by the Court below to the reorganization court would have been an exercise of discretion cutting off full appellate rights of the parties. While the decisions of a reorganization court acting pursuant to Section 77 are appealable ultimately to this Court, the decisions of such courts acting pursuant to Section 207(b) were expressly made not so appealable.

Clearly, then, *New Haven Inclusion Cases* does not support the Reading Trustees' contention. The Court below was the only court to which Appellees could have brought their complaint without subjecting themselves to inadequate remedies and truncated judicial review. No party urged the Court below to defer to the statutorily prescribed procedures for the reasons now proffered by the Reading Trustees, and no such deferral by that Court would have been proper.

CONCLUSION

The motion of the Reading Trustees for leave to file an *amicus curiae* brief should be denied.

Respectfully submitted,

LOUIS A. CRACO
1 Chase Manhattan Plaza
New York, New York 10005

FREDERIC L. BALLARD
1035 Land Title Building
Philadelphia, Pa. 19110
Attorneys for Appellees

Of Counsel:

WALTER H. BROWN, JR.
THOMAS L. BRYAN
MICHAEL B. TARGOFF
CORNELIUS T. FINNEGAN, III
REBECCA T. HALBROOK
WILLKIE FARR & GALLAGHER
1 Chase Manhattan Plaza
New York, New York 10005

ALAN S. FELLHEIMER
BALLARD, SPAHR, ANDREWS & INGERSOLL
1035 Land Title Building
Philadelphia, Pa. 19110

October 18, 1974

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

REGIONAL RAIL REORGANIZATION ACT CASES*

Argued October 23, 1974—Decided December 16, 1974

As a comprehensive solution to a national rail crisis precipitated by the entry into reorganization proceedings under § 77 of the Bankruptcy Act of eight major railroads in the northeast and midwest regions of the country, Congress supplemented § 77 with the Regional Rail Reorganization Act of 1973 (the Rail Act). Each railroad under a § 77 reorganization must proceed under the Rail Act unless its reorganization court within specified times finds (a) that the railroad is reorganizable on an income basis within a reasonable time under § 77 and that the public interest would be better served by a § 77 rather than a Rail Act reorganization or (b) that the Rail Act does not provide a process that is fair and equitable to the estate of the railroad in reorganization (hereafter railroad). § 207 (b) of the Rail Act. Appeals from § 207 (b) orders are provided to a Special Court, whose decision is final. The Rail Act establishes a Government corporation, the United States Railway Association (USRA), which is directed to formulate a "Final System Plan" (the Plan) by July 26, 1975, for restructuring the railroads into a "financially self-sustaining rail service system." The Plan must provide for transfer of designated railroad properties to the Consolidated Rail Corp. (Conrail), a private state-incorporated corporation, in return for Conrail securities, plus up to $500 million of federally guaranteed USRA

*No. 74–165, *Blanchette et al., Trustees of Property of Penn Central Transportation Co.* v. *Connecticut General Insurance Corp. et al.*; No. 74–166, *Smith, Trustee of Property of New York, New Haven & Hartford Railroad Co.* v. *United States et al.*; No. 74–167, *United States Railway Assn.* v. *Connecticut General Insurance Corp. et al.*; and No. 74–168, *United States et al.* v. *Connecticut General Insurance Corp. et al.*, on appeal from the United States District Court for the Eastern District of Pennsylvania.

obligations and the other benefits accruing to the railroad from the transfer. The Plan, which becomes effective if neither House of Congress disapproves it within 60 days, must be transmitted to the Special Court, which has exclusive jurisdiction of all proceedings concerning the Plan. § 209. Within 10 days after deposit with it of Conrail securities and USRA obligations, the Special Court must order the railroad trustee to convey forthwith to Conrail the railroad's properties designated in the Plan. § 303 (b). The Special Court then determines under § 303 (c), with an appeal extending to this Court, whether the conveyance is fair and equitable to the railroad's estate under § 77 standards, or whether the transfer is more fair and equitable than a constitutional minimum requires (in which case necessary adjustments must be made). If the Special Court finds the conveyance not fair and equitable, the court must reallocate, or order issuance of additional Conrail securities and USRA obligations, enter a judgment against Conrail, or combine such remedies. Railroads may discontinue service and abandon properties not designated for transfer under the Plan, but until the Plan becomes effective may only discontinue service or abandon any line with USRA consent and absent reasonable state opposition. § 304 (f). Parties with interests in Penn Central Transportation Co. (Penn Central) brought suits attacking the constitutionality of the Rail Act, contending that the Act violates the Fifth Amendment by taking Penn Central property without just compensation, on the grounds (1) that the Conrail securities and USRA obligations and other benefits would not be the constitutionally required equivalent of the rail properties whose transfer is compelled by § 303 (b) (the "conveyance taking" issue), and (2) that § 304 (f) compels continuation of rail operations pending the Plan's implementation even if erosion, beyond constitutional limits, of Penn Central's estate occurs during the interim period (the "erosion taking" issue). While rejecting the "conveyance taking" issue as premature in view of a number of decisional steps required before the final conveyance, the District Court held that the "erosion taking" issue was not premature, and rejected the contention of the United States, USRA, and the Penn Central Trustees that if the constitutional limit of permissible uncompensated erosion should be passed, the plaintiffs would have an adequate remedy at law under the Tucker Act, which gives the Court of Claims jurisdiction to render judgment "upon any claim against the United States founded either upon the Constitution, or any Act of Congress . . . ," the District Court finding that the Rail

Syllabus

Act precluded a Tucker Act remedy. The court therefore declared § 304 (f) invalid as violating the Fifth Amendment "to the extent that it would require continued operation of rail services at a loss in violation of the constitutional rights of the owners and creditors of a railroad," and the court declared § 303 invalid to the extent it failed to compensate for interim erosion pending final implementation of the Plan. In addition to other injunctive relief, the District Court enjoined USRA from certifying the Plan to the Special Court under § 209 (c). The court further determined that the provision of § 207 (b) requiring dismissal of certain reorganization proceedings is constitutionally invalid as a geographically nonuniform law on the subject of bankruptcies. *Held:*

1. The issue of the availability of a Tucker Act remedy if the Rail Act effects an "erosion taking" is ripe for adjudication in view of the distinct possibility that compelled continued rail operations by Penn Central, which in the past several years has sustained great losses and is not "reorganizable on an income basis within a reasonable time under § 77," would injure plaintiffs below without any assurance before the Plan is implemented of their being compensated. Pp. 16–19.

2. The Tucker Act remedy is not barred by the Rail Act, but is available to provide just compensation for any "erosion taking" effected by the Rail Act. Pp. 19–30.

(a) The correct issue is whether Congress intended to prevent recourse to the Tucker Act and not as the District Court held whether the Rail Act affirmatively manifests a congressional intent to permit such recourse. Pp. 20–21.

(b) Rail Act provisions relied on as evincing a congressional determination that no federal funds beyond those expressly committed by the Act were to be paid for the rail properties, equally support the inference that Congress felt that the Rail Act provided at least the minimum compensation and gave no consideration to withdrawal of the Tucker Act remedy. Pp. 21–23.

(c) Section 601 of the Rail Act, which specifically deals with other statutes inconsistent with the Rail Act, does not mention the Tucker Act. P. 23.

(d) There is no legislative history supporting the argument that the Rail Act should be construed to withdraw the Tucker Act remedy. Pp. 23–27.

(e) Applicable canons of construction fortify the conclusion that the Rail Act does not withdraw the Tucker Act remedy. Pp. 27–30.

Syllabus

3. Certain basic "conveyance taking" issues are now ripe for adjudication. Pp. 31–42.

(a) Since after the District Court's opinion the Special Court reversed the Penn Central reorganization court's determination that the Rail Act did not provide a process that would be fair and equitable to the estate, some of the "conveyance taking" issues must now be decided. Pp. 32–34.

(b) Implementation of the Rail Act will now lead inexorably to the final conveyance though the exact date cannot now be determined, and the Special Court must order the conveyance of rail properties included in the Plan; since the conveyance is inevitable it is not relevant to the justiciable-controversy issue that there will be a delay before the transfer occurs. Pp. 34–37.

(c) Several factors militate against the Court's deferring resolution of the constitutional issues here until a time closer to the occurrence of the disputed event and the Court will be in no better position later than it is now to determine the validity of basic final conveyance issues. However, resolution of other issues, such as those involving valuation, should be postponed. Pp. 37–42.

4. For the same reasons as obtained with respect to the "erosion taking" issue, a suit in the Court of Claims is available under the Tucker Act for a cash award to cover any shortfall between the consideration that the railroads receive for their rail properties finally conveyed under the Rail Act and the constitutional minimum. P. 42.

5. The Tucker Act guarantees an adequate remedy at law for any taking that might occur as a result of the final conveyance provisions of the Rail Act. Pp. 43–50.

(a) Plaintiffs' argument that the Tucker Act remedy is inadequate because the "conveyance taking" is an exercise of the eminent domain power and requires full cash payment for the rail properties is without merit. The Rail Act coupled with the Tucker Act is valid as a reorganization statute and does not constitute an eminent domain statute by virtue of its provisions for federal representation on Conrail's Board of Directors (which does not constitute Conrail a federal instrumentality) and the provisions for conveyance and continuation of services pending the Plan's formulation; or because of any defects in the Act's provisions for judicial review. Pp. 46–49.

(b) Though the Rail Act differs from other reorganization statutes by mandating conveyance without any prior judicial finding that there will be adequate resources in the reorganized com-

Syllabus

pany to compensate the debtor estates and, eventually, their creditors, recourse to a Tucker Act suit for any shortfall provides adequate assurance that any taking will be compensated. Pp. 49–50.

(c) The Tucker Act also assures that the railroad estates and their creditors will eventually be made whole for the assets conveyed, and thus does not deprive plaintiffs of procedural due process. P. 50.

6. The Rail Act does not contravene the uniformity requirement of the Bankruptcy Clause. Pp. 50–55.

(a) This Court's holding that the Tucker Act remedy is available for any uncompensated taking under the Rail Act obviates the possibility that the Penn Central reorganization court will ever confront the provision for dismissal of a § 77 proceeding under § 207 (b) of the Rail Act, which the District Court held violative of the bankruptcy uniformity requirement. Pp. 50–52.

(b) Plaintiffs' argument that constitutional bankruptcy uniformity is violated because the Rail Act is restricted to a single statutorily defined region lacks merit since the uniformity requirement does not preclude Congress from fashioning legislation to resolve geographically isolated problems, and here Congress acted consistently with that requirement when it dealt with the national rail crisis centering in the problems of rail carriers in the region defined by the Rail Act and applied the Rail Act to every railroad in reorganization throughout the United States. Pp. 52–55.

— F. Supp. —, reversed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion. STEWART, J., filed a dissenting statement.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 74–165, 74–166, 74–167, AND 74–168

REGIONAL RAIL REORGANIZATION ACT CASES

Robert W. Blanchette et al., as Trustees of the Property of Penn Central Transportation Company, Debtor,

74–165 — Appellants,

Connecticut General Insurance Corporations et al.

Richard Joyce Smith, Trustee of the Property of New Haven and Hartford Railroad Company, Debtor,

74–166 — Appellant,

United States et al.

Association of American Railroads et al.,

74–167 — Appellants,

Connecticut General Insurance Corporations et al.

United States et al.,

74–168 — Appellants,

Connecticut General Insurance Corporations et al.

v.

On Appeals from the United States District Court for the Eastern District of Pennsylvania.

[December 16, 1974]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

These direct appeals and cross-appeal are from a judgment of a three-judge District Court of the Eastern District of Pennsylvania that declared the Regional Rail Reorganization Act of 1973 (the "Rail Act"), 45 U. S. C. § 701 *et seq.*, unconstitutional in part and enjoined its enforcement.[1] — F. Supp. — (1974). We noted probable jurisdiction, 419 U. S. — (1974). We reverse.

I

Introduction

A rail transportation crisis seriously threatening the national welfare was precipitated when eight major railroads in the northeast and midwest regions of the coun-

[1] The judgment was entered in three consolidated cases. One action was brought in the Eastern District of Pennsylvania by Connecticut General Insurance Company and others against the United States, The United States Railway Association ("USRA"), and the Secretaries of Treasury and Transportation and the Chairman of the Interstate Commerce Commission in their capacities as incorporators and directors of USRA. A second action was brought in the District Court for the District of Columbia by Penn Central Company, a creditor and the sole stockholder of Penn Central Transportation Company (Penn Central), now in reorganization under § 77 of the Bankruptcy Act, against the same defendants named in the first action. A third action was brought in the District Court for the District of Columbia by Richard J. Smith, Trustee of the property of the New York, New Haven and Hartford R. Co. (the New Haven Trustee) against the United States, USRA and the Secretary of Transportation. Three-judge courts were convened in each suit but, by consent of the parties, the second and third actions were transferred to the Eastern District and consolidated for disposition before the three-judge court convened in that action. The Trustees of Penn Central intervened.

Three direct appeals and one cross-appeal from the District Court's judgment were consolidated for decision in this Court. No. 74–165 is the appeal of the Trustees of Penn Central; No. 76–167 is the appeal of USRA; No. 74–168 is the appeal of the United States; and No. 74–166 is the cross-appeal of the New Haven Trustee.

try [2] entered reorganization proceedings under § 77 of the Bankruptcy Act, 11 U. S. C. § 205.[3] After interim measures proved to be insufficient,[4] Congress concluded that

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[2] The Rail Act defines "Region" as the "States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, Ohio, Indiana, Michigan, and Illinois; the District of Columbia; and those portions of contiguous States in which are located rail properties owned or operated by railroads doing business primarily in the aforementioned jurisdictions (as determined by the Interstate Commerce Commission by order)." § 102 (13). ICC Order *Ex parte* No. 293, approved January 14, 1974, delineated areas near Louisville, Kentucky; St. Louis, Missouri; and Kewanee and Manitowoc, Wisconsin, as included in the Region. 39 Fed. Reg. 3605 (1974).

[3] In addition to Penn Central, the railroads are the Reading (*In re Reading Co.*, Bky. No. 71–828, ED Pa.), Erie Lackawanna (*In re Erie Lackawanna R. Co.*, No. B72–2838, ND Ohio), Central of New Jersey (*In re Central R. Co. of New Jersey*, No. B401–67, N. J.), Lehigh Valley (*In re Lehigh Valley R. Co.*, Bky. No. 70–432, ED Pa.), Boston & Maine (*In re Boston & Maine Corp.*, Bky. No. 70–250–M, Mass.), Ann Arbor (*In re Ann Arbor R. Co.*, Bky. No. 74–90833, ED Mich.), and the Lehigh & Hudson River (*In re Lehigh & Hudson River R. Co.*, No. 72–B–419, SDNY).

The following lessors of leased lines of Penn Central also filed § 77 petitions in the District Court for the Eastern District of Pennsylvania at Bky. No. 70–347: United New Jersey Railroad and Canal Co.; Beech Creek Railroad Co.; Cleveland, Cincinnati, Chicago & St. Louis Railroad Co.; Cleveland & Pittsburgh Railroad Co.; Connecting Railway Co.; Delaware Railroad Co.; Erie and Pittsburgh Railroad Co.; Michigan Central Railroad Co.; Northern Central Railroad Co.; Penndel Co.; Philadelphia, Baltimore and Washington Railroad Co.; Philadelphia and Trenton Railroad Co.; Pittsburgh, Youngstown & Ashtabula Railway Co.; Pittsburgh, Fort Wayne & Chicago Railway Co.; and Union Railroad Co. of Baltimore.

[4] These included the Emergency Rail Services Act of 1970, 45 U. S. C. § 661 *et seq.*, which authorized the Secretary of Transportation to guarantee up to $125 million in certificates issued by trustees of railroads in reorganization if he found, *inter alia*, that there was a threat of imminent cessation of essential rail services and that the

solution for the crisis required reorganization of the railroads, stripped of excess facilities, into a single, viable system operated by a private, for-profit corporation. Since such a system cannot be created under § 77 rail reorganization law, and since significant federal financing would be necessary to make such a plan workable, Congress supplemented § 77 with the Rail Act, which became effective on January 2, 1974. The salient features of the Rail Act are:

1. Reorganization of each railroad in § 77 reorganization must proceed pursuant to the Rail Act unless the District Court having jurisdiction over its reorganization (a) finds, within 120 days after January 2, 1974, "that the railroad is reorganizable on an income basis within a reasonable time under section 77 . . . and that the public interest would be better served by such a reorganization than by a reorganization under this [Rail] Act," [5] or (b) within 180 days after January 2, 1974, "finds that this Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization . . . ." § 207 (b).[6] Appeals from § 207 (b) orders

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only practicable means of meeting expenses necessary to continue such services was the issuance of such guaranteed certificates.

[5] The Erie Lackawanna and Boston & Maine reorganization courts each determined that its railroad is reorganizable on an income basis within a reasonable time; reorganization of those railroads will not proceed under the Rail Act. *In the Matter of Erie Lackawanna R. Co.*, No. B72–2838, Order No. 234 (ND Ohio May 2, 1974); *In the Matter of Boston & Maine Corp.*, No. 70–250–M, Memorandum Opinion (Mass., May 2, 1974).

[6] Three reorganization courts found that the Rail Act does not provide a process that is fair and equitable to the estates of the railroads under their jurisdiction. *In the Matter of Penn Central Transportation Co.*, Bky. No. 70–347, Order No. 1596 (ED Pa. July 1, 1974); *In the Matter of Lehigh Valley R. Co.*, Bky. No. 70–432, Order No. 252 (ED Pa. July 1, 1974); *In the Matter of Penn Centeral Transportation Co. (Secondary Debtors)*, Bky. Nos.

may be taken within 10 days of entry to a Special Court constituted under § 209 (b) and must be decided by the Special Court within 80 days after the appeal is taken. Section 207 (b) expressly provides that "[t]here shall be no review of the decision of the special court." [7]

2. Appellant United States Railway Association ("USRA") is established as a new government corporation. § 201 (a). USRA must prepare a "Final System Plan" for restructuring the railroads in reorganization

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70–347A to 70–347O (ED Pa. July 1, 1974); *In the Matter of Central R. Co. of New Jersey*, Bky. No. 401–67 (N. J. June 28, 1974); *In the Matter of Lehigh and Hudson River R. Co.*, Bky. No. 72–419 (SDNY July 1, 1974). The Special Court established under § 209 (b), see n. 7, *infra*, on September 30, 1974, reversed the orders in those cases and directed reorganization under the Rail Act, — F. Supp. — (1974).

Two other reorganization courts held that the Rail Act does provide a fair and equitable process and ordered that reorganization proceed under the Rail Act. *In the Matter of the Reading Co.*, Bky. No. 71–828, Order No. 650 (ED Pa. July 1, 1974); *In the Matter of the Ann Arbor R. Co.*, No. 74–90833, (ED Mich. July 1, 1974).

[7] Section 209 (b) provides in pertinent part:

"Within 30 days after the enactment of this Act, [USRA] shall make application to the judicial panel on multidistrict litigation authorized by section 1407 of title 28, United States Code, for the consolidation in a single, three-judge district court of the United States of all judicial proceedings with respect to the final system plan. . . . Such proceedings shall be conducted by the special court which shall be composed of three Federal judges who shall be selected by the panel . . . . The special court is authorized to exercise the powers of a district judge in any judicial district with respect to such proceedings and such powers shall include those of a reorganization court. The special court shall have the power to order the conveyance of properties of railroads leased, operated or controlled by a railroad in reorganization in the region . . . ."

The judicial panel on multidistrict litigation selected Circuit Judge Henry J. Friendly, Circuit Judge Carl McGowan and District Court Judge Roszel C. Thomsen to compose the Special Court.

into a "financially self-sustaining rail service system." § 206 (a)(1). See §§ 201, 202, 204–206. The Final System Plan must provide for transfer of designated rail properties by the railroads in reorganization to a private state-incorporated corporation, Consolidated Rail Corporation ("Conrail"), § 301 (a), in return for securities of Conrail, plus up to $500 million of USRA obligations guaranteed by the United States, and "the other benefits accruing to such railroad by reason of such transfer." § 206 (d)(1); see also § 210.[8]

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[8] Section 206 (c) provides as follows for the designation of rail properties for the Final System Plan:

"(c) DESIGNATIONS.—The final system plan shall designate—

"(1) which rail properties of railroads in reorganization in the region or of railroads leased, operated, or controlled by any railroad in reorganization in the region—

"(A) shall be transferred to [Conrail];

"(B) shall be offered for sale to a profitable railroad operating in the region and, if such offer is accepted, operated by such railroad; the plan shall designate what additions shall be made to the designation under subparagraph (A) of this paragraph in the event such profitable railroad fails to accept such offer;

"(C) shall be purchased, leased, or otherwise acquired from [Conrail] by the National Railroad Passenger Corporation . . .;

"(D) may be purchased or leased from [Conrail] by a State or a local or regional transportation authority to meet the needs of commuter and intercity rail passenger service; and

"(E) if not otherwise required to be operated by [Conrail], a government entity, or a responsible person, are suitable for use for other public purposes, including highways, other forms of transportation, conservation, energy transmission, education or health care facilities, or recreation . . .; and

"(2) which rail properties of profitable railroads operating in the region may be offered for sale to [Conrail] or to other profitable railroads operating in the region subject to paragraphs (3) and (4) of subsection (d) of this section."

Section 206 (d) provides as follows respecting transfers to Conrail:

"(d) TRANSFERS.—All transfers or conveyances pursuant to the

3. USRA must submit a proposed Final System Plan to Congress within 570 days after January 2, 1974, § 208 (a), that is by July 26, 1975.[9] The Plan becomes "effective"

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final system plan shall be made in accordance with, and subject to, the following principles:

"(1) All rail properties to be transferred to [Conrail] by a profitable railroad, by trustees of a railroad in reorganization, or by any railroad leased, operated, or controlled by a railroad in reorganization in the region, shall be transferred in exchange for stock and other securities of [Conrail] (including obligations of [USRA]) and the other benefits accruing to such railroad by reason of such transfer."

Sections 210 (b), 213, 214, and 215 provide as respects federal funds as follows:

"Sec. 210 . . . (b) MAXIMUM OBLIGATIONAL AUTHORITY.—Except as otherwise provided in the last sentence of this subsection, the aggregate amount of obligations of [USRA] issued under this section which may be outstanding at any time shall not exceed $1,500,000,000 of which the aggregate amount issued to [USRA] shall not exceed $1,000,000,000. Of the aggregate amount of obligations issued to [Conrail] by [USRA], not less than $500,000,000 shall be available solely for the rehabilitation and modernization of rail properties acquired by [Conrail] under this Act and not disposed of by [Conrail] pursuant to section 206 (c)(1)(C) of this Act. Any modification to the limitations set forth in this subsection shall be made by joint resolution adopted by the Congress."

. . . . .

"Sec. 213 (a) EMERGENCY ASSISTANCE.—The Secretary is authorized, pending the implementation of the final system plan, to pay to the trustees of railroads in reorganization such sums as are necessary for the continued provision of essential transportation services by such railroads. Such payments shall be made by the Secretary upon such reasonable terms and conditions as the Secretary establishes, except that recipients must agree to maintain and provide service at a level no less than that in effect on the date of enactment of this Act.

"(b) AUTHORIZATION FOR APPROPRIATIONS.—There are authorized to be appropriated to the Secretary for carrying out this

[*Footnote 9 is on p. 8*]

if neither House of Congress disapproves it within 60 continuous session days after submission. §§ 102 (4), 208.[10] USRA is required to transmit the Plan within 90 days

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section such sums as are necessary, not to exceed $85,000,000, to remain available until expended."

. . . . . .

"Sec. 214 (a) SECRETARY [OF TRANSPORTATION].—There are authorized to be appropriated to the Secretary for purposes of preparing the reports and exercising other functions to be performed by him under this Act such sums as are necessary, not to exceed $12,500,000, to remain available until expended.

"(b) OFFICE.—There are authorized to be appropriated to the [Interstate Commerce] Commission for the use of the Office in carrying out its functions under this Act such sums as are necessary, not to exceed $5,000,000, to remain available until expended . . . .

"(c) ASSOCIATION.—There are authorized to be appropriated to [USRA] for purposes of carrying out its administrative expenses under this Act such sums as are necessary, not to exceed $26,000,000, to remain available until expended."

. . . . . .

"Sec. 215. Prior to the date upon which rail properties are conveyed to [Conrail] under this Act, the Secretary, with the approval of [USRA], is authorized to enter into agreements with railroads in reorganization in the region (or railroads leased, operated, or controlled by railroads in reorganization) for the acquisition, maintenance, or improvement of railroad facilities and equipment necessary to improve property that will be in the final system plan. Agreements entered into pursuant to this section shall specifically identify the type and quality of improvements to be made pursuant to such agreements. Notwithstanding section 210 (b) of this title, [USRA] shall issue obligations under section 210 (a) of this title in an amount sufficient to finance such agreements and shall require [Conrail] to assume any such obligations. However, [USRA] may not issue obligations under this section in an aggregate amount in excess of $150,000,000 . . . ."

[9] The period of 450 days provided by § 207 (c) & (d) was extended 120 days by Pub. L. 73–488, effective October 26, 1974.

[10] Concerning congressional review of the Final System Plan, § 208 provides:

"Sec. 208 (a). GENERAL.—The Board of Directors of the Associ-

after its effective date to the Special Court which, under § 209, is given exclusive jurisdiction of all "proceedings with respect to the final system plan." The Special Court "within 10 days after deposit . . . of" Conrail securities and USRA obligations "shall . . . order the trustee or trustees of each railroad in reorganization . . . to convey forthwith" to Conrail "all right, title, and interest in the rail properties of such railroad in reorganization . . ." designated in the Final System Plan. § 303 (b).

4. The Special Court next determines whether the conveyances of the rail properties to Conrail "(A) . . . are in the public interest and are fair and equitable to the estate of each railroad in reorganization in accordance with the standard of fairness and equity applicable to the approval of a plan of reorganization . . . under section 77 . . . [or] (B) whether the transfers or conveyances are more fair and equitable than is required as a consti-

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ation shall deliver the final system plan adopted by [USRA] to both Houses of Congress and to the Committee on Interstate and Foreign Commerce of the House of Representatives and the Committee on Commerce of the Senate. The final system plan shall be deemed approved at the end of the first period of 60 calendar days of continuous session of Congress after such date of transmittal unless either the House of Representatives or the Senate passes a resolution during such period stating that it does not favor the final system plan.

"(b) REVISED PLAN.—If either the House or the Senate passes a resolution of disapproval under subsection (a) of this section, [USRA], with the cooperation and assistance of the Secretary and the Office, shall prepare, determine, and adopt a revised final system plan. Each such revised plan shall be submitted to Congress for review pursuant to subsection (a) of this section.

"(c) COMPUTATION.—For purposes of this section—

"(1) continuity of session of Congress is broken only by an adjournment sine die; and

"(2) the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the 60-day period."

tutional minimum." § 303 (c). If the Special Court finds that the transfer is not fair and equitable, the Special Court must reallocate, or order issuance of additional, Conrail securities and USRA obligations (subject to the overall $500 million limitation on USRA obligations for this purpose), or enter a judgment against Conrail, or decree a combination of these remedies. § 303 (c)(2). The Special Court is not authorized to enter a judgment against the United States. Section 303 provides also if the Special Court decides that the consideration exchanged for the rail properties is "more fair and equitable than is required as a constitutional minimum," § 303 (c)(1)(B), it shall make necessary adjustments so that the "constitutional minimum" is not exceeded. Appeal from § 303 (c) determinations is to this Court. § 303 (d).[11]

5. Although railroads in reorganization subject to the Act are free to abandon service and dispose as they wish of any rail properties not designated for transfer under the Final System Plan, § 304 (a)–(c), until that Plan be-

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[11] Section 303 (d) provides:

"(d) APPEAL.—A finding or determination entered pursuant to subsection (c) of this section may be appealed directly to the Supreme Court of the United States in the same manner that an injunction order may be appealed under section 1253 of title 28, United States Code: *Provided*, That such appeal is exclusive and shall be filed in the Supreme Court not more than 5 days after such finding or determination is entered by the special court. The Supreme Court shall dismiss any such appeal within 7 days after the entry of such an appeal if it determines that such an appeal would not be in the interest of an expeditious conclusion of the proceedings and shall grant the highest priority to the determination of any such appeals which it determines not to dismiss."

We are not required to consider in this case the validity of this attempted congressional regulation of the Court's disposition of any appeal from a judgment entered by the Special Court pursuant to subsection (c).

comes effective none "may discontinue service or abandon any line of railroad . . . unless . . . authorized to do so by [USRA] and unless no affected State or local or regional transportation authority reasonably opposes such action . . . ." § 304 (f).

II

Proceedings in the District Court

Constitutional questions concerning the Act are raised in this case by parties with interests in the Penn Central Transportation Company ("Penn Central"), the largest of the eight railroads in reorganization.[12] The principal

[12] The suits here were brought by the major creditors and sole shareholder of Penn Central. Penn Central was the product of the merger of the Pennsylvania Railroad with the New York Central Railroad. *Penn Central Merger Cases*, 389 U. S. 486 (1968). A condition of that merger was Penn Central's promise to take in the New York, New Haven and Hartford Railroad Company as an operating entity, and that promise was fulfilled. *New Haven Inclusion Cases*, 399 U. S. 392 (1970).

The Penn Central operation dominates the Northeast-Midwest region. It serves 55% of the Nation's manufacturing plants employing 60% of the country's industrial employees. More than 20% of all freight cars in the United States pass over Penn Central's 20,000 miles of track, and over 70% of Penn Central traffic involves other railroads. Rail Service in the Midwest and Northeast Region, 39 Fed. Reg. 5392, 5401 (1974); Report of Committee on Interstate and Foreign Commerce, 93d Cong., 1st Sess., at 26 (1973). Since 1973 Penn Central (including its leased lines) accounted for 94% of the operating mileage and 87% of the operating revenues of the six bankrupt railroads involved under the Rail Act. The merger failed to realize anticipated savings and Penn Central entered reorganization proceedings in 1970, two years after the merger was approved. Huge operating losses made reorganization inevitable and have continued. The Financial Collapse of the Penn Central Company, SEC Staff Report, at 86 (1972). The Penn Central Trustees in a Report of February 10, 1971, "Concerning Premises for A Reorganization," Joint Documentary Submission No. 1, concluded that the "overriding problem of Penn Central . . . is found in an obligation

contention of the plaintiffs in the District Court was that the Rail Act in two respects effects a taking of rail properties of Penn Central without payment of just compensation, in violation of the Fifth Amendment. They contended first that the Conrail securities and USRA obligations and other benefits to be received would not be the constitutionally required equivalent of the rail properties compelled by § 303 (b) to be transferred. This is the "conveyance taking" issue. This claim was rejected by the District Court as premature. — F. Supp., at —. They contended second that a taking of their property without just compensation will result from the severe inhibitions imposed upon discontinuance of service and abandonment of lines. In particular, they claimed that § 304 (f) compels continuation of rail operations pending implementation of the Final System Plan even if erosion of the Penn Central estate beyond constitutional limits occurs during this period. This is the "erosion taking" issue. The District Court agreed that § 304 (f) required continued operations to this extent, and viewed the huge operating losses already incurred by Penn Central as making this contention ripe for determination, saying,

> "we are persuaded that a significant possibility exists that a point of erosion has been or may soon be reached so that it can be said that [appellees] contention of interim unconstitutional taking by contin-

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to perform as a public service company in certain areas and under certain conditions which simply do not lend themselves to profitable operations, no matter who the operator is, or how efficient. The only possible remedy here is for public authority to lend its hand to a speedy elimination of the conditions which produce the losses, or respond with adequate compensation if it insists upon a continuance of the conditions."

ued loss operations is ripe for adjudication." — F. Supp., at —.

The District Court rejected the argument of the United States, USRA and the Penn Central Trustees that if in fact the constitutional limit of permissible uncompensated erosion should be passed, plaintiffs would have an adequate remedy at law in the Court of Claims under the Tucker Act, 28 U. S. C. § 1491. The District Court construed the Rail Act as precluding a Tucker Act remedy, stating

> "We are persuaded that the legislative history supports the conclusion that Congress intended that financial obligations be limited to the express terms of the Act. Article I, Section 9, Clause 7 [of the Constitution] provides that no money shall be drawn from the Treasury of the United States except in consequence of an appropriation made by law. Section 213 (b) [of the Rail Act], and section 214 entitled "Authorization for Appropriations' place an express ceiling on expenditures. Section 210 describes the maximum obligational authority of [USRA], and the authorization for appropriation is limited to 'such amounts as are necessary to discharge the obligations of the United States arising *under this section.*' (Emphasis supplied.) Judicial review is delineated with specificity in Sections 209 (a) and 303 with no mention of the Court of Claims." — F. Supp., at —.

The District Court therefore declared § 304 (f) governing interim abandonments

> "null and void as violative of the Fifth Amendment of the United States Constitution, to the extent that it would require continued operation of rail services

> at a loss in violation of the constitutional rights of the owners and creditors of a railroad."

It consequently enjoined appellees

> "from taking any action to enforce the provisions of section 304 (f) . . . with respect to any abandonment, cessation, or reduction of service which has been or may hereafter be determined by a court of competent jurisdiction to be necessary for the preservation of rights guaranteed by the United States Constitution."

The District Court also declared that § 303 relating to the final conveyance of rail properties pursuant to the Final System Plan is

> "null and void as contravening the Fifth Amendment . . . insofar as it fails to provide compensation for interim erosion pending final implementation of the Final System Plan. . . ."

Finally, the District Court enjoined appellant USRA "from certifying a Final System Plan to the Special Court pursuant to § 209 (c). . . ." — F. Supp., at —.

The Rail Act was also challenged in the District Court as not "uniform" within the requirement of Art. I, § 8, cl. 4, of the Constitution, which provides that Congress shall have the power to enact "uniform laws on the subject of Bankruptcies throughout the United States." The District Court dismissed this contention as without merit except as to one provision of § 207 (b). The section provides that if any Reorganization Court determines in the 180-day proceedings under § 207 (b) that the Act does not provide a fair and equitable process for the reorganization of a debtor, the debtor shall not be reorganized pursuant to the Act, and the Reorganization Court "shall dismiss the reorganization proceeding." The District Court declared this part of § 207 (b) "null and void, as

violative of Article I, Section 8, Clause 4 . . .," [13] and enjoined "all parties . . . from enforcing, or taking any action to implement, so much of Section 207 (b) . . . as purports to require dismissal of pending proceedings for reorganization under Section 77 of the Bankruptcy Act."

III

The Issues for Decision

The major issues dividing the parties are (1) whether an action at law in the Court of Claims under the Tucker Act, 28 U. S. C. § 1491, will be available to recover any deficiency of constitutional dimension in the compensation provided under the Rail Act for either the alleged "erosion taking" or the alleged "conveyance taking," and (2) if the Tucker Act remedy is available, whether it is an adequate remedy. The United States, USRA, and the Penn Central Trustees contend that if resort to a supplemental remedy under the Tucker Act is necessary, it is both available and adequate. The plaintiffs below contend that the Rail Act precludes resort to the Tucker Act remedy, and if it does not, that the remedy is inadequate.

The Special Court, speaking through Judge Friendly, comprehensively canvassed both issues, and in a thorough opinion, concluded that the Rail Act does not bar any necessary resort to the Tucker Act remedy and that the remedy is adequate. Our independent examination of the issues brings us to the same conclusion substantially for the reasons stated by Judge Friendly in Parts VII and VIII A of the Special Court opinion. — F. Supp. —, — (1974).[14]

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[13] For reasons stated in Part VI of this opinion, *supra*, we have no occasion to pass upon the correctness of this conclusion.

[14] Part VIII B of the Special Court opinion considered the argu-

Also disputed is the District Court's ruling on the uniformity of the Rail Act under the Bankruptcy Clause. We hold that the currently operable portions of the Act are uniform.

IV

A

The Alleged "Erosion Taking"

In its opening brief, the United States, speaking for all federal parties except USRA, argued that the case involved no "erosion taking" because, as a matter of law, compelled loss operations pending implementation of the Final System Plan would not constitute a taking of the property of the claimants against the bankrupt railroad estates. The argument was that the general rule that if the railroad "be taken to have gratned to the public an interest in the use of the railroad it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss," *Brooks-Scanlon Co.* v. *Railroad Comm'n of Louisiana*, 251 U. S. 396, 399 (1920); see also *Bullock* v. *Railroad Comm'n of Florida*, 254 U. S. 513 (1921); *Railroad Comm'n of Texas* v. *Eastern Texas R. Co.*, 264 U. S. 79 (1924), is qualified by the requirement

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ments of investors of several of the smaller lines. But those investors are not parties to the cases before us.

Part VIII C of the Special Court's opinion discusses the question whether the Court of Claims is free to deny the existence of the Tucker Act remedy if its existence should be challenged before the Court of Claims. The fact that the District Court below concluded, contrary to the Special Court, that the Tucker Act remedy was not available was viewed as making the question a "puzzlement." — F. Supp. —, —. In consequence, the Special Court stayed its order remanding the Penn Central and four other cases for the entry of orders in the reorganization courts and affirming the orders directing that the Reading and Ann Arbor reorganizations proceed under the Rail Act until "after determination by the Supreme Court" of the instant appeals. — F. Supp., at —.

that a railroad estate suffer interim losses for a reasonable period pending good-faith efforts to develop a feasible reorganization plan if the public interest in continued rail service justifies the requirement. *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific R. Co.*, 294 U. S. 648, 677 (1935); see also *RFC* v. *Denver & Rio Grande Western R. Co.*, 328 U. S. 495, 535–536 (1946); *New Haven Inclusion Cases*, 399 U. S. 392, 493 (1970). The United States maintained that the Rail Act represented just such a good-faith effort. In its Reply Brief, at pp. 3–4, however, it abandoned the position that the Final System Plan was sure to be implemented within a reasonable period:

> "Difficulties now unforeseen and unanticipated could in fact delay final implementation of the final system plan. For example, Congress could, in theory, successively disapprove several proposed final system plans. Thus, whatever the probabilities, the parties and this Court have no absolute assurance that the plan will in fact be implemented within a reasonable time. For that reason, we have determined that a taking of property through interim erosion, although extremely unlikely, remains a theoretical possibility under the Rail Act.
>
> "Accordingly, we believe that an injunction preventing [USRA] from denying applications for discontinuance of service under Section 304 (f) in those circumstances might be appropriate unless, as we contend, a remedy for any otherwise uncompensated taking will be available under the Tucker Act. We are therefore persuaded that this Court must reach and decide the 'Tucker Act question' presented by these appeals." (Footnote omitted.)

We conclude in any event that the availability of a Tucker Act remedy if the Rail Act effects an "erosion

taking" is ripe for adjudication. It is true that there has been no definitive determination that erosion of the Penn Central estate has reached unconstitutional dimensions—that is, that the estate has suffered losses unreasonable even in light of the public interest in continued rail service pending reorganization. But the Penn Central Reorganization Court found that Penn Central is not "reorganizable on an income basis within a reasonable time under § 77 of the Bankruptcy Act." — F. Supp. —, — (ED Pa. 1974). And it was stipulated in the District Court that Penn Central sustained ordinary net losses from mid-1970 through 1973 aggregating approximately $851 million, and that in the two months following enactment of the Rail Act on January 2, 1974, Penn Central had deficits in net railway operating income, total income, net income and income available for fixed charges. It is therefore reasonable to conclude that compelled continued rail operations under these conditions pending implementation of the Final System Plan may accelerate erosion of appellees' interests through accrual of post-bankruptcy claims having priority over their claims. Thus, failure to decide the availability of the Tucker Act would raise the distinct possibility that appellees would suffer an "erosion taking" without adequate assurance that compensation will ever be provided.[15] Yet there must be at the time of taking

[15] The severely limited funds available pursuant to § 213 and § 215 for emergency assistance and plant maintenance pending implementation of the Final System Plan do not assure that adequate compensation will be available for any "erosion taking." Section 213 provides $85 million in emergency grants for continued essential transportation services while § 215 provides $150 million in USRA obligations for maintenance and improvement of plant.

Nor is adequate assurance provided by the possibility that Conrail securities and other benefits can be provided for unconstitutional

"reasonable, certain and adequate provision for obtaining compensation." *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641, 659 (1890); see also *Joslin Mfg. Co.* v. *City of Providence*, 262 U. S. 668, 677 (1923); *United States* v. *Dow*, 357 U. S. 17, 21 (1958), and therefore we must determine if the Tucker Act is available.

B

Availability of the Tucker Act Remedy for Any "Erosion Taking"

The Tucker Act, 28 U. S. C. § 1491 provides:

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any

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erosion when the Special Court determines the proper consideration for the rail properties conveyed to Conrail." As the Special Court itself found:

"The Government parties [contend] that . . . this court could compensate for any unconstitutional erosion in the final system plan, either by fixing a valuation date prior to the date of conveyance or by a specific award, § 303 (c)(2)(B), or a deficiency judgment against Conrail under § 303 (c)(2)(C). The earlier valuation date method would hardly be satisfactory even if permissible,* since this would not cure erosion with respect to rail properties that were not conveyed. It would be permissible for the final system plan to provide or for us to direct that compensation for erosion should be made in the case of any railroad some of whose properties are conveyed. However, if, as the opponents urge, the consideration now authorized is inadequate as compensation for the properties themselves, enlarging the amount of claims that may be made against it would be of no avail."

"*The House version of the Act, as explained by the report accompanying it, provided that '[t]he value of consideration must equal the fair and equitable value of the rail properties as of the date of the conveyance.' House Report at 53. However, the Act contains no such limitation and the Conference Report, H. R. Rep. No. 93–774, 93d Cong., 1st Sess. (1973), makes no mention of the deletion." — F. Supp., at —.

> Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

A claim founded upon a taking of property for public use by operation of the Rail Act without just compensation in violation of the Fifth Amendment plainly would fall within the literal words of "any claim against the United States founded . . . upon the Constitution . . . ." The District Court, however, inquired whether the Rail Act affirmatively provided the Tucker Act remedy, and held that to "read a Tucker Act remedy into the [Rail] Act" would be "judicial legislation on a grand, if not arrogant, scale." — F. Supp., at —.

The District Court made the wrong inquiry. The question is not whether the Rail Act expresses an affirmative showing of congressional intent to permit recourse to a Tucker Act remedy. Rather, it is whether Congress has in the Rail Act *withdrawn* the Tucker Act grant of jurisdiction to the Court of Claims to hear a suit involving the Rail Act "founded upon the Constitution." For we agree with the Special Court that

> "the true issue is whether there is sufficient proof that Congress intended to *prevent* such recourse. The [Rail] Act being admittedly silent on the point, the issue becomes whether the scheme of the [Rail] Act, supplemented by the legislative history, sufficiently evidences a Congressional intention to withdraw a remedy that would otherwise exist." — F. Supp., at —.

Our decisions affirm that this is the correct inquiry. The general rule is that whether or not the United States so intended, "[i]f there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine." *United States*

v. *Causby*, 328 U. S. 256, 267 (1946). "[I]f the authorized action . . . does constitute a taking of property for which there must be just compensation under the Fifth Amendment, the Government has impliedly promised to pay that compensation and has afforded a remedy for its recovery by a suit in the Court of Claims." *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18, 21 (1940).[16] See also *Hurley* v. *Kincaid*, 285 U. S. 95 (1932). In *Yearsley*, the Court, speaking through Chief Justice Hughes, went on to hold that "it cannot be doubted that the remedy to obtain compensation from the Government *is as comprehensive as the requirement of the Constitution* . . . ." *Id.*, at 22. (Emphasis supplied.)

We turn then to the inquiry whether the Rail Act withdrew the Tucker Act remedy "that would otherwise exist." — F. Supp., at —. The argument that it should be so read rests on provisions of the Rail Act said plainly to evince Congress' determination that no federal funds beyond those expressly committed by the Act were to be paid for the rail properties.

The first provision referred to is § 209 which provides for the impanelling of the Special Court and the consolidation before it of "all judicial proceedings with respect to the final system plan." The argument attaches significance to the omission in § 303 of any authority in the Special Court to enter a judgment against the United

[16] As this passage from *Yearsley* indicates the government action must be authorized. "The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the Government," and hence recovery is not available in the Court of Claims. *Hooe* v. *United States*, 218 U. S. 322, 336 (1910). See also *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 585 (1952). These cases are inapposite since the government actions at issue here are authorized by the Rail Act.

States. Reliance is also placed on two of the Act's funding provisions. Section 210 (b), captioned "Maximum Obligational Authority," provides that the "aggregate amount of [USRA] obligations . . . which may be outstanding at any one time shall not exceed $1,500,000,000 of which the aggregate amount issued to [Conrail] shall not exceed $1,000,000,000 . . . ," and that "[a]ny modifications to [these] limitations . . . shall be made by joint resolution adopted by the Congress." Section 214 explicitly appropriates up to $12,500,000 to the Secretary of Transportation, to pay the expenses of "preparing the reports and exercising other functions to be performed by him under the Act," appropriates up to $5,000,000 to the Interstate Commerce Commission for its use in carrying out its functions, and appropriates up to $26,000,000 to USRA "for purposes of carrying out its administrative expenses . . . ."

But these provisions at least equally support the inference that Congress was so convinced that the huge sums provided would surely equal or exceed the required constitutional minimum that it never focused upon the possible need for a suit in the Court of Claims. That this may very well have been the case is evident in a statement in the House Report:

> "The timely implementation of the Final System Plan cannot be obstructed by controversy over the payment for the properties. The Committee is of the opinion that provisions of this title of the [Rail] Act, and especially the provision for deficiency judgment and payment of obligations of [USRA] . . . are more than adequate to guarantee that the creditors of the bankrupt railroad will receive all that they may Constitutionally claim. In view of these extraordinary protections, no litigation should be permitted to delay the Final System Plan." H. R.

Rep. No. 93–744, 93d Cong., 1st Sess., 52, 55 (1973) (hereafter H. Rep.).

That inference also finds support in the provision of § 303 (c)(3) that authorizes the Special Court to reduce payments to bankrupt estates if they "are fairer and more equitable than is required as a constitutional minimum." That provision suggests that Congress thought the compensation made possible by the Rail Act could well exceed that required by the Constitution, and gave no consideration to withdrawal of the Tucker Act remedy because it was sure the Rail Act itself provided at least the constitutional minimum compensation.

Finally, the manner Congress in § 601 expressly addressed the Rail Act's "Relationship to Other Laws" plainly implies that Congress gave no thought to consideration of withdrawal of the Tucker Act remedy. Section 601 (a)(2) provides that the "antitrust laws are inapplicable with respect to any action taken to formulate or implement the final system plan . . ."; § 602 (b) provides that "[t]he provisions of the Interstate Commerce Act . . . and the Bankruptcy Act . . . are inapplicable to transactions under this Act to the extent necessary to formulate and implement the final system plan whenever a provision of any such Act is inconsistent with this Act"; § 601 (c) provides that, "[t]he provisions of section 102 (2)(C) of the National Environmental Policy Act of 1969 . . . shall not apply with respect to any action taken under authority of this Act before the effective date of the final system plan." Yet despite this clear evidence that Congress was aware of the necessity to deal expressly with inconsistent laws, Congress nowhere addresses the Tucker Act question.

It is argued that any uncertainty in the scheme and text of the Rail Act is cleared up by legislative history, from the House and the Senate, that discloses that Con-

gress meant the Rail Act to withdraw the jurisdiction of the Court of Claims under the Tucker Act. To the contrary, we read the legislative history as disclosing no more than a repeatedly emphasized belief that the Rail Act's provisions for compensation for the rail properties assured payment of the constitutional minimum. This is plainly the import of the oft-stated view that the taxpayers would not be unduly burdened by the sums provided, see, *e. g.*, 110 Cong. Rec. H. 9741 (Nov. 8, 1973) (remarks of Rep. Metcalf); *id.*, at H. 9746 (remarks of Rep. Conte); and also of Senator Hartke's explanation of the Conference Report to the Senate, 119 Cong. Rec. S. 23,783–23,784 (daily ed. Dec. 21, 1973) which included the statement:

> "If we did nothing while continuing to mandate rail service, there is the distinct possibility in view of the prior action of Congress that a number of these people could make a claim against the Government which could be sustained in the Court of Claims." [17]

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[17] "Mr. HARTKE. We are providing that the creditors of this corporation would be required to take common stock in the new quasi-government operation. In other words, they are exchanging their present security interest in the rail properties for common stock in the new corporation.

"The railroad properties then become the properties of the new corporation free and clear of liens and encumbrances. In other words, the assets are being transferred and the rights are being changed. The nonrailroad property will remain in the bankruptcy court to be dealt with by them. One can talk about what is available if the railroad is liquidated and put through the wringer, but even then the chances of these creditors getting their money is relatively slim, and this country cannot afford cessation of rail service while the railroads are put through the wringer. So what, in effect, is called the "cram down" theory forces them to accept this kind of settlement and judges have ruled that this is fair. If we did nothing while continuing to mandate rail service, there is the distinct possibility in view of the prior action of Congress that a number of these

As the Special Court remarked, and we agree, this statement in context is "not inconsistent with the view that the Senator was so convinced that the bill, as amended in conference, contained such adequate compensation provisions that a suit in the Court of Claims could not prevail particularly in view of what he had characterized as a 'rather slim' chance of the creditors getting their money through liquidation, (*id.*, S. 23,783) rather than as meaning that such a claim could not be maintained." — F. Supp., at —.

We do not think that the argument in support of reading the Rail Act to withdraw the Tucker Act remedy is aided by the colloquy on the House side between the House managers of the Bill, 119 Cong. Rec. 11,876 (daily ed. Dec. 20, 1973).[18] That colloquy does not even con-

people could make a claim against the Government which could be sustained in the Court of Claims.

[18] "Mr. KUYKENDALL. Mr. Speaker, I would like to ask the gentleman from Washington to clarify one point, and that is the matter of the deficiency judgment. There was a lot of colloquy in the original debate which expressed fears that the Federal court had the key to the Treasury.

"Will the gentleman give us his interpretation of the guarantees we have to keep that from happening in the court proceedings?

"Mr. ADAMS. Mr. Speaker, there is a definite limitation on the total amount that can be authorized under this bill. Any amounts that go beyond that, or the shifting of the way in which it is spent, is to be approved by an act of Congress, to be signed by the President. It is defined as a joint resolution in the bill, and the statement of the managers, and it was the clear intent of the managers that any amount other than common stock was to be at the lowest possible limit to meet the constitutional guarantees.

"Mr. KUYKENDALL. Mr. Speaker, is it not true, I will ask the gentleman from Washington (Mr. ADAMS) that the creditors, of course, are given protection, and that the Board of Directors, under the control of Government officials, is the owner of the entire block of stock of 100 million shares, whatever it is?

Mr. ADAMS. The gentleman is correct. It is controlled by the United States, so long as the Secretary determines that there is an

cern the withdrawal of Court of Claims jurisdiction. It concerns only the deficiency judgment against Conrail and the powers of the Special Court.

Finally, reliance is put upon what is referred to as "subsequent legislative history" in the form of statements by Congressmen during Oversight Hearings of the House Subcommittee on Transportation and Aeronautics on June 14, 1974, and on an *amicus* brief filed in this Court on behalf of 38 Congressmen. But post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage. See, *e. g., United States* v. *United Mine Workers of America,* 330 U. S. 258, 282 (1947). Such statements "represent only the personal views of these legislators, since the statements were . . . [made] after passage of the Act." *National Woodwork Manufacturers Assn.* v. *NLRB,* 386 U. S. 612, 639, n. 34 (1967). Moreover, during oral argument before this Court, Representative Adams, spokesman for the congressional group, expressly conceded that circumstances might arise when the Tucker Act remedy would be available:

> "Question: So you do anticipate a situation where the Tucker Act would be available?
>
> "Mr. Adams: Oh, yes. Let's say, for example, that after this is all over—and this is the three-judge

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amount of obligation funds which the United States might, in any way ever, have to have anything to do with.

"During that period of time, it is controlled by a board of directors which consists of Government officials.

"Mr. KUYKENDALL. There is no way the Federal court may assess the taxpayers or this Congress on the judgments of the creditors; is that correct?

"Mr. ADAMS. The gentleman is correct.

"Mr. KUYKENDALL. There is no way they can assess the Congress for the money?

"Mr. ADAMS. The gentleman is correct."

court's problem—that if a party comes in and says, you held us beyond the constitutional limit on erosion and at that point we are of the opinion that it went just too long, it was unreasonable, but that is a specific individual case at that point.

"Question: And so the Tucker Act, you think, would be available in that situation?

"Mr. Adams: Of course. *We did not repeal the Tucker Act.*" [19] (Emphasis supplied.)

In sum, we cannot find that the legislative history supports the argument that the Rail Act should be construed to withdraw the Tucker Act remedy. The most that can be said is that the Act is ambiguous on the question. In that circumstance, applicable canons of statutory construction require us to conclude that the Rail Act is not to be read to withdraw the remedy under the Tucker Act.

One canon of construction is that repeals by implication are disfavored. See, *e. g., Mercantile National Bank* v. *Langdeau*, 371 U. S. 555, 565 (1963); *United States* v. *Borden Co.*, 308 U. S. 188, 198, 199 (1939); *Amell* v. *United States*, 384 U. S. 158, 165–166 (1966). Rather, since the Tucker Act and the Rail Act are "capable of

[19] Tr. of Oral Arg., October 23, 1974, at 50–51.

At three other times during oral argument Representative Adams implied that the Tucker Act was available for takings resulting from the Rail Act. See *id.*, at 48 ("As Justice White was asking in his question, is there a right to sue for some failure—maybe we hold a party too long, then they could."); 49 ("Now, as far as the *Causby* case is concerned, *Hurley* v. *Kincaid* and the other Tucker Act cases, we did not try to repeal the Fifth Amendment or certainly repeal the Tucker Act jurisdictional statements."); 50 ("If you decide, however, that there may be some place along the line, in the lawful process, a mistake, then you reach and say the Tucker Act case will have to be decided when and if some party can decide that they have created a case on the merits.").

co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari*, — U. S. —, — (1974). Moreover, the Rail Act is the later of the two statutes and we agree with the Special Court that

> "A new statute will not be read as wholly or even partially amending a prior one unless there exists a 'positive repugnancy' between the provisions of the new and those of the old that cannot be reconciled . . . . This principle rests on a sound foundation. Presumably Congress had given serious thought to the earlier statute, here the broadly based jurisdiction of the Court of Claims. Before holding that the result of the earlier consideration has been repealed or qualified, it is reasonable for a court to insist on the legislature's using language showing that it has made a considered determination to that end. . . ." — F. Supp., at —.

The other relevant canon of construction that comes into play is that when a statute is ambiguous, "construction should go in the direction of constitutional policy." *United States* v. *Johnson*, 323 U. S. 273, 276 (1944). There are clearly grave doubts whether the Rail Act would be constitutional if a Tucker Act remedy were not available as compensation for any unconstitutional erosion not compensated under the Act itself. In such case, as the Special Court observed, "[w]hen one admissible construction will preserve a statute from unconstitutionality and another will condemn it, the former is favored even if language, . . . and arguably the legislative history point somewhat more strongly in another way." — F. Supp., at —. In other words our "task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations." *United States Civil Service Comm'n* v. *Na-*

tional Association of Letter Carriers, 413 U. S. 548, 571 (1973).

Lynch v. *United States*, 292 U. S. 571 (1934), fully supports our conclusion. *Lynch* presented a situation requiring this Court to determine whether a statute that effected an unconstitutional taking was also to be construed to withdraw a cause of action created by an earlier statute. The Economy Act of 1933, 48 Stat. 11, provided in § 17 that ". . . all laws granting or pertaining to yearly renewable term insurance are hereby repealed. . . ." District Courts, affirmed by the Court of Appeals of the Fifth Circuit, 68 F. 2d 490 (1933), and the Seventh Circuit, 68 F. 2d 442 (1934), dismissed, on the basis of this provision, suits by beneficiaries of yearly renewable term policies brought under § 405 of the War Risk Insurance Act of 1917, 40 Stat. 409, expressly authorizing suits in the District Courts respecting any "disagreement as to a claim under the contract of insurance." The beneficiaries claim was that there was an actionable "disagreement" within the meaning of § 405 because the Government had violated the terms of the policies by failing to pay the premiums when the insureds became totally and permanently disabled and had continued to refuse payment after the insureds died. This Court unanimously reversed the dismissals. Section 17 of the Economy Act was held to effect an unconstitutional taking of vested property rights in the beneficiaries created by the insurance contracts. The question then became whether § 17 had repealed the remedy of a suit in the District Court provided by § 405 of the Insurance Act. The Court held, speaking through Mr. Justice Brandeis, that § 17 would not be read as depriving the beneficiaries of that remedy in the absence of a clear indication from Congress that the remedy was taken away. The Court said:

"*Fifth.* There is a suggestion that although, in

> repealing all laws 'granting or pertaining to yearly renewable term insurance,' Congress intended to take away the contractual right, it also intended to take away the remedy; that since it had power to take away the remedy, the statute should be given effect to that extent, even if void insofar as it purported to take away the contractual right. The suggestion is at war with settled rules of construction. It is true that a statute bad in part is not necessarily void in its entirety. A provision within the legislative power may be allowed to stand if it is separable from the bad. But no provision however unobjectionable in itself, can stand unless it appears both that, standing alone, the provision can be given legal effect and that the legislature intended the unobjectionable provision to stand in case other provisions held bad should fall. *Dorchy* v. *Kansas*, 264 U. S. 286, 288, 290. Here, both those essentials are absent. There is no separate provision in § 17 dealing with the remedy; and it does not appear that Congress wished to deny the remedy if the repeal of the contractual right was held void under the Fifth Amendment." 292 U. S., at 586.

Similarly, "There is no separate provision in [the Rail Act] dealing with the [Tucker Act] remedy; and it does not appear [from the statute or its legislative history] that Congress wished to deny this remedy" if the Rail Act should cause an "erosion taking" that would require the payment of just compensation.

We accordingly hold that the Tucker Act remedy is not barred by the Rail Act but is available to provide just compensation for any "erosion taking" effected by the Rail Act.

V

A

The Alleged "Conveyance Taking"

The District Court declined to decide whether the provisions governing the procedures for and terms of the final conveyance of rail properties to Conrail (the "conveyance taking" issue) violate the Fifth Amendment, thus rendering the Rail Act invalid in its entirety.[20] The District Court was "persuaded that these issues are premature." — F. Supp., at —.

Briefly, the challenges to the final conveyance provisions assert that the Rail Act is basically an eminent domain statute and, because compensation is not in cash but largely in stock of an unproven entity, will necessarily work an unconstitutional taking.[21] A variant of the argument is that, even if a reorganization statute, the Rail Act would be unconstitutional unless the Tucker Act remedy is now held to assure payment of any amount by which the *market value* of stocks and securities awarded by the Special Court is less than the value of the rail properties conveyed. The New Haven Trustee goes further; he argues that even if a reorganization statute, the Rail Act violates substantive due process by failing to assure the "fair and equitable equivalent" of the rail

[20] The conveyance provisions are the heart of the Rail Act. Thus, if it were clear that they were unconstitutional, a strong argument might be made that they are inseverable from the remainder of the Act and that the Act as a whole is void.

[21] The New Haven Trustee in his Reply Brief, at 45–46, seems to concede that valuation at market value of any Conrail stock may be sufficient. He then suggests, however, that it might be impossible, for legal and practical reasons, to offer Conrail stock publicly for many years. Thus, he claims, there will be no way to ascertain market value, and implies that the market value will effectively be zero.

properties valued at their "highest and best use." The New Haven Trustee also contends that the conveyance provisions constitute a taking such as that threatened by interim erosion: they require operations of the railroad to continue, albeit in a different form, even if the liquidation value for "highest and best use" is greater than the value of the railroad as a going concern. Finally, the New Haven Trustee and the creditor parties contend that the conveyance provisions deny procedural due process, because they mandate the final conveyance before any meaningful determination of its fairness, and because no provision is made for creditor or stockholder consideration of or voting upon the Final System Plan.

All of the parties now urge that the "conveyance taking" issues are ripe for adjudication. However, because issues of ripeness involve, at least in part, the existence of a live "Case or Controversy," [22] we cannot rely upon concessions of the parties and must determine whether the issues are ripe for decision in the "Case or Controversy" sense. Further, to the extent that questions of ripeness involve the exercise of judicial restraint from unnecessary decision of constitutional issues,[23] the Court must determine whether to exercise that restraint and cannot be bound by the wishes of the parties.

The District Court's holding of prematurity was influenced by the statutory scheme that requires several decisional steps before the final conveyance. The possibility that the reorganization court might determine under § 207 (b) that the Rail Act process is not fair and

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[22] *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–242 (1937); *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 140–141 (1951); *id.*, at 154–155 (Frankfurter, J., concurring).

[23] *Ashwander* v. *TVA*, 297 U. S. 288, 346–347 (1936) (Brandeis, J., concurring); *Poe* v. *Ullman*, 367 U. S. 497, 502–503 (1961).

equitable to the railroad estate, or that Congress might disapprove the Final System Plan, § 208 (a), or that the Special Court would not order the final conveyance pursuant to § 303 (b), led the District Court to conclude that the question whether the final conveyance provisions are constitutional was "too speculative to warrant anticipatory judicial determinations." *Eccles* v. *Peoples Bank*, 333 U. S. 426, 432 (1948).[24]

But subsequent to the District Court's opinion, the Penn Central reorganization court determined that the Rail Act did not provide a process that would be fair and equitable to the estate, — F. Supp. —. On appeal to the Special Court under § 207 (b), that determination

[24] Judge Fullam disagreed with the majority below on the ripeness of some of the final conveyance issues, — F. Supp., at —. Among other things, he observed that the validity of the final conveyance provisions was inextricably interwoven with the issues concerning interim erosion which the three-judge court did address: As suggested, *supra*, pp. 16–18, the constitutionality of requiring deficit railroad operations by a railroad in reorganization may depend in part upon the likelihood of a successful reorganization; if the provisions for the final conveyance were facially unconstitutional, there would be little likelihood of such reorganization, and it might be necessary to permit immediate abandonment for that reason alone. — F. Supp., at —. We believe, unlike Judge Fullam, that the Tucker Act is available to compensate any unconstitutional taking which might arise from interim erosion. See pp. 19–30, *supra*. However, his observation about the inter-relationship of the "erosion taking" and the "conveyance taking" issues is still pertinent. If it were entirely clear that no reorganization could take place under the Act because its conveyance provisions were unconstitutional, it might be pointless to permit continuing erosion of the estate and the inevitable build-up of a huge Tucker Act claim. Thus, we would have to decide whether those portions of the Act severely limiting abandonments are severable from the conveyance provisions. Because we find some of the final conveyance issues require resolution at this juncture for independent reasons, we need not determine whether we would have to confront any of them anyway in order completely to determine the validity of the abandonment provisions.

has been reversed, although the Special Court has not rendered its judgment pending our decision of this case. —— F. Supp., at ——. See n. 14, *supra*.

We agree with the parties that this change in circumstance has substantially altered the posture of the case as regards the maturity of the final conveyance issues. Whatever may have been the case at the time of the District Court decision, there can be little doubt, for reasons to be detailed, that some of the "conveyance taking" issues can and must be decided at this time. And, since ripeness is peculiarly a question of timing, it is the situation now rather than the situation at the time of the District Court's decision that must govern. [25]

First, the implementation of the Rail Act will now lead inexorably to the final conveyance, although the exact date of that conveyance cannot be presently determined. It is true Congress can reject the first plan presented to it by the USRA, § 208 (a), and that the Rail Act, while prescribing with precision the timing of the presentation of that plan, §§ 207 (c) and (d), does not mandate the presentation of successive plans at any particular time. The Rail Act does, however, contemplate that USRA will continue to present plans, § 208 (b), until one becomes "effective," § 209 (a). Thus, we must assume there will be compliance with the Rail Act's mandatory

[25] It might be appropriate under different circumstances only to decide that the issues are ripe, and to remand to the District Court for their determination on the merits. However, such a remand here would be both undesirable and unnecessary. The Rail Act provides a strict timetable for its implementation. Any delay occasioned by remanding to the District Court could seriously impede that timetable and frustrate the accomplishment of the Rail Act's objectives. Further, these issues have been fully ventilated by these same parties in the Special Court, which proceeded to decide them.

terms in this respect and that a Final System Plan will at some time be certified to the Special Court. § 209 (c).[26]

Second, the Special Court is mandated to order the conveyance of rail properties included in the Final System Plan and is granted no discretion not to order the transfer.[27] While mandatory language does not necessarily

[26] The parties have stipulated that "it is likely" that some of the rail properties of Penn Central will be designated for transfer, sale or other conveyance in any final system plan executed under the Rail Act. J. App. 205, 318–319, 370–371. Since the Penn Central system holds an overwhelming percentage of the trackage, see n. 12, *supra*, to be reorganized under the Act, it is inconceivable that all of the Penn Central rail properties could be eliminated from the final system plan without destroying the possibility of achieving the goals of the Act. See §§ 101, 206 (a). While the Act does contemplate that, under the Final System Plan, some of the rail properties may be designated for transfer to existing profitable railroads, §§ 206 (c)(1)(B), 206 (d)(2), 209 (c)(2), 303 (a)(2), 303 (b), no such transfer can occur unless the purchaser railroad agrees to the purchase. § 206 (d)(4). If any substantial portion of the Penn Central rail properties were an attractive investment for an existing railroad, the reorganization of the Penn Central presumably could have been accomplished under § 77, without recourse to the novel plan envisioned by the Act. Thus, we can properly assume that some Penn Central properties will be transferred to Conrail.

[27] Section 209 (a) provides that "[n]otwithstanding any other provision of law, the final system plan . . . is not subject to review by any court except in accordance with this section. After the final system plan becomes effective under § 208 of this title, it may be reviewed with respect to matters concerning the value of the rail properties to be conveyed under the plan and the value of consideration to be received for such properties."

Section 303 (b)(1) commands that within 10 days after the compensation provided in the Final System Plan has been deposited with the Special Court pursuant to § 303 (a), the Special Court "shall" order the conveyance. Section 303 (b)(2) provides that the conveyance "shall not be restrained or enjoined by any court."

Finally, § 303 (c)(1) provides "*After* the rail properties have been conveyed . . . the special court . . . shall decide . . . whether the transfers or conveyances . . . are in the public interest and are fair

deny a court of equity flexibility, *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329 (1944), the central scheme of the Rail Act defers decision of any controversies over the terms of the transfer of rail properties until after the transfer has occurred. H. Rep., at 55; S. Rep. No. 93–601, 93d Cong., 1st Sess., at 34 (1973) (hereafter S. Rep.).[28] The Special Court's opinion suggests that the mandatory order to convey probably could not prevent the Special Court from refusing to order the conveyance, indirectly if not by a direct injunction, if it were convinced that appellees' constitutional rights were certain to be violated. — F. Supp., at —; *Marbury* v. *Madison*, 5 U. S. (1 Cranch) 137 (1803). But the possibility that a court may later decline to enforce the Rail Act as written because of its unconstitutionality cannot constitute a contingency itself pretermitting earlier consideration of the constitutionality of the Act. Cf. *Albertson* v. *SACB*, 382 U. S. 70, 76–77 (1965).

It appears, then, that the conveyance of Penn Central's rail properties to Conrail cannot be prevented by

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and equitable . . . ." (Emphasis added.) Thus, the statutory command is that once the Final System Plan has been presented to Congress and not disapproved, the Special Court can review it only after it has ordered the conveyance.

[28] The Senate bill contained a provision that might be read as authorizing the Special Court to refuse to order the conveyance if it found it not fair and equitable. S. 2767, § 303 (c) (2). See S. Rep., at 35. However, this provision was deleted. It seems fundamentally at odds with §§ 303 (b) and (c) (1) of the Senate bill, and with the intent expressed by the Senate Committee Report, as cited in the text. We infer, therefore, that the provision was eliminated at conference precisely to make clear that the order of conveyance is mandatory, and that any litigation concerning valuation is to occur after the transfer. See Conf. R. No. 93–744, 93d Cong., 1st Sess., at 57, 58 (1973), which states that, except for certain provisions not pertinent here, the final bill follows the Senate version of the implementation scheme, "subject to technical and *clarifying* changes." (Emphasis added.)

the debtor or its creditors or stockholder; and, while the exact terms of the conveyance remain to be decided, an order of the Special Court directing the conveyance is virtually a certainty. The Rail Act empowers no court, including this Court, to prevent it.

Thus, occurrence of the conveyance allegedly violative of Fifth Amendment rights is in no way hypothetical or speculative. Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect. *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 592–593 (1923); *Pierce* v. *Society of Sisters*, 268 U. S. 510, 536 (1925); *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 287 (1936). "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." *Pennsylvania* v. *West Virginia*, *supra*, 262 U. S., at 593.[29]

True, there are situations where, even though an allegedly injurious event is certain to occur, the Court may

[29] For this reason, decisions concerning justiciability of cases of apprehended criminal prosecution are not pertinent. Because the decision to instigate a criminal prosecution is usually discretionary with the prosecuting authorities, even a person with a settled intention to disobey the law can never be sure that the sanctions of the law will be invoked against him. Further, whether or not the injury will occur is to some extent within the control of the complaining party himself, since he can decide to abandon his intention to disobey the law. For these reasons, the maturity of such disputes for resolution before a prosecution begins is decided on a case-by-case basis, by considering the likelihood that the complainant will disobey the law, the certainty that such disobedience will take a particular form, any present injury occasioned by the threat of prosecution, and the likelihood that a prosecution will actually ensue. Compare *Golden* v. *Zwickler*, 394 U. S. 103 (1969) with *Albertson* v. *SACB*, 382 U. S. 70 (1965); *Steffel* v. *Thompson*, 415 U. S. 452, 459 (1974).

delay resolution of constitutional questions until a time closer to the actual occurrence of the disputed event, when a better factual record might be available. Cf. *Public Affairs Press* v. *Rickover*, 369 U. S. 111 (1962). Several factors militate however against that course in this case.

First, decisions to be made now or in the short future may be affected by whether or not the "conveyance taking" issues are now decided. The constitutionality of the final conveyance may be interwoven with the validity of the abandonment provisions. See n. 24, *supra*. The Penn Central Trustees may delay expending funds for maintenance in the interval before the final conveyance if constitutional doubts linger about ultimate reorganization under the Rail Act. See Reply Brief for Penn Central Trustees, at 12.

Second, the Act is a carefully structured method for planning and implementing a reorganization scheme. It necessitates the present denial to the railroads in reorganization of options otherwise available. For example, the New Haven Trustee filed in the District Court a motion to dismiss the § 77 proceeding, and to set up an equity receivership to liquidate Penn Central's assets. So long as reorganization under the Rail Act remains possible, an equity receivership is not available.

Third, and particularly significant, because of the structure of the Act there is no better time to decide the constitutionality of the Act's mandatory conveyance scheme to minimize or prevent irreparable injury. The precise contours of the Final System Plan will not be known until shortly before its certification to the Special Court.[30]

[30] The Final System Plan will become "effective" if it is not disapproved by either house of Congress within 60 calendar days of continuous session from the time it is transmitted to Congress. Sections 102 (4); 208 (a); 209 (a). After that, it may still have to

Until that Plan has been finally developed, the courts will not have any more settled facts concerning the rail properties to be conveyed, the valuation of those properties, or the value of Conrail stock and other securities to be transferred to the Penn Central estate than they do now.

After the Final System Plan is effective, the Rail Act prohibits initial judicial review of its terms except by the Special Court. §§ 209 (a); 303 (b)(2). And this review is to occur after conveyance, not before.[31] Further, as all parties agree, the conveyance, because of its complexity and because of the long time lapse probable before valuation review is completed, in practical effect will be irreversible once it is made.

Thus, we will be in no better position later than we are now to confront the validity of the final conveyance provisions. Rather, delay in decision will create the serious risk that consideration of the validity of those provisions may either be too hasty to afford protection of rights or too late to prevent the conveyance or assure compensation if the Rail Act were found unconstitutional.[32]

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be changed if USRA is unable to execute agreements with profitable railroads for purchases from the reorganized railroads (within 30 days of the effective date) or for sales to Conrail or to other profitable railroads (within 60 days of the effective date). § 206 (d)(4). Thus, it is possible that the Final Plan to be certified to the Special Court will not be known until 60 days after the effective date of the Plan. The Plan must be certified within 90 days of the effective date; however, it can be certified earlier. § 209 (c).

[31] The Special Court may have jurisdiction derived from the Constitution itself to refuse to convey if the terms of the transfer are clearly unconstitutional. See p. 36, *supra*. But as the Special Court noted, any such review would be hasty and made without adequate information. — F. Supp., at —. Thus, while review at this stage is a theoretical possibility, it would not afford a better opportunity than the present one for an informed decision in light of well-developed facts.

[32] See also n. 36, *infra*.

We hold, therefore, that the basic "conveyance taking" issues are now ripe for adjudication. This does not mean however that we need decide now all of the contentions pressed upon us. "Even where some of the provisions of a comprehensive legislative enactment are ripe for adjudication, portions of the enactment not immediately involved are not thereby thrown open for a judicial determination of constitutionality." *Communist Party* v. *SACB*, 367 U. S. 1, 71 (1961).

For example, the controversy over the proper valuation theory to be applied to both the rail properties and the stock of Conrail provided as compensation depends upon contingencies that argue forcefully for postponement of its resolution. The parties have stipulated that it will be impossible to ascertain until the Final System Plan is effective which rail properties will be transferred to Conrail, or their value on *any* valuation theory, or the value of the consideration to be exchanged for the rail properties. J. App. 205, 319, 371. Thus, it cannot be determined now what impact any particular theory of valuation may have when applied to either side of the equation, nor can we know where the interests of the various parties lie—that is, which methods of valuation would result in higher compensation to the estate or lower cost to Conrail. Rulings on these questions would plainly be rulings upon "hypothetical situations that may or may not [arise]." *International Longshoremen's Union* v. *Boyd*, 347 U. S. 222, 224 (1954).

Moreover, valuation issues peculiarly require a much more developed record than has been prepared. Without evidence of actual figures supporting various valuation theories, a court is not able to discern "what legal issues it is deciding, what effect its decision will have on the adversaries, [or] some useful purpose to be achieved in deciding them." *Public Utilities Comm'n* v. *Wycoff*, 344 U. S. 237, 244 (1952). Clearly the record on these issues does

not yet provide the "confining circumstances of particular situations," *Communist Party* v. *SACB, supra,* 367 U. S., at 72, which best inform constitutional adjudication.

Finally, there will be ample opportunity later to litigate valuation controversies after the factual record has matured. The Rail Act in terms vests the Special Court with the initial responsibility for valuation determinations,[33] subject to review by this Court. In that circumstance, we should surely await the Special Court's determinations. *Public Utilities Comm'n* v. *Wycoff, supra,* 344 U. S., at 246. Were we to attempt decisions of valuation questions before the Special Court's determinations, we would necessarily be forced to a speculative interpretation of a statute not clear on the subject of valuation before the court entrusted with its construction has given us the benefit of its views.[34] Cf. *Public Utilities Comm'n* v. *Wycoff, supra; Great Atlantic & Pacific Tea Co.* v. *Grosjean,* 301 U. S. 412 (1937).

In sum, of the "conveyance taking" issues, we hold ripe for adjudication the questions (a) of the availability of the Tucker Act remedy if the consideration exchanged upon final conveyance of the rail properties is less than the constitutional minimum, (b) whether stocks, however valued, can be part of the consideration for the rail properties, and (c) whether procedural due process will be

[33] The House bill attempted to define the valuation theory to be applied to the rail properties conveyed. H. R. 9142 § 102 (5); see H. Rep., at 31. However, the definition of "fair and equitable value" is not in the Rail Act as adopted.

[34] The New Haven Trustee's contention that the conveyance provisions will constitute a taking because they mandate continuation of rail services indefinitely is similarly premature, because it is premised upon a hypothetical relationship between the railroad's liquidation value for "highest and best use" and its value as a going concern. Both of these values are by stipulation unknown, and the proper method of valuing the railroad properties is itself not justiciable now.

denied by the statutory process for conveyance. We hold further that decision of the questions concerning the method of valuation to be applied to either the rail properties or the consideration therefor is premature.

B

Availability of Tucker Act Remedy for Any "Conveyance Taking"

Whether the Rail Act precludes the availability of the Tucker Act remedy for any amount by which the consideration exchanged for the rail properties finally conveyed falls short of the constitutional minimum need not detain us. The reasons that led to our conclusion that the Rail Act, insofar as it may work an unconstitutional taking due to interim erosion, does not render a Tucker Act remedy unavailable apply equally to the "conveyance taking" issue. No party has suggested that a difference in result can be supported. The Rail Act authorizes inclusion in the Final System Plan of different kinds of consideration in exchange for the rail properties, subject to adjustment by the Special Court to assure fairness and equity. Congress fully expected that this consideration would provide the minimum compensation required by the Constitution; it wished to provide no more. If, however, that hopeful expectation should not be fulfilled, and the consideration exchanged for the rail properties should prove to be less than the constitutional minimum, the Tucker Act will be available as the jurisdictional basis for a suit in the Court of Claims for a cash award to cover any constitutional shortfall.

C

Adequacy of the Tucker Act Remedy for "Conveyance Taking"

It is argued, however, that, even if a Tucker Act remedy remains open, the remedy is inadequate because it fails

to cure basic deficiencies in the conveyance provisions of the Rail Act.[35] We hold, to the contrary, that while the conveyance provisions of the Rail Act might raise serious constitutional questions if a Tucker Act suit were precluded, the availability of the Tucker Act guarantees an adequate remedy at law for any taking which might occur as a result of the final conveyance provisions. Further, with the Tucker Act remedy, the payment of "fair and equitable consideration" in compliance with the reorganization statutes is assured, and procedural due process is satisfied.

Primarily, it is contended that the Tucker Act remedy is inadequate because the "conveyance taking" is an exercise of the eminent domain power and therefore requires full cash payment for the rail properties.[36] Since our rea-

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[35] It is also contended that the Tucker Act is inadequate since Congress may not appropriate the money awarded by the Court of Claims. But as Mr. Justice Harlan wrote, "there seems to be no sound reason why the Court of Claims may not rely on the good faith of the United States." *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 571 (1962). See also *Albert Hanson Lumber Co.* v. *United States*, 261 U. S. 581, 587 (1923); *Silesian-American Corp.* v. *Clark*, 332 U. S. 469, 480 (1947).

We reject as well the suggestion that a Tucker Act remedy comes too late. See *Hurley* v. *Kincaid*, *supra*. Interest on a just compensation award runs from the date of the taking. See, *e. g.*, *United States* v. *Thayer-West Point Hotel Co.*, 329 U. S. 585, 588 (1947). Finally, contrary to the suggestion of some appellees, we see no reason why a Tucker Act remedy is inadequate because the valuations involved may be complex. Cf. *Phillips* v. *Commissioner of Internal Revenue*, 283 U. S. 589, 596–601 (1931).

All of the arguments concerning inadequacy of the Tucker Act remedy are pressed with regard to both the alleged "erosion taking" and the alleged "conveyance taking." As with the availability of the Tucker Act remedy, see *supra*, p. 42, there is no distinction between these arguments or their resolutions in the two contexts.

[36] To delay until any Court of Claims suit adjudication with respect to the *form* of consideration provided by the Act would be exceed-

sons supporting the availability of the Tucker Act remedy assume that the basic compensation scheme of the Act is valid but could result in payment of less than the constitutional minimum, it might indeed be inconsistent with the Rail Act to suppose that a Tucker Act suit would lie for the *entire* value, in *cash*, of the rail properties.

This argument fails, however, for two reasons. First, it is extremely questionable whether, even if the Rail Act were on its face an acquisition of private property for public use, the entire value of the property acquired would have to be paid in cash. More important, we believe that there is nothing in the Act fundamentally at odds with the expressed purpose of Congress to supplement the reorganization laws, see H. Rep., at 29, and, with the Tucker Act, the Rail Act is valid as a reorganization statute.

No decision of this Court holds that compensation other than money is an inadequate form of compensation under eminent domain statutes. Statements can be found in opinions that the compensation "must be a full and perfect equivalent for the property taken," *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, at 326 (1893); must reimburse "the full and perfect equivalent in money of the property taken," *United States* v. *Miller*, 317 U. S. 369, 373 (1943); and must be the "full monetary equivalent of the property taken," *United States* v. *Reynolds*, 397 U. S. 14, 16 (1970); see also *Almota Farmers Elevator and Warehouse Co.* v. *United States*, 409 U. S. 470, 473 (1973).[37] Yet, in none of these cases was com-

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ingly irresponsible: while the fact that Congress did not contemplate a taking does not pretermit a Tucker Act remedy, it does suggest that Congress might wish to consider whether to abandon the whole Act if it turned out that the *entire* value of the rail properties must be paid in cash.

[37] At least two of the complaining parties agree that, to the extent compensation to the rail estates is paid in obligations of USRA

pensation in a form other than cash at issue. The clear implication of other decisions is that consideration other than cash—for example, any special benefits [38] to a property owner's remaining properties—may be counted in the determination of just compensation. *Bauman* v. *Ross*, 167 U. S. 548, 584 (1896); see Nichols, 3 Eminent Domain § 8.62 *et seq.* (Rev. 3d ed. 1974).[39]

We need not, however, determine whether compensation in the form of securities would be constitutional if

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backed by federal guarantees, the securities can be figured at face value as the perfect equivalent of money. Reply Brief for Cross-Appellant New Haven Trustee, at 45; Brief for Appellee Penn Central Co., at 56. See §§ 206 (h), 210, 303 (c)(2).

[38] The special benefits rule of compensation may later have direct relevance to the Penn Central reorganization. The Act provides that determination of the fairness and equity of the terms of the transfer should take into account "securities and *other benefits*" (emphasis added) provided to the railroad estate. § 303 (c)(2). See also § 206 (d)(1). The parties here disagree about what "other benefits" may be under the Act, and the extent to which any such may be counted as constitutional consideration. In particular, there is a dispute over whether the sums up to $250,000,000 in benefits to be paid Conrail as reimbursement for certain labor expenses are "other benefits" to be counted in evaluating the exchange. See § 509. For the reasons given *supra*, pp. 40–42, with respect to other valuation problems, this issue is presently premature.

[39] The claim is also made that, whatever the form of compensation proper under the Fifth Amendment, the legislature cannot specify the form of compensation but must leave the decision to the judiciary. This argument is based upon an erroneous reading of *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 327 (1893). *Monongahela* held only that the legislature could not, by setting either a fixed amount to be paid for property condemned or a principle for arriving at that amount, settle the constitutional right to just compensation. Thus, *Monongahela* did no more than restate the general principle that the courts, not the legislature, are ultimately entrusted with assuring compliance with constitutional commands. It said nothing about whether Congress can dictate the mode of compensation rather than the amount.

the Rail Act were merely an eminent domain statute. For the arguments in favor of this construction have no merit.

First, it is contended that despite the express provision of § 301 (b) that Conrail "shall not be an agency or instrumentality of the Federal Government," federal participation through federally appointed members of the Board of Directors constitutes Conrail a federal instrumentality.[40] From that premise the contention proceeds that the conveyance is an exercise of eminent domain. But Conrail is not a federal instrumentality by reason of the federal representation on its Board of Directors. That representation was provided to protect the United States' important interest in assuring payment of the obligations guaranteed by the United States. Full voting control of Conrail will shift to the shareholders if federal obligations fall below 50% of Conrail's indebtedness. The responsibilities of the federal directors are not different from those of the other directors—to operate Conrail at a profit for the benefit of its shareholders. Thus, Conrail will be basically a private, not a governmental, enterprise.

Second, it is contended that the Rail Act's provisions for a compelled conveyance and for the continuation of

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[40] Section 301 (d) provides:

"(d) BOARD OF DIRECTORS.—The Board of Directors of [Conrail] shall consist of 15 individuals selected in accordance with the articles and bylaws of [Conrail]: *Provided,* That so long as 50 per centum or more, as determined by the Secretary of the Treasury, of the outstanding indebtedness of [Conrail] consists of obligations of [USRA] or other debts owing to or guaranteed by the United States, three of the members of such board shall be the Secretary [of Transportation], the Chairman and the President of [USRA] and five of the members of such board shall be individuals appointed as such by the President, by and with the advice and consent of the Senate."

rail services pending formulation of the Final System Plan constitute the Act a condemnation statute. We see no significance in these features of the Act either. Congress, in enacting those provisions, clearly intended to legislate pursuant to the bankruptcy power. The Rail Act, like § 77 of the Bankruptcy Act, which the Rail Act supplements, merely "advances another step in the direction of liberalizing the law on the subject of bankruptcies." *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific R. Co.*, 294 U. S. 648, 671 (1935), and ". . . far reaching though [it] be, [the Rail Act has] not gone beyond the limit of congressional power . . . ." *Ibid.* That is the teaching of *RFC* v. *Denver & Rio Grande R. Co.*, 328 U. S. 495 (1946), where the Court sustained the "cram-down" provision of § 77 authorizing a reorganization court to confirm a plan despite its rejection by creditors. The Court said, "We think that the provisions for confirmation by the courts over the creditors' objection are within the bankruptcy powers of Congress. Those powers are adequate to eliminate claims by administrative valuations with judicial review and they are adequate to require creditors to acquiesce in a fair adjustment of their claims, so long as the creditor gets all the value of his lien and his share of any free assets." *Id.*, at 533.[41] Similarly, under the Rail

[41] An attempt is made to distinguish the "cram-down" provisions of § 77 (e) because § 77 (e) provides for a vote of all classes of creditors after the reorganization court has determined that a plan is fair and equitable. A "cram-down" is permitted only if the reorganization court finds any objection by a class of creditors "not reasonably justified." But creditors right to object to a plan approved by the court has a severely limited scope. "If a plan gives fair and equitable treatment to dissenters, the elements which make the plan fair and equitable cannot be the basis for a reasonably justified rejection." *RFC* v. *Denver & Rio Grande R. Co.*, 328 U. S. 495, 535 (1946). A "reasonable" objection must be based

Act, the Special Court has the duty to provide the railroad estates with the "fair and equitable" equivalent in Conrail securities for the rail properties conveyed.

Finally, it is argued that there are defects in the Rail Act's provisions for judicial review that identify the Act as an exercise of the eminent domain power. The argument is frivolous. Although the time has not yet arrived for the mandatory transfer to Conrail, the reorganization courts have had a full opportunity to assess the fairness of the Rail Act's scheme to the rail estates. § 207 (b). The Special Court has reviewed those determinations and under § 303 (c) will have an opportunity to review the terms of the transfer, although not the conveyance itself. In addition, neither the Rail Act itself nor the procedures thereunder finally determine the interests of the respective creditors. Those will be decided in the § 77 reorganization courts, which will distribute to creditors the consideration received for the rail properties. There are therefore ample adequate "[s]afeguards . . . to protect the rights of secured creditors . . . to the extent of the value of the property." *Wright* v. *Union Central Life Ins. Co.*, 311 U. S. 273, 278 (1940); cf. *North American Co.* v. *SEC*, 327 U. S. 686 (1946).

We are not to be understood to intimate that the Rail Act proceeding could not result in a compensible taking. We hold only that, since the Rail Act does not on its face exceed the broad scope of congressional power under the Bankruptcy Clause, *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific R. Co.*, *supra*, at 670,[42] Congress has not formulated an un-

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upon facts arising *after* the original approval of the plan by the court. *Ibid.* The omission in the Rail Act of this very limited right of objection cannot constitute the Act an eminent domain statute.

[42] *Continental Bank* expressly notes that § 77 does not represent the limits of the bankruptcy power. 294 U. S., at 671.

constitutional reorganization plan in compelling a reorganization wherein the compensation to appellees consists of Conrail and USRA securities and other benefits "so long as the creditor gets all the value of his lien and his share of any free assets." *RFC* v. *Denver & Rio Grande, supra,* at 533.

This Act does differ from other reorganization statutes such as § 77, however, in that it *requires* a conveyance before it is possible to ascertain whether this last condition will be met. Thus, the conveyance is mandated without any prior judicial finding that there will be adequate resources in the reorganized company of whatever kind to compensate the debtor estates and, eventually, their creditors. Because of this congressional insistence upon accomplishing the transfer whatever the ultimate equity of the compensation provisions, any deficiency of constitutional magnitude in the value of the limited compensation provided under the Act will indeed be a taking of private property for public use. Cf. *North American Co.* v. *SEC, supra,* at 710.[43] Since we have already determined, however, that there would then be recourse to a Tucker Act suit in the Court of Claims for a cash award to cover any constitutional shortfall, the Rail Act does provide adequate assurance that any taking will be compensated.

The remaining contentions regarding the validity of the final conveyance provisions require little discussion in view of the availability of a Tucker Act suit.

The first contention is that, even if considered as a reorganization statute, the Rail Act fails to assure that creditors will receive the full value of their liens in stock or securities. However, we have already held that, because of the possibility that the Rail Act will work a tak-

[43] None of the parties question that any "taking" effected by the Rail Act will be for "public use." Cf. *Berman* v. *Parker,* 348 U. S. 26 (1954).

ing, there must be assurance of consideration equal to any constitutional shortfall, and that a Tucker Act remedy is available to provide that assurance. Thus, the value of the stocks and securities provided under the Act is backed up by what is essentially a guarantee of cash payment for any lack of fairness and equity of constitutional dimensions. The Tucker Act remedy fulfills perfectly, then, the function of the underwriting provision approved in the *New Haven Inclusion Cases, supra,* 399 U. S., at 486–488.

Similarly, the availability of the Tucker Act cures what might otherwise be a troublesome problem of procedural due process. The Tucker Act assures that the railroad estates and the creditors will eventually be made whole for the assets conveyed. Complainants evidence no interest in retaining their property for longer than the Rail Act requires. Indeed, their position is really that they want to be free to dispose of it sooner. Thus, there is no interest asserted in retaining the properties themselves; the only interest is in making sure that creditors receive fair compensation for those properties. On the other hand, the procedural sequence is vital to accomplishing the goals of the Act. If judicial review of the terms of the transfer was required before the conveyance could occur, the conveyance might well come too late to resolve the rail transportation crisis. As long as creditors are assured fair value, with interest, for their properties, the Constitution requires nothing more.

VI

Validity of the Rail Act under uniformity requirement of Bankruptcy Clause

We consider finally the contention that, because the Rail Act's provisions apply only to railroads in reorganization in the "region," the statute lacks the uniformity

required by Art. I, § 8, cl. 4, of the Constitution giving Congress power "To establish . . . uniform laws on the subject of Bankruptcies throughout the United States."

The District Court held that "[R]ecourse to the bankruptcy clause to justify Congressional action is necessary only if that action impairs the obligation of contracts." — F. Supp., at —. In that respect, the court found the Rail Act adds virtually nothing to the powers already granted to reorganization courts under the "uniform and admittedly valid provisions of § 77 of the Bankruptcy Act. . . . Authority to order conveyances free and clear of liens, and to 'cram down' a plan of reorganization, already exists under § 77, and is not newly created or added by the [Rail] Act." — F. Supp., at —.

The court determined, however, that one provision of the Rail Act is "newly created or added by the [Rail] Act." Section 207 (b) requires the reorganization court to dismiss the § 77 proceeding if it finds that the railroad is not reorganizable on an income basis within a reasonable time, *and* that the Rail Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization. The District Court noted that the *New Haven Inclusion Cases*, 399 U. S., 392 (1970), held that inasmuch as the plan disposed of the New Haven's assets to the Penn Central for continued operations, § 77 could be used to reorganize the enterprise as an investment holding company, "at least where the plan contemplates that the bulk of the rail properties will continue to be operated as a railroad by someone." — F. Supp., at —. The District Court held that § 207 (b) of the Rail Act precludes a like reorganization under § 77 by requiring dismissal of the § 77 proceedings, and to that extent violates the uniformity clause since this dismissal relates only to debtors within the region covered by the Rail Act.

We need not decide whether the District Court was correct in this respect. Following the decision of the District Court, the Penn Central reorganization court issued its 180-day order finding that, although Penn Central is not reorganizable on an income basis under § 77, the Rail Act does not provide a process which would be fair and equitable to the debtor's estate. — F. Supp., at —. Rather than dismiss the § 77 proceeding as required by § 207 (b), however, the court stayed its order pending an appeal to the Special Court. The Special Court found the processes prescribed in the Rail Act are fair and equitable if a remedy exists under the Tucker Act, and reversed. — F. Supp., at —. The Rail Act expressly provides that this holding is nonreviewable. § 207 (b). Although we need not address today the issue whether the judgment of the Special Court is subject to review, we do hold that the Tucker Act remedy is available for any uncompensated taking occurring under the Rail Act. That holding obviates the possibility that the Penn Central reorganization court will ever confront the provision for dismissal of a § 77 proceeding under § 207 (b) of the Rail Act.

There remains, however, another aspect of the uniformity issue for decision. Appellees urge that the entire Rail Act violates the uniformity clause. The argument is that the uniformity required by the Constitution is geographic, *Hanover National Bank* v. *Moyses*, 186 U. S. 181, 188 (1902), and since the Rail Act operates only in a single statutorily defined region, the Act is geographically nonuniform.

The argument has a certain surface appeal but is without merit because it overlooks the flexibility inherent in the constitutional provision. Section 77 was upheld against a like challenge on the ground of the "capacity of the bankruptcy clause to meet new conditions

as they have been disclosed as a result of the tremendous growth of business and development of human activities from 1800 to the present day." *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific R. Co.*, 294 U. S. 648, 671 (1935). The Court therefore held that, though § 77 was a distinctive and far-reaching statute, treating railroad bankruptcies as a distinctive and special problem, it was not "beyond the limit of congressional power." [44]

The uniformity provision does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems. "The problem dealt with [under the bankruptcy clause] may present significant variations in different parts of the country." *Wright* v. *Vinton Branch of Mountain Trust Bank*, 300 U. S. 440, 463 n. 7 (1937). We therefore agree with the Special Court that the uniformity clause was not intended "to hobble Congress by forcing it into nationwide enactments to deal with conditions calling for remedy only in certain regions." — F. Supp., at —.

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[44] The Court observed that it is not unusual for railroads to receive disparate treatment under the bankruptcy laws:

"Railway corporations had been definitely excluded from the operation of the law in 1910 (c. 412, § 4, 36 Stat. 838, 839), probably because such corporations could not be liquidated in the ordinary way or by a distribution of assets. A railway is a unit; it cannot be divided up and disposed of piecemeal like a stock of goods. It must be sold, if sold at all, as a unit and as a going concern. Its activities can not be halted because its continuous, uninterrupted operation is necessary in the public interest; and, for the preservation of that interest, as well as for the protection of the various private interests involved, reorganization was evidently regarded as the most feasible solution whenever the corporation had become 'insolvent or unable to meet its debts as they mature.'" 294 U. S., at 671–672.

The national rail transportation crisis that produced the Rail Act centered in the problems of the rail carriers operating in the region defined by the Act, and these were the problems Congress addressed.[45] No railroad reorganization proceeding, within the meaning of the Rail Act, was pending outside that defined region on the effective date of the Act or during the 180-day period following the statute's effective date. Thus the Rail Act in fact operates uniformly upon all bankrupt railroads then operating in the United States and uniformly with respect to all creditors of each of these railroads.

The uniformity clause requires that the Rail Act apply equally to all creditors and all debtors, and plainly this Act fulfills those requirements. *Vanston Bondholders Protective Committee* v. *Green*, 329 U. S. 156, 172 (1946) (Frankfurter, J., concurring). "No provision of the Act restricts the right of any creditor wheresoever located to obtain relief because of regionalism." — F. Supp., at —. (Aldisert, J., dissenting.)

Our construction of the Bankruptcy Clause's uniformity provision comports with this Court's construction of other "uniform" provisions of the Constitution. The *Head Money Cases*, 112 U. S. 580 (1884), involved the levy on ships' agents or owners of a 50-cent tax for any passenger not a United States citizen who entered an American port from a foreign port "by steam or sail vessel." Individuals engaged in transporting passengers from Holland to the United States challenged the levy as contrary to Art. I, § 8, cl. 1, under which Congress is empowered to lay and collect "all Duties, Imposts and Excises [which] shall be uniform throughout the United States." The argument was that the head tax violated the uniformity clause because it was not also levied on noncitizen passengers entering this country by rail or

[45] H. Rep., at 25–29; S. Rep., at 6–14.

other inland mode of conveyance. The Court upheld the tax, stating:

> "The tax is uniform when it operates with the same force and effect in every place where the subject of it is found. The tax in this case . . . is uniform and operates precisely alike in every port of the United States where such passengers can be landed." *Id.*, at 594.

That the tax was not imposed on noncitizens entering the Nation across inland borders did not render the tax nonuniform since "the evil to be remedied by this legislation has no existence on our inland borders, and immigration in that quarter needed no such regulation." *Id.*, at 595. Similarly, the Rail Act is designed to solve "the evil to be remedied," and thus satisfies the uniformity requirement of the Bankruptcy Clause. The argument that the Rail Act differs from the Head Tax statute because by its own terms the Rail Act applies only to one designated region is without merit. The definition of the region does not obscure the reality that the legislation applies to all railroads under reorganization pursuant to § 77 during the time the Act applies.

Reversed.

MR. JUSTICE STEWART dissents from the opinion and judgment of the Court, substantially for the reasons set out in Part II of the dissenting opinion of MR. JUSTICE DOUGLAS.

SUPREME COURT OF THE UNITED STATES

Nos. 74–165, 74–166, 74–167, AND 74–168

REGIONAL RAIL REORGANIZATION ACT CASES

Robert W. Blanchette et al., as Trustees of the Property of Penn Central Transportation Company, Appellants,
74–165 *v.*
Connecticut General Insurance Corporation et al.

Richard Joyce Smith, Trustee of the Property of the New York, New Haven and Hartford Railroad Company, Appellants,
74–166 *v.*
United States et al.

United States Railway Association, Appellants,
74–167 *v.*
Connecticut General Insurance Corporation et al.

United States et al., Appellants,
74–168 *v.*
Connecticut General Insurance Corporation et al.

On Appeals from the United States District Court for the Eastern District of Pennsylvania.

[December 16, 1974]

MR. JUSTICE DOUGLAS, dissenting.

These cases have created, as did the *Penn-Central*

Merger cases,[1] that "hydraulic pressure" which Mr. Justice Holmes once said, "makes what previously was clear seem doubtful and before which even well settled principles of law will bend." [2]

If the rule of law under a moral order is the measure of our responsibility, as I have always assumed, we can only hold that the Rail Act of January 2, 1974, 87 Stat. 985, undertakes to sanction a fraudulent conveyance, as those words were used in 13 *Eliz,*[3] and in our Bankruptcy Act. I have been reluctant so to hold, implicating as it does our legislative branch in a lawless maneuver of gigantic proportions. But baldly put, the present law is a *tour de force* to that end.

Article I, § 10, of the Constitution bars the States from passing a law "impairing the obligation of contracts." Though the Federal Government is not so enjoined, it is restrained by the Fifth Amendment which provides that no person can be deprived of "property" without "due process of law." I assume it is conceded that Congress, apart from the Bankruptcy power in Art. I, § 8, may not impair the obligation of contracts without violating the Due Process Clause.[4] But "[t]he bankruptcy power, like the other great substantive powers of Congress, is subject

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[1] See *Baltimore & O. R. Co.* v. *United States,* 386 U. S. 372; *Penn-Central Merger Cases,* 389 U. S. 486; *New Haven Inclusion Cases,* 399 U. S. 392. In *Baltimore & O. R. Co.* v. *United States, supra,* I summarize in my dissent, 386 U. S., at 452–459, some of the financial chicanery behind the creation of the "new Frankensteins" with which we now deal, *id.,* 455.

[2] *Northern Securities Co.* v. *United States,* 193 U. S. 197, 401 (dissenting opinion).

[3] 13 *Eliz.* C5 (1570); Glenn, Fraudulent Conveyances & Preferences (1940).

[4] *The Gold Clause* cases are on a different footing, for as Chief Justice Hughes wrote in *Norman* v. *Baltimore & O. R. Co.,* 294 U. S. 240, the power of Congress to regulate the currency and establish the monetary system was involved.

to the Fifth Amendment," as Mr. Justice Brandeis, writing for the Court in *Louisville Bank* v. *Radford,* 295 U. S. 555, 589, held.

This does not mean that so far as rail carriers are concerned the creditors can exact their pound of flesh, dismembering or liquidating the debtor. The public interest may not be subverted in that manner, as the Court said in *Continental Illinois Bank & Trust Co.* v. *Rock Island R. Co.,* 294 U. S. 648, 671, a case involving a rail reorganization under § 77 of the Bankruptcy Act:

> "A railway is a unit; it can not be divided up and disposed of piecemeal like a stock of goods. It must be sold, if sold at all, as a unit and as a going concern. Its activities can not be halted because its continuous, uninterrupted operation is necessary in the public interest . . . ."

Congress made such findings in these cases in § 101 (a) of the Act. Hence the congressional objective in the Rail Act of preserving the assets of these six railroads [5] as part of a continuing enterprise in the form of a new corporation (for convenience called Conrail [6]) is well within the Bankruptcy Clause. The question remains however, whether by the means it has chosen Congress has transgressed constitutional boundaries.

I

The property is "taken for public use" within the meaning of the Fifth Amendment. First is the mandate of Congress. The Rail Act provides for an obligatory transfer of the assets of these companies to Conrail. The creditors, the trustees, the stockholders, the reorgani-

[5] Penn Central Transportation Co. and its subsidiaries; Lehigh Valley R. R.; Central R. R. of New Jersey; Lehigh & Hudson River R. R.; Reading Co.; Ann Arbor R. R.

[6] Consolidated Rail Corp. created by § 301 of the Act.

zation judge have no other option. The record makes abundantly clear what all the parties concede, that Conrail, though dubbed "a for-profit corporation" by § 301 (b) of the Act, shows no prospect of being an enterprise operating on a profitable basis.[7] Penn-Central losses between June 21, 1970, and December 31, 1973, were $851 million, and the Reorganization Court,[8] whose judgment we are not reviewing, found that reorganization on an income basis was not possible. The values that ride on today's decisions are therefore not based on the prospect of future profitable operations.[9] The only consideration in the framework of the Act which provides "just compensation" for the taking is in the form of "securities" of Conrail, § 206 (d)(1). If those "securities" are common stock, they will have value only insofar as Conrail will be a viable entity which generates income in excess of costs and fixed charges. If the Trustees under § 77 cannot make ends meet, there is no reason to expect that Conrail can. Conrail, to be sure, is made eligible to receive obligations of the United States Railway Association, an incorporated nonprofit association created by the Act to issue obligations not exceeding $1,500,000,000,

[7] The Reorganization Court found that Penn-Central (the debtor) was "not reorganizable on an income basis within a reasonable time"; and that ruling has not been appealed. *In re Penn-Central Trans. Co.*, — F. Supp. — (ED Pa., Order No. 1543, May 2, 1974).

[8] Section 209 (b) designates a Special Court of three federal judges which, *inter alia*, is to pass on the question whether the plan is "fair and equitable" § 303 (c)(2). A preliminary decision by the Special Court which in certain important aspects conflicts with that of the Reorganization Court was rendered September 30, 1974. *In the Matter of Penn-Central Trans. Co.*, — F. 2d — (1974).

[9] A study commissioned by the Penn Central Trustees, on file with the ICC, estimates for Penn-Central assets as of December 31, 1970, a "continued railroad use" value of $13,858,493,000 and a "liquidation for non-rail uses" at $3,532,110,000. PCTC Physical Asset Valuation Study (April 1973 revised May 30, 1973), ICC Fin. Docket No. 26241.

which are guaranteed by the Secretary of the Treasury, § 210. But of this one billion and a half not more than one billion can be issued to Conrail; of that one billion "not less than $500,000,000 shall be available solely for rehabilitation and modernization" of the rail properties, § 210 (b). Hence $500 million might be apportioned under a plan to creditors. But if the Special Court determines under § 303 (c) that the value of the securities given creditors in exchange for the property pledged under prior law for payment of their claims is less than the fair value of the properties conveyed, the Special Court can under § 303 (c)(2) do only three things:

1. Reallocate the securities issued;
2. Require Conrail to issue additional securities;
3. Enter a deficiency judgment against Conrail.

The common stock of Conrail is plainly only token payment. Issuance of new and different securities by Conrail would have to have interest or dividend rights to be marketable and that would bring back into play some of the forces that plague the present Trustees under § 77. Any securities issued by Conrail must "minimize any actual or potential debt burden" of Conrail, § 206 (i). Moreover, § 301 (d) of the Rail Act provides that so long as more than half the debt of Conrail is guaranteed by the Government, a majority of the 15 directors are designated from outside—the Secretary of Transportation, the Chairman and President of the Association, and five others named by the President with the consent of the Senate. One cannot read the Rail Act and believe that Congress thought that federal money going into Conrail could be made subordinate to any debt created by Conrail. A contrary assumption would make the watch-dog purpose of § 301 (d) quite superfluous. Yet, unless Conrail's new debt were serviced, it could not be marketed and even if it were, it could add no element

of value to the compensation received by the creditors of these railroads under a reorganization plan. The upshot is that compensation for properties acquired by Conrail would be mostly paid for in Conrail stock with a sprinkling of the bonds of the Association issued to Conrail, assuming that they were not expended in the operations of Conrail between the time it started its operation and the date of the final plan of reorganization.

The value of the properties to be transferred has not yet been determined. We held in the *New Haven Inclusion Cases*, 399 U. S. 392, 489, where the New Haven road was being shut down and its assets sold, that just compensation was to be measured by the "highest and best value" of the assets sold. In that case that value was liquidation value. In light of the findings of the Reorganization Courts in the present cases, we cannot say that the $500 million of federally guaranteed bonds comes anywhere near any reasonably assured value.[10] Value of any sub-

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[10] See n. 9, *supra*. In the case of Penn-Central alone, the Reorganization Court said ". . . there is every reason to suppose that the included properties would be worth considerably more than $500 million." *In re Penn-Central Trans. Co.*, — F. Supp. — (ED Pa., Order No. 1597, July 2, 1974). (Fullam, J.)

Judge Fullam's concurring opinion in the District Court noted:

"As a matter of simple maximization of values, if there is no 'going concern' value in the usual sense, there is no justification for continuing a reorganization proceeding, unless either or both of the following conditions are established: (1) a reasonable prospect that, because of streamlining, consolidations, and other changes in circumstances, earning power and profitability can be restored; or (2) a reasonable prospect that the public need for preserving the debtor's railroad is such that it will be appropriated for public use, and that the values inherent in its assemblage as an operating railroad will be recognized and paid for. Cf. *Port Authority Trans. Hudson Corp.* v. *Hudson Rapid Tubes*, 20 N. Y. 2d 457, 231 N. E. 734, cert. denied 409 U. S. 1002 (1967)." *Connecticut General Insurance Corp.* v. *United States Railway Assn.*, — F. Supp. — (ED Pa. 1974). (Footnote omitted.)

stantial amount cannot be attributed to the common stock of Conrail, because most of the problems of the existing roads will be inherited by Conrail and its prospects of generating income in excess of costs and fixed charges are, if not nil, remote. It would be irony to call entry of a deficiency judgment against Conrail adequate to make up any deficiency. For that judgment would only eat away at any value which the common stock of Conrail had.

The vicious character of these legislative decisions is emphasized by the cram-down provision of the Rail Act. In § 77 proceedings there is a cram-down provision to prevent one class from a holdup of a fair and equitable plan. Section 77, however, allows a cram-down only if the Court *first* finds the plan fair and equitable and *after* the security holders have had their hearing. Under the Rail Act the assets are first transferred to Conrail *even before* the Special Court has made its "fair and equitable" finding. Moreover, the security holders never have a vote on the plan.

Congress has lowered all the procedural barriers and foisted on these rail carriers a conveyance of their assets which, if done by private parties in control of a bankrupt estate, would be a fraudulent conveyance. Here it is achieved by Congress purporting to act in the "public interest." That is a taking for a public purpose; but by Fifth Amendment standards it is a taking of property without assurance of just compensation.

II

The Court relies, as do all parties who seek to sustain the statute, on the assumed availability of a suit in the Court of Claims under the Tucker Act, 28 U. S. C. § 1491, to recover any shortfall between fair liquidation value and the compensation the bankrupt roads receive under the Rail Act. The Solicitor General, while initially arguing that the judgment below could be reversed

without reaching the Tucker Act question, now pitches his argument in support of the statute chiefly upon the availability of a Tucker Act suit.

The Tucker Act, 28 U. S. C. § 1491, confers jurisdiction on the Court of Claims

> "to render judgment in any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

The Rail Act neither expressly permits nor expressly excludes a suit under § 1491. The Association says that "one searches the Rail act in vain for a sentence such as 'The Court of Claims shall have no jurisdiction over any action alleging that the property of any person has been taken pursuant to this Act without just compensation.'" But this observation is only the beginning of analysis. It is not enough merely to note that the Rail Act carves out no exception to § 1491 in express words. "Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions." *Boys' Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235, 250 (1970). This precept requires us to inquire whether provisions that are not mutually exclusive by their terms are so divergent in approach that they cannot coexist in a particular setting. Congress may provide a mechanism for dealing with a particular problem that by its structure and purpose is inconsistent with a traditional avenue of relief applicable to a broader class of cases. Under these circumstances, Congress may have supplanted the traditional remedy, albeit by implication. In my view, this is precisely what Congress has done in the Rail Act.

The Act provides a strict timetable for bringing Conrail into operation. The Association is expected to present the Final System Plan to Congress within 450 days of the enactment of the Rail Act.[11] The plan is deemed approved unless Congress specifically disapproves within a specified period. § 208 (b). Once the plan is approved, the Association must certify it to the three-judge Special Court within 90 days, § 209 (c). Within 10 days after certification, Conrail must deposit its stock and securities with the Special Court, § 303 (a), and the court must direct the conveyance of properties to Conrail pursuant to the plan within 10 days thereafter, § 303 (b).

Congress plainly sought expedition in the process of creating Conrail. This is apparently the reason for deferring until after the transfer of the properties the question of valuation and distribution of stock to the contributing railroads.[12] The policy of expedition carries over into the provisions for judicial participation in this process. Appeals from decisions of the reorganization district courts concerning the inclusion of the debtor roads in the provisions of the Rail Act lie exclusively to the Special Court; its decision in these appeals must be made within 80 days, § 207 (b). Once the Final System Plan is approved by Congress, § 209 (b) of the Act provides for consolidation in the Special Court of "all judicial proceedings with respect to the final system plan." The decision of the Special Court regarding the

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[11] Section 207 (c) requires the executive committee of the Association to present the final system plan to the Association's Board of Directors for approval within 420 days after enactment of the Act. Within 30 days after presentation by the executive committee, the Board "shall approve a final system plan which meets all the requirements of section 206 [prescribing contents of the plan and the general goals]." The plan is then submitted to Congress, § 208 (a).

[12] See H. R. Rep. No. 93–620, 93d Cong., 1st Sess., 54–55 (1973) (hereinafter cited as House Report).

distribution of Conrail stock and securities pursuant to § 303 (c) is appealable directly to this Court. We are directed to give the appeal "the highest priority" and even to dismiss it within seven days if we conclude that its pendency "would not be in the interest of an expeditious conclusion of these proceedings." § 303 (d).

A suit in the Court of Claims would be quite an odd appendage to the streamlined judicial procedures just described. The language of § 209 (b) vesting in the Special Court "all judicial proceedings with respect to the final system plan" immediately raises doubt that a Tucker Act remedy is compatible with the Act.[13] The doubt is amplified when one looks at the entire scheme of judicial participation. I do not think that Congress, in setting up a Special Court, consolidating proceedings, limiting appeals, and demanding expeditious decisions, intended at the same time to permit yet another round of litigation on the compensation question to begin in the Court of Claims after all the procedures mandated by the Rail Act had been exhausted.

Despite the obvious frustration of the policy of expedition, the inference that a Tucker Act remedy is available might still be justified were it not for the special features of the compensation arrangement that limit the infusion of federal funds. As will be seen, these features

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[13] This language originated in the Senate bill. The House bill had provided for consolidation in the Special Court of "all proceedings of any kind which arise or may arise concerning the final system plan or implementation thereof." (§ 501 (a)). The House Report explains that "Title V . . . guarantees the creditors their day in court and preserves their constitutional right to a judicial determination of just compensation for their property." House Report, at 47. The Senate language was incorporated in the final bill, and apparently no significance was attached to the disparity between the two versions. See H. R. Rep. No. 93-744, 93d Cong., 1st Sess., 56-59 (1973) [Conference Report].

were important to Congress, and they are circumvented if a suit in the Court of Claims is allowed.

The Special Court, after it has directed the transfer to Conrail of "all right, title, and interest" in the properties of contributing roads designated in the final system plan, § 303 (b), must determine whether the transfers of property from the bankrupt roads are "fair and equitable to the estates." But the Special Court has only limited tools for rectifying any unfairness or inequity it finds, and the limitations on its powers quite clearly indicate congressional intent to limit the commitment of federal funds. The preferred form of compensation to the debtor roads is stock of Conrail. § 303 (c)(2)(A). If the stock is insufficient, the Special Court may next order distribution of government-guaranteed obligations of Conrail, § 303 (c)(2)(B), but these are limited in face value to $500 million,[14] absent an authorization by joint resolution of Congress to exceed the limitation. If any shortfall remains after distribution of stock and government-guaranteed obligations, the Special Court is directed to enter a deficiency judgment against Conrail, § 303 (c)(2)(C). The judgment is against the corporation and not the United States, with the apparent purpose of protecting the Treasury from a liability of unanticipated magnitude. As Representative Adams, one of the principal architects of the Rail Act in the House, explained when specific assurances about the federal exposure were sought early in debate on the bill:

"Mr. ADAMS. There is a specific limitation in

[14] Under § 210 (b), the Association is authorized to issue government-guaranteed obligations not exceeding $1.5 billion. Only $1 billion, however, may be issued to Conrail, and of this amout $500 million must be made availabel solely for rehabilitation and modernization of properties acquired from contributing roads. This leaves $500 million of obligations available to the Special Court for distribution to the estates under § 303 (c)(2)(B).

the final bill which says no more than $200 million [later raised to $500 million] of Government loan guarantees can be used for acquisition in any event, so if the court in 5 to 10 years should come in with a higher value, the only judgment would be against this new corporation that is there.

"Under the New Haven case the court was placed in this kind of position that if it loads up that new corporation with a debt structure by requiring it to issue additional bonds, it lowers the value of the common stock, which is what it is being paid for in terms of these assets.

"Mr RUPPE. Does it not have to deliver more stock? It seems to me from reading the language that we have to cause the corporation securities issued in payment of the properties to have a value which is a fair and equitable value as determined by the court.

"Mr. ADAMS. That is correct, but that is this corporation's and not the taxpayers of the United States money." 119 Cong. Rec. H. 9742 (daily ed. Nov. 8, 1973).

The possibility that there might be a large deficiency judgment was not unnoticed. See 119 Cong. Rec. H. 9739 (remarks of Mr. Skubitz) and H. 9742 (remarks of Mr. Shoup) (daily ed., November 8, 1973). But those who adverted to this possibility noted that Congress would have an opportunity to consider later whether to deal with it by relaxing the limitations on the amount of government loan guarantees available to Conrail, by means of a joint resolution as provided in § 210 (b). Congress was thus to have a "second look" at the debt structure of Conrail after the Special Court valuation proceedings had concluded; at that point Congress might improve the corporation's balance sheet by an

additional commitment from public funds. What is clear, however, is that Congress intended to preserve a choice, whether to allow Conrail to begin life with a large deficiency judgment unalleviated by further federal aid.[15]

To hold that a Tucker Act remedy is available is *first* to leave just compensation of security holders to wholly speculative chances that Congress might grant it and *second* to deprive Congress of that opportunity to choose,

[15] Were Congress to choose the latter, the creditors of the bankrupt roads, armed with a large deficiency judgment, might cause levy to be made upon Conrail's assets. Since the value of Conrail stock held would presumably reflect the value of the assets, levy would not give the estates any additional value but would merely change its form. Liquidation would, at most, terminate further erosion of asset value due to continued unprofitable operations.

An *amicus* brief submitted by Representative Adams for himself and 36 other Representatives suggests that liquidation would allow the creditors to get back what they relinquished, involuntarily, to Conrail (p. 7). But, as the Special Court noted, this position ignores the probable erosion of asset value during the pendency of valuation proceedings, the possibility of new senior debt, and the difficulty of unscrambling the assets. *In the Matter of Penn Central Transportation Co.*, — F. 2d — (1974) (slip op., at 66).

Appearing as *amicus curiae* at oral argument, Representative Adams made statements that the majority now reads as indicating a conclusion that a Tucker Act suit would be available to remedy an uncompensated "erosion taking." *Ante*, p. 26. Yet this position is contrary to that taken in the brief Mr. Adams submitted, which urges us to decide the case without reaching the Tucker Act question and specifically cites the colloquy printed, at p. 14, *infra*. The Court properly notes that these post-enactment expressions should be treated with caution, a warning that applies as much to the "relatively spontaneous responses of counsel to equally spontaneous questioning from the Court," *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 170, as to the more considered statements that appear in written submissions. Viewed in their entirety, the post-enactment expressions are ambiguous and add little to the statute and legislative history. Moreover, Mr. Adams' remarks bear an interpretation fully consistent with the nonavailability of the Tucker Act. See pp. 16–17, *infra*.

since the bankrupt estates would be permitted to obtain a deficiency judgment against the United States after proceedings under the Rail Act have been exhausted. Assurances against such an eventuality were given in the following colloquy between two of the managers for the House, during debate on the conference report:

> "Mr. KUYKENDALL. Mr. Speaker, I would like to ask the gentleman from Washington to clarify one point, and that is the matter of the deficiency judgment. There was a lot of colloquy in the original debate which expressed fears that the Federal court had the key to the Treasury.
>
> "Will the gentleman give us his interpretation of the guarantees we have to keep that from happening in the court proceedings?
>
> "Mr. ADAMS. Mr. Speaker, there is a definite limitation on the total amount that can be authorized under this bill. Any amounts that go beyond that, or the shifting of the way in which it is spent, is to be approved by an act of Congress, to be signed by the President. It is defined as a joint resolution in the bill, and the statement of the managers, and it was the clear intent of the managers that any amount other than common stock was to be at the lowest possible limit to meet the constitutional guarantees.
>
> "Mr. KUYKENDALL. Mr. Speaker, is it not true, I will ask the gentleman from Washington (Mr. Adams) that the creditors, of course, are given protection, and that the Board of Directors, under the control of Government officials, is the owner of the entire block of stock of 100 million shares, whatever it is?
>
> "Mr. ADAMS. The gentleman is correct. It is controlled by the United States, so long as the Secretary determines that there is an amount of obliga-

tion funds which the United States might, in any way ever, have to have anything to do with.

"During that period of time, it is controlled by a board of directors which consists of Government officials.

"Mr. KUYKENDALL. There is no way the Federal court may assess the taxpayers or this Congress on the judgments of the creditors; is that correct?

"Mr. ADAMS. The gentleman is correct.

"Mr. KUYKENDALL. There is no way they can assess the Congress for the money?

"Mr. ADAMS. The gentleman is correct." 119 Cong. Rec. H. 11, 876 (daily ed., Dec. 20, 1973).

None of these comments refer expressly to the Court of Claims or to the Tucker Act. But the implication of depriving the courts of a "key to the federal Treasury" is powerful, and the reference to "assess[ing] Congress for the money" equally so, since that is in practical terms what the Court of Claims does. For me, the import of the words is clear: there was to be no possibility that an aggrieved party was to have recourse against the United States in such a way as to circumvent the limitations on federal funds embodied in the Rail Act.[16] On

[16] The House Report in its cost estimate specifically notes those cost elements as to which the ceiling is not fixed, such as the open-ended authorization for a federal contribution to operating subsidies paid for local rail service. This authorization, originally contained in § 701 of the House bill, appears in § 402 of the Rail Act, subject to an annual limitation of $90 million. Significantly, there is no mention of a possible Court of Claims judgment of uncertain but potentially astronomical proportions. See House Report, at 30. The Senate Report is similar. In a section entitled "Minimizing Taxpayer Expense" it explains:

"Although the amounts of money required to implement the rationalization and restructuring of the bankrupt railroads in the Northeast authorized by this legislation may seem substantial to the

oral argument as *amicus curiae*, Representative Adams stated that Congress had not repealed the Tucker Act. The majority seizes upon this statement as a concession that suit might be brought in the Court of Claims to supplement compensation. But that interpretation of his words is overborne by the manifestations of a contrary congressional intent reviewed above. Mr. Adams' remarks, however, have a straightforward import that accords with the colloquy cited above and with the position taken in the brief he filed with this Court, which urged us to uphold the Rail Act without reference to a Tucker Act remedy. His remarks confirm that the

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uninitiated, every effort has been made to design a bill which minimizes the direct cost to the U. S. taxpayer. Indeed, the very process by which the bill would create a new healthy railroad out of the bankrupt ones arose from this strong desire to limit the use of Federal money. The bill is thus written to permit the transfer of the required rail properties of the bankrupt estates in exchange for securities of the new corporation via a reorganization plan under the umbrella of a Section 77 proceeding under the Bankruptcy Act. In addition, the bill calls for the use of Federal loan guarantees rather than direct grants wherever possible. This procedure allows for the necessary funds to come from the private sector in exchange for loans which are to be repaid by the new Corporation or other recipients. The use of loan guarantees in this instance was felt to be particularly appropriate since they will support a new railroad with excellent earnings prospects." S. Rep. No. 93-601, 93d Cong., 1st Sess., 18 (1973).

In the section on cost estimates it is noted that "The obligational authority of the Association is limited to $150,000,000 to finance the Secretary's agreements with railroads in reorganization for the acquisition, maintenance, and improvement of rail facilities prior to completion of the final system plan. Under the bill any additional obligation authority necessary for the implementation of the final system plan must be designated in the final system plan and affirmatively approved by a joint resolution of the Congress." Senate Report 125-126. Had Congress intended to allow a Tucker Act remedy in addition to all that was created by the Rail Act, all of the foregoing assurances would have been worthless.

Tucker Act remains available to enforce obligations against the United States (and not merely against Conrail) created by the Act. For example, should the Government fail to make good on its guarantee of bonds issued under § 210, holders thereof could obtain relief in the Court of Claims.

We are asked to infer a Tucker Act remedy by applying the canon that favors interpretations of statutes that avoid substantial constitutional questions. See, *e. g.*, *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407–408; *United States* v. *Jin Fuey Moy*, 241 U. S. 394; *Richmond Screw Anchor Co.* v. *United States*, 275 U. S. 331; *Crowell* v. *Benson*, 285 U. S. 22, 62; Screws v. *United States*, 325 U. S. 91, 98. As originally stated, the proposition was that where a statute "is reasonably susceptible of two constructions," the courts will choose the one that steers clear of collision with constitutional limitations. *United States* v. *Delaware & Hudson Co.*, *supra*, at 407; *Texas* v. *Texas Eastern R. Co.*, 258 U. S. 204, 217. The principle is applied so as to preserve substantially the legislative purpose, even where a statute must be tailored to avoid a question of constitutional infirmity. See *Srews* v. *United States*, *supra*; *Crowell* v. *Benson*, *supra*; *FTC* v. *American Tobacco Co.*, 264 U. S. 298. In more recent applications, however, the Court has on occasion abandoned any fidelity to congressional intent in order to avoid a constitutional question. See *United States* v. *Rumely*, 345 U. S. 41; *United States* v. *CIO*, 335 U. S. 130. In those cases, I believe, the Court engaged in a judicial rewriting of the relevant congressional acts, and I concurred in the result only after reaching the constitutional questions the Court avoided. Today's decision, however, goes well beyond what was done in *Rumely* and *CIO*. In those cases, as in most that have applied the canon of construction, the Court has narrowed the congressional regulatory scheme in order to avoid con-

fronting the possibility of overreaching. See *United States* v. *Delaware & Hudson Co., supra; United States* v. *Jin Fuey Moy, supra; Texas* v. *Eastern Texas R. Co., supra, FTC* v. *American Tobacco Co., supra; Blodgett* v. *Holden,* 275 U. S. 142, 148 (concurring opinion); *Missouri Pacific R. Co.* v. *Boone,* 270 U. S. 466. Today, however, the Court expands the opportunities for correcting unfairness in the congressional program, foisting upon Congress a device it never chose and indeed thought it had rejected. Today's holding thus represents a sheer *tour de force.* Cf. *United States* v. *Seegar,* 380 U. S. 163, 188 (concurring opinion). This judicial legislation transgresses the bounds of our responsibility to avoid unnecessary constitutional questions. What Mr. Justice Cardozo said in *Moore Ice Cream* v. *Rose,* 289 U. S. 373, bears repeating:

> "A statute must be contrued, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that 'score.' [Citation omitted.] But avoidance of a difficulty will not be pressed to the point of disingenous evasion. Here the intention of the Congress is revealed too distinctly to permit us to ignore it. . . . The problem must be faced and answered." 289 U. S., at 379.

See also *Aptheker* v. *Secretary of State,* 378 U. S. 500, 515; *United States* v. *CIO,* 335 U. S. 106, 129–130 (concurring opinion).

The drafters of the Rail Act wrote against a background of reorganization law, in which the Tucker Act has never before been regarded as a device for escaping constitutional questions. Challenges to bankruptcy legislation as permitting unconstitutional deprivations of property have occurred before. Our cases until today have faced these challenges without adverting to any

Tucker Act remedy. See *Continental Illinois National Bank & Trust Co.* v. *Chicago, R. I. & P. R. Co.*, 294 U. S. 648; *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555; *Wright* v. *Vinton Branch*, 300 U. S. 440; *Ecker* v. *Western Pacific R. R.*, 318 U. S. 448.[17] In construing the Rail Act to embrace a Tucker Act remedy, the Court disregards this tradition, and in this case opens up the possibility which Congress sought diligently to avoid—the imposition of a large financial burden upon the treasury for the Conrail acquisition.

The Court of Claims is without power to enforce its judgments. While those amounting to less than $100,000 are paid from a general appropriation, the payment of judgments exceeding this sum require special action by Congress. Ordinarily, of course, Congress pays these judgments as a matter of routine. See *Glidden* v. *Zdanok*, 370 U. S. 530, 570–571. But this is an exceptional case, involving the possibility of judgments in the billions of dollars.

The construction the Court gives the Rail Act today will amaze the legislators who drafted and voted for this statute. I cannot believe that Congress would have enacted this law had it been told that in the end it might have to dig into taxpayers' pockets not for the one billion appropriated but for unknown billions—perhaps 10 or 12 billion—for "just compensation" for property it authorized to be "taken."

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[17] *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, held that the first Frazier-Lemke Act, which provided special relief to farm mortgagors in bankruptcy, was an unconstitutional taking of the mortgagee's security. Had the theory offered here by the Government been applied there, the Court could have avoided the issue by inferring a Tucker Act remedy. The possibility of such a course could not have escaped the Court's attention; *Hurley* v. *Kincaid*, 285 U. S. 95, had been decided just three years earlier, and Mr. Justice Brandeis, author of the *Radford* opinion, had written *Lynch* v. *United States*, 292 U. S. 571, only the previous Term.

III

Article I, § 8, cl. 4, of the Constitution empowers Congress to establish "uniform laws on the subject of Bankruptcies throughout the United States." This Court held many years back that that requirement required "geographical" uniformity. Its main purpose was to treat claimants against debtors the same in one area as in another. As stated by Justice Frankfurter, concurring in *Vanston Bonholders Protective Committee* v. *Green*, 329 U. S. 156, 172–173: [18]

> "The Constitutional requirement of uniformity is a requirement of geographic uniformity. It is wholly satisfied when existing obligations of a debtor are treated alike by the bankruptcy administration throughout the country, regardless of the State in which the bankruptcy court sits. See *Hanover National Bank* v. *Moyses*, 186 U. S. 181, 190. To establish uniform laws of bankruptcy does not mean wiping out the differences among the forty-eight States in their laws governing commercial transactions. The Constitution did not intend that transactions that have different legal consequences because they took place in different States shall come out with the same result because they passed through a bankruptcy court. In the absence of bankruptcy such differences are the familiar results of a federal system having forty-eight diverse codes of local law. These differences inherent in our federal scheme the day before a bankruptcy are not wiped out or transmuted the day after."

[18] The requirement of "uniformity" does not preclude local variations that make rights of creditors or debtors depend on peculiarities of state law relating, *e. g.*, to dower exemptions, validity of mortgages, and the right to enforce through bankruptcy state remedies against fraudulent conveyances. *Stellwagen* v. *Clum*, 245 U. S. 605, 613–615; *Wright* v. *Vinton Branch*, 300 U. S. 440, 463, n. 7.

The Solicitor General makes the curious argument that the Commerce Clause power which supports the continuance of this rail system requires no uniformity. But it is the bankruptcy power that gives Congress power to cut down on the obligation of contracts. Recourse to the Bankruptcy Clause is necessary to sustain this statute, for, as noted below, it authorizes significant impairment beyond that permitted under §§ 77.

The Act applies not across the Nation but only in the Northeast section of the United States. Section 102 (13) indeed so defines "region." It is to that "region" that the Association is confined by § 202 (b) in the performance of its various duties. Reporting features of the Act reach only railroads in this "region." § 203 (a). The Secretary of Transportation is likewise so confined. § 204 (a). So is the new office—Rail Services Planning Office—in the Interstate Commerce Commission. § 205 (a), (d). The "final system plan" covers only rail service in this "region." § 206 (a), (c), (d). In short, the Act would have to be amended to make its procedure applicable to rail carriers not in the Northeastern region. The Solicitor General is therefore quite wrong when he says that the Rail Act applies with the same force and effect wherever railroad reorganizations are found.

The Special Court is a bankruptcy court, for Congress has given it "such powers" as "a reorganization court" has. § 209 (b). And, "a railroad in reorganization" as defined in § 102 (12) includes those in § 77 of the Bankruptcy Act. That means that a railroad in § 77 proceedings but not located in the Northeastern section has more benign treatment than the six rail carriers before us in these cases. The importance of that difference is felt among the ranks of security holders: security holders of rail carriers who now or in the future are in a § 77 reorganization in the Middle West, South, or

West receive more considerate treatment than the appellees in these cases. The differences are not minor but exceedingly substantial.

(1) Under § 77, as we held in the *New Haven Inclusion Cases, supra,* a plan was approved whereby the rail assets were disposed of with a view to reorganizing the remaining enterprise as an investment company. Under the Rail Act, § 207 (b) mandates a dismissal if "this Act does not provide a process which would be fair and equitable to the estate of the railroad." As the Reorganization Court held, the plan approved in the *New Haven Inclusion Cases* would not be permissible under the Rail Act, as the Rail Act nowhere envisages a bifurcated reorganization, one for nonrail assets and another for rail assets. The only choice is between an overall reorganization on the one hand and a dismissal whereupon all the diversities of the old equity receivership can be explored. Thus, security holders of companies reorganized under the Act are deprived of advantages which security holders of other rail carriers in § 77 proceedings enjoy.

(2) In a sale or conveyance of assets pursuant to a plan under § 77, any lien on those assets is transferred to the proceeds. § 77 (o). But by reason of § 303 (b)(2) of the Rail Act the transfer is "free and clean of any liens or encumberances."

(3) Under § 77 (d) *before* a plan can be consummated, the judge (as well as the Interstate Commerce Commission), must find it to be "fair and equitable." Under the Rail Act, § 303 (c), that finding is made only *ex post facto.* Thus the pressures are on to consummate the plan with no alternatives open to the Special Court except dismissal. The choice under § 77, which the *New Haven Inclusion Cases* illustrate, are barred; and the security holders here lack the benefit of the expertise of the Interstate Commerce Commission to which the courts give

very great deference. See *Ecker* v. *Western Pacific R. Co.*, 318 U. S. 448, 472–475. The *ex post facto* finding on the "fair and equitable" prerequisite of this plan robs these security holders of protective measures that security holders enjoy in reorganizations of rail carriers in other geographical areas.

(4) While the Rail Services Planning Office is directed to hold public hearings on the "preliminary system plan," § 207 (a)(2), it is the Association that prepares the final system plan, § 207 (c), (d) and submits it to the Congress. § 208. That submission to Congress is, however, perfunctory in the sense that the plan clears that hurdle *unless* Congress disapproves it. Under § 77 (e) the security holders ("all parties in interest") have a right to be heard before the court approves a plan. Under the Rail Act no like hearing is granted. The right to be heard may at times amount to a denial of due process. I intimate no opinion on whether such a right could be constitutionally eliminated from all § 77 rail reorganizations.[19] But where the security holders of some rail carriers under § 77 are given that right and those who are claimants against these appellees are denied it, that provision of this Rail Act obviously lacks that "uniformity" which the Constitution mandates.

While we have heretofore recognized that local variations by reason of state law governing the rights of credi-

[19] Under § 77 (e) a two-thirds vote of each class of security holders affected by the plan is normally required. The bankruptcy Court, however, may nevertheless approve the plan even though the two-third vote is lacking if it finds that the plan is fair and equitable and the rejection of it by a class of security holders "is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts." For an instance where we sustained a bankruptcy court in approving a plan that a class of security holders had rejected, see *RFC* v. *Denver & R. G. R. Co.*, 328 U. S. 495, 531–535.

tors and debtors may be honored in bankruptcy without violating the uniformity clause,[20] we have never sanctioned a harsher bankruptcy procedure for the same class of debtors in one region than is applied to the same class in a different region. The bankruptcy court may, of course, be empowered to make its orders turn on the availability of credit which may be existent in one area but not in another.[21] But down to this day we have never dreamed of allowing debtors in the same class and their creditors to be treated more leniently in one region than in another.[22]

My conclusion that this Rail Act does not have that "uniformity" required by Art. I, § 8, c. 4 of the Constitution does not mean that it is unconstitutional in its entirety. It does mean, however, that the four ways in which "uniformity" is lacking must be remedied before the present group of security holders can be made to suffer both from § 207 (b) of the Act and from the cramdown provisions in § 303, including the absence of any meaningful right of the security holders to be heard on the fairness of a law.

We are urged to bow to the pressure of events and expedite in the public interest the reorganization of these six rail carriers. An emergency often gives Congress the occasion to act. But I know of no emergency that permits it to disregard the Just Compensation Clause of

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[20] Note 18, *supra.*

[21] *Wright* v. *Vinton Branch, supra,* n. 18.

[22] *Chicago Illinois National Bank & Trust Co.* v. *Chicago, R. I. & P. R. Co.*, 294 U. S. 648, cited by the majority, *ante,* p. 53, involved no question of geographical nonuniformity; § 77, upheld in that case, adopted special procedures for all railroad bankruptcies. Similarly inapposite are the *Head Money Cases,* 112 U. S. 580 (1884), which involved the uniformity requirement of Art. I, § 8, cl. 1. Although the head tax classified persons by citizenship and mode of entry, it applied "alike in every port of the United States where such passengers can be landed." *Id.,* at 594.

the Fifth Amendment nor the uniformity requirement of the Bankruptcy Clause of the Constitution.

I fear that the "hydraulic pressure" generated by this case will have a serious impact on an historic area of the law, jealously protected over the centuries by courts of equity in the interests of justice.